The double holding foundation model

Empowering sustainable stewardship in business

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The double holding foundation model is crucial in laying the groundwork for a sustainable steward-owned business. However, on its own, it is not entirely adequate and needs to be supplemented by diverse shares classes and governance control mechanisms. This entails integrating tailored provisions into the articles of association for both the company and its holding foundation(s), as well as drafting thorough shareholder agreements. Such a comprehensive approach is instrumental in overcoming Swiss legal limitations while leveraging its possibilities, notably the recognition of holding foundations by the Swiss Supreme Court. This paper presents the model, addresses legal challenges, and offers strategies for navigating this framework effectively.

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I. Introduction

There is an increasing aspiration for self-governance and profits to align with a long-term purpose within the company. The movement is encapsulated under the term *steward ownership*[1] because shareholders do not hold the shares for themselves but act as stewards for a broader group of stakeholders and beneficiaries. The objective is to ensure the long-term sustainability of the company. This encompasses both a temporal aspect, as the company aims to span across generations, and a long-term, pluralistic dimension focused on creating sustained social value.[2] This involves conducting a purpose (and values)-driven commercial activity contributing to the common good, as outlined by the Sustainable Development Goals (SDGs) of Agenda 2030.[3]

Several global companies have embarked on this path, such as Patagonia, Bosch, Zeiss, Novo Nordisk, Carlsberg, Victorinox, and Rolex.

There are typically three ways to anchor such a structure: the single (holding) foundation model, the double (holding) foundation model, and the redeemable shares and veto right model (also covered by the Golden Share model). In the last two alternatives, a splitting of the share capital occurs.

The single (holding) foundation model ensures oversight of adherence to a vision through the foundation's board. The double (holding) foundation model, on the other hand, enables clear distinctions between the altruistic interests of the foundation and the continuing management of business. It often bifurcates money and power: one entity totally or significantly retains control rights, while another, often a charitable foundation, totally or significantly holds non-voting and capital shares.

The third model involves splitting the share capital into categories, without the involvement of a charitable foundation as shareholder. The control is granted to the holder of a specific category through veto

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1 For a definition of the concept, see *Anne Sanders,* Binding Capital to Free Purpose: Steward Ownership in Germany, January 2022.

2 On this broader vision of long-term value creation instead of ESG, see *Alex Edmans,* The End of ESG, Financial Management, vol. 52, issue 1, Spring 2023.

3 United Nations General Assembly, Resolution "Transforming our world: the 2030 Agenda for Sustainable Development", 21 October 2015, A/RES/70/1.

rights (so called Golden Share model)[4], redeemable shares, restrictions on the voting rights and on transferability of shares. On top of that, shareholder agreements provide for voting guidelines along the mission.

Both the first and third models have shortcomings. The double (holding) foundation model, when complemented with features from the third model, provides a viable solution.

This contribution demonstrates how to navigate the limitations imposed by the Swiss Civil Code (CC)[5], Swiss tax regulations, and the Swiss Code of Obligations (CO)[6], while leveraging the opportunities provided by this sets of regulations to establish a double foundation model under Swiss law. It highlights why such a model is pivotal for achieving a sustainable and steward-owned business structure.

II. Structure and usefulness of the double foundation model

1. Structure and purposes

Although the notion of a holding foundation lacks a precise definition within Swiss law, its fundamental characteristics have been elucidated through judicial interpretations by the Swiss Supreme Court. Consequently, a range of arrangements involving direct or indirect holdings can be established. The double holding foundation model introduces the complication of having two separate legal entities as shareholders. These configurations have prompted inquiries into the potential purposes of foundations, and despite Swiss Supreme Court rulings addressing this matter within the context of a holding foundation, the question remains partially disputed amongst legal scholars.

1.1 Structure

A holding foundation is a foundation that holds significant stakes in one or more companies.[7] The term *holding foundation* (also referred to as a shareholder foundation) has been established in the case law of the Swiss Supreme Court:[8] there is no legal definition under Swiss law. The term *enterprise foundation* is also widely used in Europe[9] but could be confusing under Swiss law. In fact, the term *enterprise foundation* refers to both holding foundations and enterprise foundations *stricto sensu*[10] – those that operate an economic business themselves to fulfill their purpose.

The holding foundation may hold the shares directly or indirectly: directly if the foundation holds shares of the commercial company, or indirectly if it holds shares in the holding company, which is the parent company of the operational company. The double foundation model refers then to a structural arrangement characterized by the presence of two distinct holding foundations (or one holding foundation and another shareholding company), both of which possess shares in the identical group of companies. Figure 1 presents the two options.[11]

4 For more information on the concept of the Golden Share model and its veto right component, see Purpose Foundation, Steward-Ownership, Rethinking ownership in the 21st century, p. 17; *Claude Humbel/Thimo Wittkämper*, Corporate Philanthropy und Sozialunternehmertum im Schweizer Unternehmensrecht, Zürich 2024, § 9 N 454.

5 CC/ZGB, RS/SR 210.

6 CO/OR, RS/SR 220.

7 ATF 127 III 337 para. 2c, SJ 2002 I 193.

8 ATF 127 III 337 para. 2c, SJ 2002 I 193.

9 In 2023 the European Law Institute launched the *Enterprise Foundations in Europe Project* defining them as "foundations that own companies" (available at: <*https://www.europeanlawinstitute.eu/news-events/news-contd/news/new-eli-project-on-enterprise-foundations-in-europe/*>, last consulted on 20 March 2024).

10 For a distinction of the two, see notably *Philippe Meier*, Droit des personnes – Personnes physiques et morales, art. 11–89*a* CC, Zürich 2021, 697 N 1196; *Humbel/Wittkämper* (n. 4), § 9 N 401.

11 *Delphine Bottge*, Holding Foundations in Switzerland – The Foundation-owned company model from theory to practice, Geneva 2022, 30.

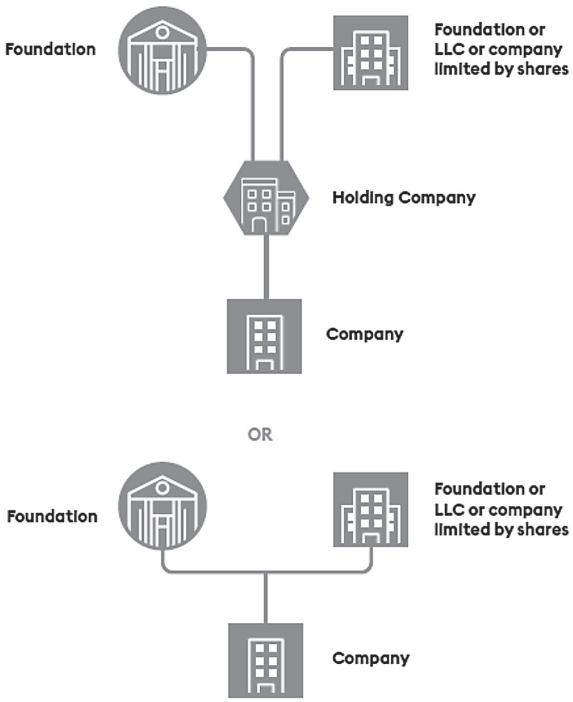

Figure 1: The double holding foundation model

These two holding foundations may differ either by their purpose alone[12] or by a division of voting rights and patrimonial rights. This division can be strict, where voting (control) rights are exclusively attributed to one foundation while the other receives all patrimonial rights, or it can be soft, where both foundations receive both rights but in varying proportions.[13]

An example of the combination of different purposes and a soft splitting of rights is the Victorinox group. In this case, there is an equal splitting of voting and patrimonial rights. As shown in Figure 2[14], the Carl und Elise Elsener-Gut Stiftung, with a general interest purpose, holds 10% of shares of Victorinox AG, alongside Victorinox Stiftung. The purpose of the latter is to maintain Victorinox AG as an independent company on solid grounds and ensure that the company may prosper as much as possible.[15]

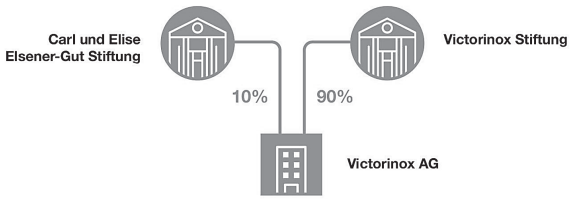

Figure 2: Double holding foundation and the soft splitting of rights

The German group Bosh is an example of strict splitting, as shown in the figure below.

