

Umberto Milano

Benefit Corporations:
International
Perspectives and
Implications
under Swiss Law



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT

Schulthess
ÉDITIONS ROMANDES

§ 2024

Table of Contents

Acknowledgements	V
Summary	VII
Table of Contents	IX
Table of Tables	XVII
Table of Figures	XIX
List of Abbreviations	XXI
First Part: General Introduction and Comparative Landscape	1
Chapter 1: Introduction	3
Chapter 2: The Ongoing Transition Towards Enhanced Sustainability of Business	6
Section I Introduction	6
Section II The partition of societal organizations in three sectors and their respective failure	6
Section III The hybridization of the three sectors and the rise of the fourth sector	9
Section IV The stakeholder primacy model as inherent hybridization factor	10
§ I. Outline of the shareholder primacy model	10
§ II. Outline of the stakeholder primacy model	12
§ III. The consolidation of the stakeholder primacy model at a global scale	12
§ IV. Interim conclusion	16
Section V Leveraging the potential of sustainability in business	17
§ I. The consumers' perspective	17
§ II. The employees' perspective	18
§ III. The suppliers' perspective	19
§ IV. The communities' perspective	20
§ V. The investors' perspective	21
§ VI. Interim conclusion	22
Section VI Selected forms to integrate sustainability into business	23
§ I. Corporate social responsibility	24
§ II. Benefit corporations	26

§ III. Social enterprises	28
§ IV. Interim conclusion	30
Section VII Conclusion	30
Chapter 3: Reference Jurisdictions for Benefit Corporation Law:	
United States and Italy	32
Section I Introduction	32
Section II United States	33
§ I. Introduction	33
§ II. The shareholder primacy model as default standard of conduct for US directors	34
§ III. Constituency statutes setting an alternative standard of conduct to the benefit of the company's stakeholders	36
§ IV. Business judgement rule, entire fairness and enhanced scrutiny as standards of review	38
§ V. The rise of the B Movement as precursor to US benefit corporation legislation	42
§ VI. The Model Benefit Corporation Legislation	45
A) Pursuing a general public benefit purpose and one or more specific public benefit purposes	46
B) The expanded duties of directors	49
C) Benefit directors and benefit officers	54
D) Enhanced transparency obligations and the third-party standard	56
E) The minimum status vote	60
F) Tax considerations	61
§ VII. The Delaware Public Benefit Corporation (PBC) Statute ...	62
A) Producing a public benefit or public benefits	63
B) The expanded duties of directors	64
C) Benefit directors and benefit officers	66
D) Enhanced transparency obligations and the third-party standard	67
E) The minimum status vote	68
F) Use of the name public benefit corporation	69
G) Tax considerations	71
Section III Italy	71
§ I. Introduction	71
§ II. The Italian law on società benefit	73
A) Pursuing one or more purposes of common benefit	74
B) The expanded duties of directors	76

C) Benefit officers	77
D) Enhanced transparency obligations and the third-party standard	79
E) The minimum status vote	80
F) Use of the name società benefit	82
G) Public enforcement mechanism	83
H) Tax considerations, public procurement	85
Section IV Synopsis	85
Section V Conclusion	88
Second Part: Benefit Corporation under Swiss Law	91
Chapter 4: Overview of the Swiss Legal Landscape as Relevant for Benefit Corporations, Recent Developments and Swiss “B Corps”	93
Section I Introduction	93
Section II Overview of the Swiss legal landscape as relevant for benefit corporations	94
§ I. General legal context and recent developments on sustainable development in Switzerland	94
§ II. Benefit corporations in the Swiss political arena	96
§ III. The proposal for the introduction of a legal status for sustainable enterprise	101
Section III Applicable governance requirements for Swiss certified “B Corps”	103
Section IV A snapshot of certified “B Corps” in Switzerland	109
Section V Conclusion	120
Chapter 5: Purpose	122
Section I Introduction	122
Section II The promotion of public good as the underlying assumption for the recognition of legal personality to companies	123
Section III The use of the term “purpose” in respect of companies limited by shares	126
Section IV Possible meanings of the term “purpose”	127
§ I. Corporate object	127
§ II. Corporate purpose	129
§ III. Immediate economic purpose	131

	§ IV. Ultimate economic purpose	135
	§ V. Motives	141
	§ VI. Declared or actual purpose	141
Section V	Matching of the term “purpose”, as used in the SCO, with the corresponding meaning	142
Section VI	Possibility for companies to pursue a non-economic purpose....	143
	§ I. Apparent coincidence of the organizational structures of the SCO and the economic nature of their purpose	143
	§ II. Deceptiveness of the analysis assuming a bipartition of legal entities pursuing an economic and non-economic purpose governed, respectively, by the SCO and by the SCC	145
	§ III. Interim conclusion	148
Section VII	Consequences on corporate purpose of the implementation of B Lab’s language	151
	§ I. Specification of the company’s corporate object (rather than purpose)	151
	§ II. Relevant majorities for its introduction and language on minimum status vote	153
	§ III. Effects on the limitations to the transfers of shares	156
	§ IV. No outright abolition (but possible mitigation) of immediate or ultimate economic purpose	158
	§ V. No judicial dissolution as possible sanction	160
Section VIII	Conclusion	161
Chapter 6: Duties of Directors	163
Section I	Introduction	163
Section II	Leeway of directors of conventional companies in considering stakeholders’ interests	163
	§ I. Corporate purpose	163
	A) Measure of the company’s legal capacity	163
	B) The consideration of stakeholders’ interests as liberalities in their favor	165
	§ II. Corporate interest	168
	A) The shareholder or stakeholder primacy debate in Switzerland	168
	B) Consolidation of the stakeholder primacy model in Switzerland	171
	C) Expected impact of the Corporate Sustainability Due Diligence Directive	177