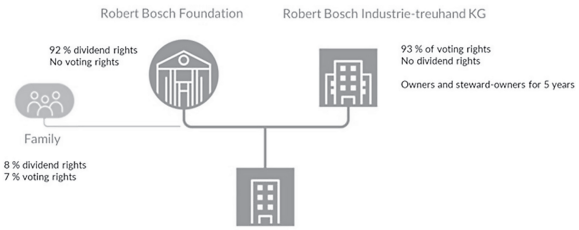

Figure 3: Double holding foundation and the strict splitting of rights

12 *Humbel/Wittkämper* (n. 4), § 9 N 454.

13 As an example, in France, the Naos Group is owned by Jean-Noël Thorel Foundation (endowment fund with a general-interest purpose) and the Asteroïde B612 company to ensure the group's longevity and control. The latter holds 51% of voting rights, while the endowment fund holds 49%, as well as the vast majority of dividend rights. As examples of splitting in Switzerland (not double foundation model): – one foundation, the purpose of which is to support the group's preservation as an independent family company (economic purpose), which holds 56,4% of voting rights and 27,9% of group dividend rights along with a family holding company (Bossard Unternehmensstiftung); – one foundation with a public utility purpose, which holds 100% dividend rights and 10,1% voting rights in a group alongside family shareholders (Jacobs Stiftung).

14 *Bottge* (n. 11), 61, including a case study.

15 The purpose of this structuring was to guarantee unity in the holding of company shares and to ensure both the survival of the company over generations as well as its long-term, sustainable development, all while respecting its founder's altruistic values. The Victorinox Stiftung does not receive any dividends: all profits generated are kept as reserve funds, thereby allowing the company to reinvest in its development and in implementing its strategy.
As another structuring in Switzerland: The Lindt Cocoa Foundation, with a general interest purpose, holds, with the Lindt Chocolate Competence Foundation and two of the company's pension funds, 20,5% of Chocoladefabriken Lindt & Sprüngli AG, a holding company listed on the stock market.

1.2 Purpose(s)

As a foundation, a Swiss holding foundation may pursue a general interest purpose,[16] occupational pension purposes,[17] or purposes authorized by law for family foundations.[18] Several purposes may also be combined within a single foundation.[19] However, combining these purposes is often challenging[20] in practice without jeopardizing the tax-exempt status.[21]

Regarding the pursuit of an economic purpose by a foundation, the Swiss Supreme Court affirmed this in a case involving a holding foundation with multiple purposes, including the secondary goal of maintaining and expanding the commercial company.[22] This ruling unequivocally acknowledged that foundations can pursue economic purposes, a concept not originally anticipated by legislators,[23] unfortunately categorizing the maintenance of a business company as such.[24]

Since then, there has been an ongoing scholarly debate on the scope of this case law. Authors disagree on:

- the validity of a foundation with a principal (and not accessory) economic purpose;[25]
- the validity of a foundation with a purely economic purpose; [26]
- the qualification of business preservation as an economic purpose. [27]

16 Federal Tax Administration, Exonération de l'impôt pour les personnes morales poursuivant des buts de service public ou de pure utilité publique (art. 56 let. g LIFD) ou des buts cultuels (art. 56 let. h LIFD); déductibilité des versements bénévoles (art. 33 al. 1 let. i et art. 59 let. c LIFD), Circular no. 12 of 8 July 1994; see also *Nicolas Urech,* Art. 56, in: Yves Noël/Florence Aubry Girardin (eds.), Commentaire romand: Impôt fédéral direct, 2e ed., Basel 2017, N 59: on the relevance of both activities mentioned in the charter and the activity actually carried out.

17 Art. 89*a* CC.

18 Art. 87 and 335 para. 1 CC. The Parliament voted on February 27, 2024 in favor of a parliamentary motion (22.4445) pushing for an amendment of family foundation law and the cancellation of the prohibition of family foundations whose purpose is to support family members and enable them to maintain a certain standard of living.

19 *Lukas Brugger,* Die gemischte Stiftung – Die Stiftung zur Verfolgung unterschiedlicher Zwecke im Lichte des schweizerischen ZGB und des österreichischen PSG, Basel, 2019; *Florian Zihler,* Zulässigkeit von Holdingstiftungen aus der Sicht der Handelsregisterbehörden, REPRAX 2/2018, 69.

20 *Dominique Jakob,* The Role of Foundations in Family Governance, in: Trusts & Trustees, vol. 26, no. 1, February 2020, 7 mentions the increased risk of conflicts of interests which can however be addressed with a prudent drafting of the statutes.

21 See below III.1 Tax law requirements, III.1.2 Subordination of commercial activity. In theory, tax authorities may grant partial tax exemption if the funds devoted to activities of general interest, likely to benefit from an exemption, be clearly separated from the rest of the assets. In practice, partial tax exemption is not easily granted.

22 ATF 127 III 337 para. 2c, SJ 2022 I 193, for a foundation aiming to protect the company from family dissensions and to ensure its unique orientation.

23 "*En fait, dans ce cas, la fondation devient sa propre destinataire, son but se confondant avec son patrimoine.*", *Parisima Vez,* Les sous-ensembles flous de la fondation, in: Pascal Pichonnaz/Bettina Hürlimann-Kaup (eds.), Une empreinte sur le Code civil – Mélanges en l'honneur de Paul-Henri Steinauer, Bern 2013, 147.

24 ATF 127 III 337 para. 2c, SJ 2002 I 193.

25 In favor of the validity or without making the distinction, *Loïc Pfister,* La fondation, 2e ed., Zurich 2024, 52 N 98; *Martin Würmli,* Das gemeinnützige Unternehmen, AJP 2010, 901–902, notably pointing out in n. 6 that it overturns a decision of the federal department of the interior according to which an economic purpose can only be pursued if the income directly serves a purpose of general utility; *Henry Peter/Vincent Pfammatter,* Social Enterprises and Benefit Corporations in Switzerland, in: Henry Peter/Carlos Vargas Vasserot/Jaime Alcalde Silva (eds.), The International Handbook of Social Enterprise Law – Benefit Corporation and Other Purpose-Driven Companies, Cham 2023, 847; *Henry Peter/Benoît Merkt,* Utilité publique et activité économique: possibilité et limites de l'exonération fiscale, EF 2019, 210. Against the validity, *Zihler* (n. 19), 75 and references in n. 33; *Paul Eitel,* Die Stiftung als Instrument zur Perpetuierung von Aktiengesellschaften?, in: Peter Breitschmid/Wolfgang Portmann/Heinz Rey/Dieter Zobl (eds.), Grundfragen der juristischen Person, Festschrift für Hans Michael Riemer zum 65. Geburtstag, Bern 2007, 96; *Kurt Schweizer,* Zulässigkeit der Stiftung mit wirtschaftlichem Zweck. Standortbestimmungen und Bemerkungen zu BGE 127 III 337 ff., in: Hans Michael Riemer/Reto Schiltknecht (eds.), Aktuelle Fragen zum Stiftungsrecht, unter Einbezug der geplanten Gesetzesrevision (Parlamentarische Initiative Schiesser), Bern 2002, 75; *Humbel/Wittkämper* (n. 4), § 9 N 459 and references.

26 Against *Jean Nicolas Druey,* Die Unternehmensstiftung als Instrument der Unternehmensnachfolge, Rechtliches und Ausserrechtliches zu einem heutigen Trend, WuR 1985, 98; *Harold Grüninger,* Zivilrechtliche Analyse der Unternehmensstiftung, Kaum mehr umstrittene Zulässigkeit, ST 1991, 3; *Dominique Jakob,* Ein Stiftungsbegriff für die Schweiz, ZSR 2013 II, 272–273. In favor, see n. 23 authors in favor or not making any distinction between principal or accessory economic purpose.

27 *Hans Michael Riemer,* Systematischer Teil und Kommentar zu Art. 80–89*c* ZGB, in: Regina E. Aebi-Müller/Christoph

2. Usefulness

Foundation ownership embodies the belief that capitalism can provide profitable solutions to societal and environmental problems by private and public owners who do not profit from producing problems for people or planet.[28] Governed by their charters, holding foundations prioritize their purpose over profit, fostering trust among stakeholders.[29] Additionally, they serve as a barrier against hostile takeovers, preserving local businesses and job opportunities.[30]

Entrepreneurs seeking to ensure the continuity of their businesses while upholding their values and mission find foundation ownership appealing. It offers an alternative to inheritance or sale, safeguarding family legacies.[31] The double foundation model further consolidates family unity through philanthropic activities while maintaining control over the company. One foundation takes on the role of coordinating or uniting the family (federator role), while the other oversees and monitors activities through its voting rights (watchdog role). A family charter will anchor family values and governance principles (degree of involvement of family members in business, in respective foundation board, non-family experts as board members, etc.).[32]

For young entrepreneurs, foundation ownership presents an opportunity to establish socially responsible businesses without compromising their ideals to meet investor demands. Although costly to establish, this model ensures startup independence, protects their mission, and fosters innovation.

III. Special requirements

1. Tax law requirements

According to an old case law of the Swiss Supreme Court of 1987,[33] a holding foundation could not benefit from a tax exemption if the equity participation exceeded 20% of shareholdings.

This ceiling, present in US tax law,[34] was eliminated by the 3rd sentence of Art. 56 (g) of the Federal Act on the Federal Direct Tax (LIFD)[35] (also reflected in Art. 23 (1) (f) of the Federal Act on the Harmonization of Direct Taxes of Cantons and Municipalities [LHID][36]) upon its adoption in 1990. The debates refer[37] to the legal opinion of Prof. *Markus Reich* from March 1990, (rightly) asserting that holding shareholdings in a company exceeding 20% does not automatically qualify as an economic activity. Thus, tax exemption remains viable as long as the public utility purpose is not compromised by an interest in preserving the company.[38]

This sentence, added by the Parliament,[39] specifies that "*the acquisition and management of substantial shareholdings in enterprises shall be deemed in the public interest when the interest in preserving the enterprise is secondary to the public interest goal, and managerial activities are not conducted*". Conversely, these criteria are not required to maintain the tax exemption in the case of *minor* participation.

Müller (eds.), Berner Kommentar, Die juristischen Personen, Die Stiftungen, 2e ed., Bern 2020, 229 N 532: on the fact that maintaining and promoting a business is neither an economic goal nor an ideal goal but rather a detail of the way assets are dedicated and that it becomes an economic purpose only if the benefits are planned to be reinjected into the company, whereas it is an ideal purpose if the funds are attributed to the pursuit of the ideal purpose. In our view, ATF 147 II 287 para. 8.3 supports this opinion as it states that the ownership of significant stakes in a company is only compatible with tax exemption within the meaning of Art. 56 let. g LIFD if it is disinterested and not an end in itself, meaning if the interest in preserving the company held can be considered subordinate to the public utility purpose pursued by the foundation. Of the same opinion, reminding that the management of its own assets is not a commercial activity, *Cédric Panchaud*, La transformation d'une association en société anonyme, GesKR 2022, 221.

28 *Colin Mayer*, Ownership, Agency and Trusteeship, ECGI Working Paper Series in Law, January 2020, 6.

29 *Steen Thomsen*, The Danish Industrial Foundations, Kopenhagen 2017, 35.

30 *Jakob* (n. 20), 5.

31 *Joël Botello/Arthur Gautier/Anne-Laure Pache*, Families, Firms and Philanthropy: Shareholder Foundation Responses to Competing Goals, in: Roza Lonneke/Steffen Bethmann/Lucas Meijs/Georg von Schnurbein (eds.), Handbook on Corporate Foundations, Nonprofit and Civil Society Studies, Cham 2020, 68.

32 *Jakob* (n. 20), 6.

33 Federal Tribunal, case A.678/1986, judgment of 26 June 1987, in: ASA 57/1989, 556 ss.

34 Internal Revenue Code § 4943(c)(2)(A)(ii).

35 LIFD/DBG, RS/SR 642.11.

36 LHID/StHG, RS/SR 642.14.

37 Official bulletin (OB) 1990 CN 448.

38 *Markus Reich*, Gemeinnützigkeit als Steuerbefreiungsgrund, ASA 58/1989, 490–492.

39 FF 1990 III 1598, 1620.

The Parliament aimed to introduce two specific requirements for obtaining tax exemption when a holding foundation holds a so-called *significant* shareholding (III.1.1). These requirements include the subordinate position of the interest in preserving the company compared to the purpose of public utility (III.1.2) and the absence of managerial activities by the foundation within the commercial entity (III.1.3).[40]

1.1 Holding of a significant participation

The term *significant participation* lacks explicit definition. The provision eliminates any specific ceiling, with case law acknowledging that a 100% ownership of a commercial enterprise may still be eligible for tax exemption for public utility purposes of the shareholder entity.[41] Parliamentary debates and case law do not explicitly address the threshold triggering a specialized analysis from a tax law perspective. The concept of *significance* is interpreted as having the potential to confer control or create a situation of dependence that alters the public interest objective.[42]

For coherence within the legal order, the principles applicable under Swiss accounting law for determining control should be applied *mutatis mutandis.* These principles provide for the following forms of control:[43]

- an entity (directly or indirectly) holds a majority of votes;
- an entity has (directly or indirectly) the right to appoint or remove a majority of the members of the supreme management or administrative body; or
- an entity is able to exercise a controlling influence in another manner.

The analysis should however be limited to the first hypothesis since reference is made to *significant shareholding* or *significant participation in the share capital*. Consequently, foundation holding (directly or indirectly) a majority of votes in a commercial company must comply with the additional tax law requirements to obtain a public utility purpose tax exemption. Those holding shares that do not grant (directly or indirectly) a majority of votes must then not comply with the additional requirements of Art. 56 let. g 3rd sentence LIFD. Depending on the dilution of the shareholding, may fall in the first category also foundations holding only 10% of the share capital.[44]

The distinction between holding foundations subject to the additional tax requirements of Art. 56 let. g 3rd sentence LIFD and those subject to the basic tax requirements of Art. 56 let g 1st sentence is coherent with the Swiss Supreme Court's definition of a holding foundation, the text of Art. 56 let. g LIFD, and the Federal Council message of 1990. Clarifying this also means distinguishing between a significant holding and a mere financial investment.

Thus, only holding foundations with a significant shareholding (i.e., holding – directly or indirectly – a majority of votes) must ensure that the interest in maintaining the enterprise is secondary to the public interest purpose (III.1.2), and that managerial activities are not conducted (III.1.3).

1.2 Subordination of commercial activity

The first requirement of Art. 56 let. g 3rd sentence LIFD emphasizes the foundation's purpose: the general utility objective must take precedence over any aim to maintain the commercial enterprise. This implicitly acknowledges the widely employed practice of simultaneously pursuing both objectives.[45]

This requirement must be fulfilled at the foundation's incorporation and maintained throughout its existence. The foundation's charter must provide clarity, either by clearly prioritizing goals or explicitly stating that the purpose of sustaining the business is subordinate to other objectives.[46] Tax authorities have adopted a stricter stance in this regard, deeming

40 Art. 56 let. g 3rd sentence LIFD.

41 ATF 147 III 287 para. 8.2. As examples of foundations holding 100% ownership of commercial enterprises, we can cite Fondation Hans Wilsdorf holding the Rolex Group, Fondation Alfred et Eugénie Baur holding A. Baur & Co (Pvt) Ltd through Lanka-Baur-Holding SA and Fondation DSR holding DSR (former Eldora) Group.

42 ATF 147 II 287 para. 8.5.

43 See Art. 963 para. 2 CO.

44 See reference to a 10% shareholding in Art. 9 para. 4 of the Swiss Financial Market Infrastructure Act, FinMIA (LIMF/FinfraG, RS/SR 958.1), for a definition of control in the financial market.

45 As examples of holding foundations with dual purposes, see Unternehmensstiftung Glockengiesserei H. Rüetschi AG, Triner Medien Stiftung, Hoerbiger-Stiftung, Fondation Alfred et Eugénie Baur, Josua Stiftung, Fondazione Federico e Edvige Kever, WT Partner-Stiftung.

46 In practice however the charter makes no mention whatsoever of the held company, see *Bottge* (n. 11), 24.

formulations used for older foundations potentially unacceptable today. For older holding foundations, the immutability of the deed of foundation provided for by law[47] should lead to a degree of flexibility on the part of the authorities.