	D) Effects on the duty of care and duty of loyalty of directors of conventional companies	179
	E) The Swiss business judgement rule	183
	§ III. Interim conclusion	185
Section III	Consequences on the duties of directors of the implementation of B Lab's language	187
	§ I. In respect to B Lab's language on corporate purpose	187
	§ II. In respect to B Lab's language on the duties of directors and managers	189
	A) On its face and comparison with other legal models ...	189
	B) Implications on internal organizational structures and supervision	191
	C) Specifications of the directors' allegiance duties leading to a procedural rather than substantial expansion of their decision-making responsibilities	194
	D) No (or limited) verification by the company's auditor	198
	E) Liability profiles for failure to consider the stakeholders' interests	199
	F) Enforceability of the expanded directors' duties by the stakeholders	205
	1) No standing to enforce liability directors pursuant to art. 754 SCO	205
	2) Claims under general tort provisions	206
	3) Stakeholders as beneficiaries of a contract in favor of third parties	207
	4) Stakeholders as beneficiaries of special advantages	211
Section IV	Conclusion	214
Chapter 7: Transparency Requirements	216
Section I	Introduction	216
Section II	Mandatory reporting	216
	§ I. Financial reporting	216
	§ II. Governance	219
	A) By-laws	219
	B) Organizational regulations	220
	C) Shareholders' agreement	222
	D) Shareholders and ultimate beneficial owners	224
	§ III. Non-financial reporting	226
	A) Outcome of the responsible business initiative	226
	B) Extraterritorial Impact of the Corporate Sustainability Reporting Directive	231

Section III	Voluntary reporting	233
	§ I. Applicable reporting standards	234
	§ II. The B Impact Assessment	235
Section IV	Conclusion	238
Chapter 8:	Enforcement Mechanisms Outside of Corporate Law	242
Section I	Introduction	242
Section II	Claims based on unfair competition law	243
	§ I. Procedural aspects	246
	A) Claims by competitors	247
	B) Claims by customers, professional associations or consumer organizations and by the Swiss confederation	248
Section III	Claims based on criminal provisions	251
	§ I. Unfair competition pursuant to art.23 UCA	252
	§ II. False statements about commercial business pursuant to art.152 SPC	252
	§ III. Counterfeiting of goods pursuant to art.155 SPC	254
Section IV	Other civil liability claims	255
	§ I. Warranty for defects in connection with the sale of goods	256
	§ II. Warranty for defects in connection with work or services made for hire	257
	§ III. Increased diligence duties for services rendered in the context of an agency relationship	257
Section V	B Lab's policing of the "B Corp" certification	258
Section VI	Conclusion	259
Chapter 9:	Conclusions and Call for a (Limited) Reform of the Swiss Legal Framework	263
Section I	Corporate purpose	263
	§ I. Flexibility of a company's corporate purpose	263
	§ II. No abolition of the company's economic purpose by adopting a benefit corporation model	265
	§ III. No impact on the company's corporate purpose by adopting a benefit corporation model	266
	§ IV. Publicity of the corporate purpose and related transparency implications	267
	§ V. Interim conclusion	268

Section II	Duty of Directors	269
	§ I. Fulfillment of the company's interest "as such"	269
	§ II. Impact on directors' fiduciary duties	272
	§ III. No course of action for third-party stakeholders	272
	§ IV. Interim conclusion	273
Section III	Transparency	273
	§ I. Transparency towards the company's shareholders	274
	§ II. Transparency towards the company's other stakeholders	278
	A) Extent of transparency obligations	279
	B) Scope of application	283
	§ III. Sanctions	287
Section IV	Policy considerations and conclusion	288
	Bibliography	291

Table of Tables

Table 1 - The Three Sectors	7
Table 2 - Comparison MBCL, DGCL, ILSB	87
Table 3 - By-Laws Requirements for Swiss "B Corps" (Old Version)	105
Table 4 - By-Laws Requirements for Swiss "B Corps" (Current Version)	106
Table 5 - Snapshot of Swiss "B Corps"	117
Table 6 - Possible "Mutations" of Corporate Object/Purpose	142
Table 7 - Matching of the Term "Purpose" with its Meaning	143

Table of Figures

Figure 1 - Integration of Sustainability Concerns into Business	29
Figure 2 - Articulation of Immediate and Ultimate, Economic and Non-Economic Purpose	140
Figure 3 - Purpose-Means Relationship	140