The stipulation that the purpose of public utility must prevail implies for tax authorities the *regular and significant* contributions from the commercial company to the foundation.[48] It should also be evident in decisions made by the foundation's board.

A recent and controversial decision by the Swiss Supreme Court highlighted this requirement, particularly in a case involving a foundation acting as a major shareholder and creditor of a commercial company.[49] The court deemed the situation, characterized by a potential conflict of interest or financial interdependence, as contrary to the primacy of the general utility purpose.[50] It is important to note that foundations may face challenging decisions and asserting that they will invariably prioritize the survival of the company is uncertain. The Swiss Supreme Court's implication in this case seems to prejudge the board of foundation's decisions, encroaching on the supervisory authority's competence in the realm of sound asset management.[51] Conflict situations are inherent in social and economic life, and the focus should be on how they are managed when a conflict occurs rather than the probability of the occurrence of the conflict. Failing to do so would also violate the legislator's decision in 1990 to allow the development of holding foundations in Switzerland.[52]

1.3 Managerial activities are not conducted

The second requirement stipulated by Article 56 let. g 3rd sentence LIFD for holding foundations with a significant shareholding is the abstention from conducting managerial activities. The meaning and rationale behind this requirement pose challenges for comprehension. Essentially, it implies that if a holding foundation holds a controlling position through its shareholding and seeks tax exemption, it must refrain from exercising control. In other words, it mandates that a holding foundation with a substantial shareholding refrain from utilizing its social rights (e.g., agenda-setting, board member elections, etc.) in a manner that confers control of the company upon itself.

The Federal Tax Administration has indeed construed this requirement as a limitation, stipulating that only a designated *liaison person* can concurrently serve on both the board of directors of the commercial company and the board of trustees of the holding foundation.[53] In simpler terms, when the holding foundation, acting as the majority shareholder, exercises its right to elect the company's board, it must avoid selecting members who would grant it managerial control of the company. In certain situations, especially with large boards, the Federal Tax Administration will consider allowing more than one liaison person.

This requirement presents challenges both in terms of practicality and alignment with good corporate governance principles. Practically, ensuring that newly elected board members are entirely free from the influence of the holding foundation is not easy. From a corporate governance standpoint, this requirement conflicts with recommendations for the parent company to maintain a certain level of influ-

47 Art. 86 and 86*a* CC.

48 Federal Tax Administration, Circular no. 12 of 8 July 1994, sec. II.3. For a critic of the constraints imposed by such requirements on a young social enterprise, advocating for a less strict approach might involve considering the waiver of dividends as an impact investment, see *Humbel/Wittkämper* (n. 4), § 9 N 587.

49 ATF 147 II 287.

50 ATF 147 II 287 para. 8.5.

51 *Giulia Neri-Castracane*, ATF 147 II 287: une confusion de notions et de rôles au préjudice de l'intérêt général, in: Frédéric Bernard/Maya Hertig Randall/Christian Bovet/Alexandre Flückiger (eds.), Le droit au service de l'humanité – Mélanges en l'honneur de Michel Hottelier, Zurich 2023, 347; *Dominique Jakob*, Swiss Enterprise Foundations – Overview and Current Challenges, in: Anne Sanders/Steen Thomsen (eds.), Enterprise Foundation Law in a Comparative Perspective, Cambridge/Antwerp/Chicago 2023, 99; *Rébecca Dorasamy/Alexandra Tisma*, ATF 147 II 287 = 2C_166/2020 du 10 mai 2021 [Exonération des fondations Holding], RDAF 2023 II, 228–233.

52 BO 1990 CN 448.

53 Federal Tax Administration, Circular no. 12 of 8 July 1994, sec. II.3; *Thomas Koller*, Maecenas ante portas? – Die steuerliche Behandlung von privatrechtlichen Stiftungen gemäss der Parlamentarischen Initiative Schiesser, in: Hans Michael Riemer/Reto Schiltknecht (eds.), Aktuelle Fragen zum Stiftungsrecht, unter Einbezug der geplanten Gesetzesrevision (Parlamentarische Initiative Schiesser), Bern 2002, 21.

ence over the entire group[54] and to engage in shareholder activism,[55] which involves actively exercising social rights as a shareholder.

If properly implemented, the sole requirement of prioritizing the ideal purpose should, in our opinion, be sufficient.

2. Accounting law requirement

Where a legal entity required to file financial reports, controls one or more undertakings also required to file such reports, it must prepare consolidated annual accounts (consolidated accounts) in the annual report for all the controlled undertakings.[56] The mere possibility of exerting controlling influence is sufficient to trigger the requirement for consolidated accounts, regardless of whether such control is actively exercised.

However, a foundation is exempt from the duty to prepare consolidated accounts if, together with the controlled undertaking, it has not exceeded two of the following thresholds in two successive financial years: [57]

- a balance sheet total of 20 million francs,
- revenue of 40 million francs, or
- 250 full-time employees on annual average.

Alternatively, a foundation may transfer the obligation to prepare consolidated accounts to a controlled company *(intermediate holding company)* if it consolidates all other companies under a single management through a majority of votes or through other means, and can prove effective control over them.[58]

Nevertheless, the supervisory authority may waive such exemption and require the foundation to prepare consolidated accounts and provide additional information.[59] Article 84 para 2 CC, which provides that the supervisory authority must ensure that the foundation's assets are used for their declared purpose, empowers this decision.

Consequently, the supervisory authority of the foundation may gain access to the consolidated accounts of a commercial group of companies, to which such administrative authority would not typically have access. However, in line with the principles of proportionality and subsidiarity[60] that govern authority, proper supervision of holding foundations may not always justify granting access to the organizational and financial statements of privately operated companies.[61]

IV. Sustainability of the commercial company

1. The temporal durability of the company

Foundation ownership is easily designed for long-term commitment[62]. When a founder transfers his personal assets into a foundation, he effectively establishes a portion of his will as an independent commitment device for a certain, or indefinite, duration. This significantly influences the foundation's role as shareholder.

54 Economiesuisse, Swiss Code of Best Practice for Corporate Governance, 2023 (SCBP 2023), Recommendation 9. Of the same opinion regarding the incoherence, *Urs Landolf,* Die Unternehmensstiftung im schweizerischen Steuerrecht, Diss. St. Gallen 1987, Bern 1987, 322; *Parisima Vez,* La fondation: lacunes et droit désirable: une analyse critique et systématique des articles 80 à 89 CC, Bern 2004, 171; *Henry Peter,* L'action révocatoire dans les groupes de sociétés, Basel 1990, 35.

55 SCBP 2023 (n. 54), Recommendation 1.

56 Art. 963 CO.

57 Art. 963*a* para. 1 CO.

58 Art. 963 para. 4 CO.

59 Art. 963*a* para. 2 (4) CO. The supervisory authorities' regulations usually state that they are invested with "*the most extensive powers*" (Art. 3 (1) of the Règlement sur la surveillance des fondations de droit civil et des institutions de prévoyance of 29 March 2012 – RSFIP-Surv. [ASFIP Geneva]) or are entitled to request "*in addition to the documents that must be sent to it, (…) other information, reports and documents*" (Art. 18 of the Règlement sur la surveillance LPP et des fondations of 27 October 2022 – RLPPF [Autorité de surveillance AS-SO)]; § 4 of the Ordnung über die Stiftungsaufsicht of 23 January 2012 (BVG- und Stiftungsaufsicht beider Basel [BSABB]); § 5 of the Ausführungsbestimmungen der ZBSA betreffend die Aufsicht über die Stiftungen of 16 September 2005 (Zentralschweizer BVG- und Stiftungsaufsicht [ZBSA]). The Federal Supervisory Authority asks in its annual report submission form the reason of such shareholdings.

60 *Pfister* (n. 25), 237 N 802.

61 *Harold Grüninger,* Unternehmenstiftung, in: Peter V. Kunz/Florian S. Jörg/Oliver Arter (eds.), Entwicklungen im Gesellschaftsrecht V, Bern 2010. See also *obiter dictum* of the Swiss Federal Supreme Court in the case law published in ATF 127 III 337 para. 2c for a supervision confined to foundations pursuing, even in part, a public interest purpose. Against *Arthur Meier-Hayoz/Peter Forstmoser,* Droit suisse des sociétés, Bern 2015, 857.

62 *Thomsen* (n. 29), 36.

A study published in 2018[63] concluded that companies held by Danish foundations have a longer lifespan compared to the average: The probability of surviving beyond age 40 is 30% for foundation-owned firms and 10% for other firms. The survival probability is always higher for foundation-owned firms. – Foundation-owned firms have higher survival rates even after the first 30 years. Among the non-foundation-owned firms, 80% of the remaining population at age 30 is gone at age 60, while only 30% of the foundation-owned population at age 30 is gone at age 60.

2. The dimension of sustained social value creation of the business activity

Current[64] regulations applicable to business activities fail to guarantee their orientation towards creating sustained social value, aiming at prosperity rather than profitability.[65] It is important that controlling shareholder (or members) comfort the board in such a direction.[66]

Swiss company law does not mandate the immutability of the articles of association but instead allows for their adaptation to changing circumstances. The principle of parity between the general assembly and the board of directors,[67] the principle of equal treatment among shareholders,[68] and the protection of voting rights[69] mean that a corporation's shareholder has the possibility and right to change direction at any time, whether under the influence of other shareholders or the board of directors, without being reprimanded by anyone.[70]

In contrast, the foundation, particularly the holding foundation, appears as an attractive and innovative[71] structure to ensure the continuity of the mission over several generations. It has no members, and the foundation's statutes, especially the purpose, are meant to be immutable.[72]

The single holding foundation model has the potential to positively impact business sustainability in theory. However, in practice, it faces challenges from

63 *Steen Thomsen/Thomas Poulsen/Christa Børsting/Johan Kuhn*, Industrial Foundations as Long-Term Owners, European Corporate Governance Institute (ECGI) – Finance Working Paper No. 556/2018. The authors state, based on Danish data, that holding foundations are "long-term owners", they practice long-term governance. They bring to light the following points: these foundations are more stable and have a longer lifespan than their alternatives; the companies held use conservative capital structures with limited financial leverage. The managers of these companies are less frequently replaced.

64 For a proposal of a new legal status of sustainable enterprises, see *Giulia Neri-Castracane/Jean-Luc Chenaux/Henry Peter/Germana Barba/Claude Humbel/Michel Jaccard/Christoph Burckhardt/Umberto Milano/Vincent Pfammatter*, Legal Status For Sustainable Enterprises In Switzerland, White Paper from the group of legal experts, Alliance for Sustainable Enterprises, December 2023 (available at: <*https://www.alliance-sustainable-enterprises.ch/keydocuments*>, (in French, German and English), last consulted on 24 March 2024).

65 For references to Swiss Supreme Court decisions giving place to stakeholders but an interpretation of it as an instrumental approach to stakeholder governance, see *Giulia Neri-Castracane*, Sustainable purpose-driven enterprises – Swiss legal framework in a comparative law perspective, Geneva 2023, 47, n. 217. For the lack of clarity on the application of the double materiality concept to Art. 964*a* to 964*c* CO, see Federal Office of Justice (OFJ), Mandat du DFJP du 23 février 2022, Analyse des propositions de directives de l'UE sur le devoir de vigilance des entreprises en matière de durabilité et sur la publication d'informations en matière de durabilité par les entreprises et examen de la nécessité d'adapter le droit suisse – Rapport sur les propositions de l'UE en matière de durabilité et sur le droit en vigueur en Suisse, 25 novembre 2022 (only in French or German), § 7.3, 15, except for climate issues for which the double materiality concept is applicable, see Art. 1 para. 1 Ordinance on climate-related report (RS/SR 221.434). Of this opinion, that the double materiality concept could be applied in a non-pluralistic stakeholder governance approach, see University of Cambridge Institute for Sustainability Leadership (CISL), Future of Boards – Legal and Regulatory Frameworks for Sustainability (Phase 1, Part 2), Cambridge 2023, 6.

66 *Nikolaos Kavadis/Steen Thomsen*, Sustainable corporate governance: A review of research on long-term corporate ownership and sustainability. Corporate Governance: An International Review, vol. 31(1), 2023, 198–226.

67 *Peter Böckli*, Schweizer Aktienrecht, 5e ed., Zurich/Geneva 2022, § 8 N 6 and references.

68 Art. 717 para. 2 CO

69 Art. 692 para. 2 CO.

70 Of the same opinion, *Laura Studhalter/Thimo Wittkämper*, Die Umsetzung von Verantwortungseigentum in der Schweiz, GesKR 2023, 361, pointing out the limitations of a veto rights model under Swiss law.

71 *Henry Peter/Livia Ventura/Delphine Bottge/Vincent Pfammatter*, Profit and Non-profit Purposes, EF 2019, 165, referring to the holding foundation as "*innovative as it matches the contemporary trend to blend economic activities and philanthropic missions*".

72 See Art. 86 and 86*a* CC for limited possibilities to amend the purpose of a foundation.

tax regulations and Swiss corporate law that can impede this sustainability.

On one hand, having a long-term controlling shareholder base dedicated to public welfare can encourage decision-making focused on creating lasting social value. On the other hand, tax authorities' requirements for significant contributions from the company to the foundation[73] often prioritize financial profitability over a comprehensive view of prosperity (financial materiality).[74] Additionally, restrictions on managerial activities, such as barring foundation board members from also serving on the company's board,[75] can hinder the transmission of philanthropic values and mission integration into operational activities.

The single foundation model requires thus a choice between maintaining tax exemption or adopting a steward ownership legal structure. Combining both within the same legal entity in Switzerland is not feasible.

In cases where the single foundation model falls short, the double foundation model offers an alternative. By forgoing tax exemptions, a foundation can maintain majority voting control, allowing it to steer the company towards fulfilling its mission as a steward. Dividend rights are assigned to shareholders (e.g. a charitable foundation) which then allocates the sum towards fulfilling its charitable objectives.

V. Splitting of voting and economic rights and other governance control mechanisms

1. Statutory law and articles of association

To embed steward ownership within the double foundation model, it must be complemented by a splitting of voting and economic rights and/or governance mechanisms to ensure the creation of social value in business activities. It is crucial to differentiate between what is mandated by Swiss law and what can be included in the articles of association in compliance with the law, as well as what can be arranged through separate contractual agreements.

1.1 Splitting of voting and economic rights

The Swiss legal framework does not allow for a complete separation of social and economic rights. It mandates that voting rights associated with shares cannot be solely owned by a shareholder who does not hold the entire share capital. Each shareholder is guaranteed at least one vote[76] and cannot be stripped of their patrimonial rights.

However, Swiss law provides significant flexibility in adjusting both voting and patrimonial rights among different classes of shareholders. There are four possible options for this adjustment:

- *Preferred voting shares:* These give each shareholder one vote per share, regardless of the share's nominal value.[77] However, unlike in some jurisdictions,[78] these shares do not directly confer multiple voting rights. Nonetheless, they facilitate the creation of two distinct classes of shares, one of which holds significant voting power, with a specified limit for ordinary shares set at 10 times the nominal value of the preferred voting shares.[79] If substantial voting control is desired, the issuance of non-voting shares becomes necessary.
- *Preferred shares:* Unlike preferred voting shares, preferred shares provide advantages related to dividends, liquidation shares, and preemptive subscription rights in cases of new share issuance, without impacting voting rights.[80]
- *Non-voting shares:* This class of shares allows for the creation of shareholders who only receive financial benefits and are deprived of social rights.[81]

73 See above section III.1.2.

74 *Andreas Hösli/Rolf H. Weber,* Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility, ECFR 6/2021, 968, referring to "*financialization of sustainability*".

75 See above section III.1.2.

76 Art. 692 para. 2 CO.

77 Art. 693 para. 1 CO. The voting privilege is however suspended for certain decisions, see Art. 693 para. 3 CO.

78 This is the case in Delaware (*Del. Gen. Corpo. Law, § 151),* in France (*Art. L225-123 para. 1 of the French Commercial Code* allows for the provision of double voting rights if shares are hold for 2 years or more and, following adoption of the Pacte Law, *Art. L228-11 para. 1 of the French Commercial Code* even allows multiple voting rights for private companies), in the UK (Companies Act 2006, Art. 629 s.) as well as in the Netherlands *(Amsterdam Court of Appeal, 1 September 2020, ECLI:NL:GHAMS:2020:2379).*

79 Art. 693 para. 2 CO.

80 Art. 656 para. 2 CO.

81 Art. 656*a* and 657 CO.

– *Restricted voting shares:* These shares enable the limitation of votes allocated to holders of multiple shares.[82]

Non-voting shares and restricted voting shares are the primary instruments for controlling voting power and distributing dividends to shareholders without voting rights, referred to as certificate holders.

1.1.1 Non-voting shares

Swiss law permits the formation of a cohort with predominantly or exclusively economic rights, albeit with constraints. Economic rights may be conferred through dividend right certificates *(Genussschein; bon de jouissance)* or participation certificates *(Partizipationsschein; bon de participation)*,[83] with the caveat that in limited liability companies (LLC), the issuance of participation certificates is neither stipulated nor allowed.[84] The Swiss Supreme Court interprets this as an instance of qualified legislative silence, indicating the impracticality of issuing participation certificates within an LLC.[85]

Dividend right certificates confer solely financial benefits, including dividends (in cash or kind) and/or liquidation proceeds), or a preferential right to subscribe for new shares).[86] On the other hand, participation certificates may extend beyond purely financial benefits to include certain social rights, such as the right to challenge an annulment and access to information under specific circumstances. However, participation certificates do not include any voting[87] or associated rights, such as the right to convene the general meeting, participate in it, obtain information, inspect documents, and make proposals.[88] Swiss legislation imposes restrictions, notably:

– Dividend right certificates may only be issued to individuals linked to the company, with exceptions for founders unless otherwise stated in the articles of association.[89] These certificates primarily aim to engage shareholders, creditors, and employees in the company's financial prosperity.[90] Unlike shares and participation certificates, dividend rights certificates do not serve a financing function and hence cannot possess a nominal value or be issued against a capital contribution.[91]
– The segment of participation capital composed of participation certificates listed on a stock exchange must not surpass ten times the share capital registered in the commercial register, with the remainder (unlisted) not exceeding twice the share capital recorded therein.[92]
– Distributions under dividend rights certificates or participation certificates may not be capped. Certificate holders cannot be disadvantaged in relation to shareholders with regards to dividends or entitlements in the event of bankruptcy.[93]

The issuance of participation certificates, particularly in listed companies limited by shares, enables the concentration of almost all patrimonial rights into the hands of a single shareholder, known as the certificate holder. For example, if one foundation possesses the entire voting shares capital of a nominal value of CHF 100,000, and participation certificates worth CHF 1 million (ten times the nominal value of the shares capital) are issued to a second foundation, the latter would effectively control 90,9% of the economic entitlements.

82 Art. 692 para. 2 CO.

83 The holder or a participation certificate has a right to dividends and the liquidation proceeds (Art. 656*f* CO). Additionally, they possess a pre-emptive subscription right (Art. 656*g* CO). On the scholarly debate if they can cover other economic rights (e.g. right to repurchase the participation certificates), see *Rita Trigo Trindade*, Art. 657 CO, in: Pierre Tercier/Marc Amstutz/Rita Trigo Trindade (eds.), Commentaire Romand: Code des obligations II (CR CO II), 2e ed., Basel 2017, N 7.

84 FF 2002 2429, 3045 where the Federal Council concludes that draft bill therefore refrained from admitting the issuance of participation certificates in the LLC, since this was a qualified silence of the legislator.

85 ATF 140 III 206 para. 3.4.2.

86 Art. 657 CO.

87 Art. 656*a* CO.

88 Art. 656 para. 2 CO. If the articles of association do not grant the right to obtain information or access documents, or the right to propose the institution of a special audit, participants may submit a written request to the general meeting for the purpose of obtaining information or consulting the documents. See Art. 656*c* para. 3 CO.

89 Art. 657 para. 5 CO.

90 On the limited scope of possible beneficiaries of the voucher for use, see Art. 657 para. 1 CO and *Corrado Rampini/Rocco Rigozzi*, Art. 657 CO, in: Rolf Watter/Hans-Ueli Vogt (eds.), Basler Kommentar Obligationenrecht II (BSK OR II), 6e ed., Basel 2023, N 2.

91 Art. 657 para. 3 CO

92 Art. 656*b* para. 1 CO.

93 Art. 656*f* para. 1 and 657 para. 2 and 4 CO.

1.1.2 Restricted voting shares

The articles of association may (initially or subsequently) limit (through a percentage) the number of votes allocated to the holder of multiple shares.[94] If they can be used to make the decision-making process more democratic, they mainly serve as a defense mechanism against the risk of a change of control.[95] They may however be used to consolidate the control of the controlling shareholders if the other shareholders hold stakes exceeding the specified caps.[96] In case of such restrictions on the voting rights, the voting rights of the surplus shares according to the statutory provisions are suspended.[97]

In essence, the exemption from the proportionality rule regarding the nominal value of shares and their corresponding voting rights can either affect all shareholders or target specific ones.[98] A scholarly debate surrounds whether a shareholder holding multiple shares can be effectively limited to a single vote,[99] and whether the board may be given the discretion to decide which shareholders are subject to such clauses.[100]

The connection of these restrictions to voting rights with the aim of serving the company's purpose is crucial. The Swiss Supreme Court holds that the principle of equal treatment allows for unequal treatment of different shareholders if it is deemed an indispensable means of pursuing the company's objectives.[101] Linking these restrictions to the aim of maintaining a particular vision of the company is thus a solution.

94 Art. 692 para. 2 CO.

95 CR CO II-*Trigo Trindade/Héritier Lachat,* Art. 692 CO N 39.

96 *Arnaud Philippe,* Droit des sociétés cotées à l'actionnariat concentré – Enjeux, gouvernance et perspectives, Zurich 2021, 78 N 195.

97 *Peter Forstmoser/Arthur Meier-Hayoz/Peter Nobel,* Schweizerisches Aktienrecht, Bern 1996, § 24 N 60.

98 In favor CR CO II-*Trigo Trindade/Héritier Lachat,* Art. 692 CO N 55; *Hans Caspar von der Crone,* Aktienrecht, 2e ed., Bern 2020, § 12 N 420. Against *Böckli* (n. 67), § 8 N 591 and 598. Regarding the inadmissibility of limiting the right to vote solely against a single shareholder see BSK OR II-*Schärli,* Art. 692 CO N 8.

99 In favor CR CO II-*Trigo Trindade/Héritier Lachat,* Art. 692 CO N 55. Against, *Böckli* (n. 67), § 8 N 611. With some reservations, *von der Crone* (n. 98), § 12 N 420.

100 Against *Böckli* (n. 67), § 8 N 598. In favor if the articles of association specify the criteria for granting an exemption to a voting right restriction, *von der Crone* (n. 98), § 12 N 420.

101 ATF 102 II 265; ATF 99 II 55 para. 4; ATF 95 II 555 para. 4.

1.2 Other governance control mechanisms

To keep control on a majority stake and to ensure the fulfilment of the mission of both the charitable foundation and of the company, three other legal instruments are used across the jurisdictions: the redeemable shares, the veto right, or the combination of rights, and transfer restrictions. To a certain extent, these instruments, when authorized under Swiss law, can be detailed in publicly available articles of association.

Additionally, the articles of association can further delineate the mission (and the steward ownership model). Differences may arise depending on whether the company is a company limited by shares or an LLC.

1.2.1 Redeemable shares

The compatibility of redeemable shares[102] with corporate law is controversial in light of the doctrine of share capital maintenance which is the heart of company law since the 19th century.[103] Following criticism addressed to this principle,[104] UK[105], Delaware[106], as well as Italian[107] and French[108] laws, as authorized by

102 On the question, see *Derek French/Stephen W. Mayson/Christopher L. Ryan,* Company Law, Oxford 2014, 173 s.

103 This doctrine prohibits the variability of share capital for the protection of creditors. On the importance of this doctrine: under UK law, see notably *Eilis Ferran,* Company Law and Corporate Finance, Oxford 1999, 355; under French law, see notably Rapport au Président de la République relatif à l'ordonnance no. 2014-863 du 31 juillet 2014 relative au droit des sociétés, prise en application de l'article 3 de la loi no. 2014-1 du 2 janvier 2014 habilitant le Gouvernement à simplifier et sécuriser la vie des entreprises, Journal officiel, no. 0177 du 2 août 2014, which refused the redemption right of the shareholder based on this argument. For the importance of this doctrine under Swiss law: see *Böckli* (n. 67), § 1 N 113–119 and the fact that it prohibits redeemable shares, see *Marc Hanslin,* Corporations and Limited Liability Companies: a Comparison, in: Homburger AG (ed.) Swiss Corporation Law: A Primer for Legal Practitioners, Zurich 2022, 32; under French law: to be noted that this prohibition was then lifted under French law with the Pacte Law introducing shares that can be redeemable at the initiative of the shareholder.

104 For a clear summary of the critics addressed, primarily in Anglo-Saxon countries, to the capital maintenance doctrine (and a reply to them), see notably see *Böckli* (n. 67), § 1 N 113–119.

105 Sections 684–686 Companies Act 2006.

106 § 151 Delaware General Corporation Law.

107 Art. 2473 Italian Civil Code.

108 Art. L. 228-12 French Commercial Code.

the EU Directive on social capital,[109] have introduced redeemable shares, with variations in terms of price to pay and extent of the redemption.[110]

Under Swiss law (like German law)[111] redeemable shares are not permitted. Capital protection covers the prohibition of returning capital contribution.[112] Shares cannot thus be subject to any condition subsequent,[113] as the concept of temporary shareholding contradicts the doctrine of share capital maintenance.

This principle has one possible exception offered by the law: statutory redemption (for good cause or grounds stipulated in the articles of association) in the cases of LLCs.[114]

The statutory redemption right for *good cause* or grounds specified in the articles of association in the LLC enables the expulsion of a partner from the LLC, with compensation at the intrinsic value of the shares,[115] if their continued involvement has become untenable. This exception is rooted in the personal dimension of a LLC, as opposed to a company limited by shares.[116] *Good cause* presupposes that continued membership can no longer be objectively and reasonably imposed on the applicant.[117] Where shares are freely transferable, the right should be limited to particularly serious infringements.[118] Certainly, mission drift could be a ground specified in the articles of association. Mission drift could also indeed qualify as a good cause, as it pertains to the *raison d'être*, or fundamental purpose, for which members have joined the LLC. This is particularly true if the mission is outlined in the articles of association, accompanied by the concept of steward ownership. If the shares are freely transferable, the probability of deviation from the mission must likely approach certainty for a good cause for redemption to be granted.

Outside of this exception, Swiss law does not permit the imposition through the articles of association of a duty to sell shares.[119]

1.2.2 Veto rights

Veto rights – either limited or unlimited in time[120] are available under Swiss law.[121] Veto rights may thus be granted to specific shareholders over major corporate decisions. Reference is often made to the list of decisions outlined in Art. 704 CO that require a supermajority for approval. This includes any alteration of the company's purpose.

While the veto right is a statutory right under LLC law[122] and can thus be included in the articles of association, it may only be a contractual right in companies limited by shares.

In a LLC, as the right is stipulated in the articles of association, a breach would open the possibility of

109 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30 June 2017, 46–127, Art. 82.

110 French law prohibits a company from repurchasing shares exceeding 10% of its own shares, with a further restriction of 10% in each category of shares (as per Art. L 225-210 of the French Commercial Code). This limitation makes the instrument unsuitable for venture capital structures. Similarly, Italian law permits listed companies to repurchase shares up to 20% of the share capital (as outlined in Art. 2357 of the Italian Civil Code). In both US and UK law, there are no prescribed limits for redeemable shares, other than ensuring the availability of funds. On this concept of *availability of funds* and deference given by the court in the US to the board of directors, see *SV Investment Partners, LLC v. Thoughtworks, Inc., C.A.* no. 2724, WL 2010 4547204 (Del. Ch. Nov. 10, 2010). Regarding the pricing mechanism, US and UK law necessitate that the articles of association specify the price to be paid, which could be set at the par value. Conversely, Italian law grants shareholders of redeemable shares the right to repayment proportional to the company's assets (per Art. 2473, para. 3 of the Italian Civil Code). French law generally mandates repayment at par value, although the articles of association may allow for an additional agreed amount (Art. L228-12 para. III of the French Commercial Code).

111 § 57 Aktiengesetz of the 6 September 1965 (BGBl I S. 1089).

112 Art. 680 para. 2 CO and 793 para. 2 CO.

113 *Böckli* (n. 67), § 5 N 150.

114 Art. 823 para. 1 and 2 CO.

115 Art. 825 para. 1 CO.

116 Regarding the personal dimension of a LLC, see Art. 772 para. 1 CO; *Jean Nicolas Druey/Eva Druey Just/Lukas Glanzmann*, Gesellschafts- und Handelsrecht, 12e ed., Zurich 2021, 317; CR CO II-*Chappuis/Jaccard*, Art. 772 CO N 14–15; *Lukas Glanzmann*, Verhältnis von Aktiengesellschaft und Gesellschaft mit beschränkter Haftung unter dem neuen Aktienrecht, GesKR 2023, 433.

117 CR CO II-*Buchwalder*, Art. 822 CO N 3.

118 *Ibidem.*

119 In contrast, statutory rights exist for the purchase of shares in the event of a squeeze-out merger (Art. 8 para 2 Merger Act) or following a public tender offer when the offeror holds more than 98% of the voting rights (Art. 137 of the Swiss Financial Market Infrastructure Act [FinMIAè).

120 BSK OR II-*Truffer/Dubs*, Art. 807 CO N 3.

121 In a LLC, veto rights can be included in the articles of association, as stated in Art. 807 para. 1 CO, thereby binding any new quotaholder. In the case of a company limited by shares, these rights must be incorporated into the shareholder agreement.

122 Art. 807 para. 1 CO.

seeking annulment of the decision. Nevertheless, the possibilities for seeking annulment of a decision are limited due to the non-transferability of the right.[123]

1.2.3 Restrictions on transferability of shares

Another line of defense against mission drift and loss of control lies in restrictions on the transferability of shares.

For LLCs, the legal regime stipulates that, unless otherwise specified in the articles of association within the boundaries of Art. 786 para. 2 CO, the transfer of shares may only be valid with the approval from the shareholders' meeting at a qualified majority.[124] The shareholders' meeting is not required to provide reasons for its decision of refusal. However, if the transfer arises from inheritance, estate distribution, matrimonial regime, or enforcement proceedings, refusal is considered valid only if the LLC offers to repurchase the shares are their intrinsic value.[125]

In companies limited by shares, bearer shares are freely transferable, while the transferability of registered shared may be restricted: the articles of association can provide for the circumstances in which the board may refuse its consent and therefore prevent the transfer of shares. Art. 685*b* and 685*d* CO clarify the circumstances for refusal. For listed shares, refusal is possible (if provided in the articles of association) only if a pre-determined percentage of shareholders has been reached,[126] if the shares are not fully paid up[127] or if the shareholder fails to declare to have acquired the shares in its own name and for its own account.[128] For unlisted shares, on top of the last two reasons for refusal, the board may also refuse the transfer for good cause. These *good causes* are limited to preserve the shareholder group, ensuring the continuation of the company's objectives or its economic independence are deemed *good causes*.[129] The voting rights are suspended for the shares intended for transfer until approval from the board is obtained.

A majority of scholars recognize the validity of specific language regarding the beneficiaries of the commercial activities as grounds to invoke restrictions on transferability.[130] Continuing along the same line of thought, refusal of the transfer due to the threat to the fulfillment of the corporate purpose *(mission/raison d'être)*, ideally as outlined in the object provision of the articles of association, is conceivable. However, this interpretation of Art. 685*b* para. 2 CO alone may not suffice to establish secure steward ownership within companies, as the degree of risk required for a good cause for refusal remains a topic of debate in the literature. Prominent scholars argue for a tangible threat, which may be challenging to substantiate.[131]

The board retains also the right to refuse its consent without proving justification.[132] But in such a case it must offer to repurchase the shares at a price which corresponds to the value of the corporation on a going concern basis,[133] and the shareholder may refuse.[134] Besides, the buyback offer may only be done within the limits of the share buyback, typically capped at 10% of its own share capital.[135]

1.2.4 Mission statement and voting guidelines

The mission of a company can and should be further elaborated in the articles of association. It is advisable to include it within the purpose or object provision, explicitly stating that shareholders are dedicated to upholding the mission over the long term and introducing the concept of steward ownership. This could theoretically enable shareholders to seek annulment of any decision that contradicts the mission as outlined in the articles of association, although this has yet to be tested in practice.[136]

123 In a LLC, veto rights are individual, meaning that they are not tied to the quota itself and do not transfer to the recipient upon transfer. See Art. 807 para. 3 CO.
124 Art. 786 para. 1 CO.
125 Art. 788 para. 3 CO.
126 Art. 685*d* para. 1 CO.
127 Art. 685 para. 1 *in fine* CO (so called escape clause).
128 Art. 685*d* para. 2 CO.
129 Art. 685*b* para. 2 and 7 CO.
130 BSK OR II-*du Pasquier/Wolf,* Art. 685*b* CO N 4 and references. For dissenting opinions, see CR CO II-*Trigo Trindade,* Art. 685*b* CO N 17 and references.
131 BSK OR II-*du Pasquier/Wolf,* Art. 685*b* CO N 6.
132 Art. 685*b* para. 1 CO.
133 Art. 685*b* para. 1 CO.
134 Art. 685*b* para. 6 CO.
135 For companies limited by shares: Art. 659 para. 2 CO with an exception up to 20% if the purchase is made due to a transfer restriction with the burden to reduce this share to 10% within two years (Art. 783 para. 2 CO); for LLC: Art. 783 para. 1 CO, with an exception up to 35% if the purchase is made due to a transfer restriction with the burden to reduce this share to 10% within two years (Art. 783 para. 2 CO).
136 Art. 706 para. 1 CO provides for the right to request the annulment of any decision violating the law or the articles of association.

2. Shareholder agreements and agreements between shareholders and the company

Shareholder agreements,[137] as well as agreements between shareholders and the company, which lack detailed data due to their non-public nature, may stipulate voting restrictions and other control governance mechanisms that exceed legal boundaries and the scope of what can be included in the articles of association.

Both instruments are contractual documents, only entailing damages in the event of breach and further non-execution.

These agreements may thus notably include:

- Voting guidelines to promote shareholder activism, whereby shareholders exercise their rights in alignment with the mission.
- Voluntary redemption or shares structured as a call or put options.
- Veto rights, notably for companies limited by shares which do not benefit for the statutory veto rights offered to LLCs under Swiss law.
- Restrictions on the transferability of shares, as well as limitations on voting rights.

If the shareholder agreements encompass all shareholders, effectively creating a second company (simple partnership) atop the existing one *(Doppelgesellschaft)*,[138] such contractual agreements will be deemed valid as long as their provisions do not infringe upon rights protected by the absolute equal treatment principle.[139] In this context, the aforementioned restrictions and control mechanisms pose no inherent issues.

If the shareholder agreement does not encompass all shareholders, adherence to the principle of relative equal treatment becomes imperative. This principle also extends to agreements between shareholders and the company, which must also ensure the non-transfer of statutory prerogatives between the company's bodies.[140] Provisions related to redeemable shares, veto rights, voting guidelines, and restrictions on transferability of shares do not bind the other shareholders and must not grant the company execution rights to avoid the agreement being deemed unlawful. Veto rights are problematic in this context.[141] This challenge prompted a German academic working group to propose revisions to the German LLC.[142] These proposed changes aimed to incorporate an asset lock in support of the mission, a move that has faced criticism.[143]

That being said, in unlisted companies, the board, in accordance with Art. 685*b* CO, can enforce adher-

137 Controlling shareholders usually include in shareholder agreements emption (call option, i.e. right of the optionee to buy shares at a fixed price for a definitive duration) and pre-emption rights (right of first look, right of first refusal or right of last refusal), as well as rights and restrictions on the sale of shares to third parties or to other shareholders, while minority shareholders request tag-along (right of minority shareholders to co-sell shares in the event of a sale by majority shareholders) and drag-along (duty of minority shareholders to co-sell shares in the event of a sale by majority shareholders) rights as well as put options (right to sell).

138 CR CO II- *Chenaux/ Gachet*, Art. 680 CO N 22; BSK OR II-*Vogt*, Art. 680 CO N 55.

139 Are rights protected by an absolute equal treatment principle, rights of shareholder control (Art. 696 and 697 CO), the right to challenge decisions of the general assembly (Art.706 et seq. CO), the right to bring an action for liability against the organs (Art. 752 et seq. CO), the right to demand the restitution of benefits (Art. 678 para. 3 CO), the right to request the court to revoke liquidators (Art. 741 para. 2 CO), the right to participate in the general assembly (Art. 689 CO), and the rights related to the convocation and participation in the general assembly. See *Guy Mustaki/ Alain Alberini*, La participation de la société anonyme à une convention entre ses actionnaires, SJ 2013 II 91, 98.

140 CR CO II- *Chenaux/ Gachet*, Art. 680 CO N 22; *Mustaki/ Alberini* (n. 139), 97–98; *Rashid Bahar/Martin Peyer*, Art. 680, in: Lukas Handschin/Peter Jung, Zürcher Kommentar, Die Aktiengesellschaft, Rechte und Pflichten der Aktionäre, Art. 660–697 OR (ZK), Zurich 2021, N 93; BSK OR II-*Vogt*, Art. 680 CO N 57–58.

141 On the matter of the invalidity of such agreements and their non-binding nature towards third parties, see Handelsgericht des Kantons Zürich, Urteil vom 28. Oktober 2015, Geschäfts-Nr: HG140114-O, c. 4.3.1, regarding an agreement among certain board members containing a veto right.

142 *Studhalter/ Wittkämper* (n. 70), 361. Of the same opinion about German law, see *Advant Beiten*, A limited liability company in steward ownership? Lexology 2020.

143 For the proposal of the Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen (GmbH-gebV), see documentation of the draft law, available at: <*https://www.gesellschaft-mit-gebundenem-vermoegen.de/der-gesetzesentwurf/*>, last consulted on 22 March 2024. For the negative position of the Ministry of Finance on the draft, see Wissenschaftlicher Beirat beim Bundesministerium der Finanzen, Zum Vorschlag für eine GmbH mit gebundenem Vermögen, Gutachten 04/2022, 28 September 2022, available at: <*https://www.bundesfinanzministerium.de/Content/DE/Downloads/Ministerium/Wissenschaftlicher-Beirat/Gutachten/gmbh-mit-gebundenem-vermoegen.html*>, last consulted on 22 March 2024.

ence to the shareholder agreement upon the acquirer of registered shares. This effectively obligates any new acquirer to be bound by the terms of these contractual arrangements,[144] and provides a more feasible alternative than refusing the transfer of shares for good causes.[145]

These agreements do not guarantee absolute security, as adopting decisions or making changes to the articles of association contrary to the mission in breach of contractual rules may still occur. However, such agreements remain useful, especially if they encompass a majority of shareholders or those with significant voting rights.

VI. Conclusion

In conclusion, the double foundation model presents a robust framework for safeguarding mission security via a steward ownership paradigm within the Swiss legal context.

This model offers a compelling strategy for promoting sustainable business practices while navigating the constraints imposed by Swiss law. A foundation possessing the majority of voting rights, albeit ineligible for tax-exempt status, assumes an active role in advocating for sustainable business practices. Concurrently, a separate foundation holds almost all dividend rights.

By strategically combining different share classes (voting shares, restricted voting shares and non-voting shares), implementing specific provisions in the articles of association (notably veto rights and restrictions on transferability of shares), and leveraging shareholder agreements (with mission statement, voting guidelines and restrictions), organizations can effectively achieve a degree of separation between voting and dividend rights, aligning with their mission objectives.

The solution thus lies in combining a company limited by shares, exclusively authorized to issue participation certificates, and one or more holding foundation(s). The structure must be supported by well-crafted articles of association and shareholder agreements, as well as any other mechanisms to ensure the social value creation of the business activity itself. Meticulous drafting of the statutes of the holding foundation(s) is also crucial given the ongoing debate surrounding the permissible purposes of Swiss foundations.

While the complexity (and associated costs) of such a double (holding) foundation model may render it more suitable for larger businesses or groups of companies, its potential for safeguarding mission integrity makes it a valuable consideration for organizations aiming to balance financial objectives with social responsibility.

144 ZK-*Bahar/Peyer*, Art. 680 CO N 47.
145 See section V.1.2.3.