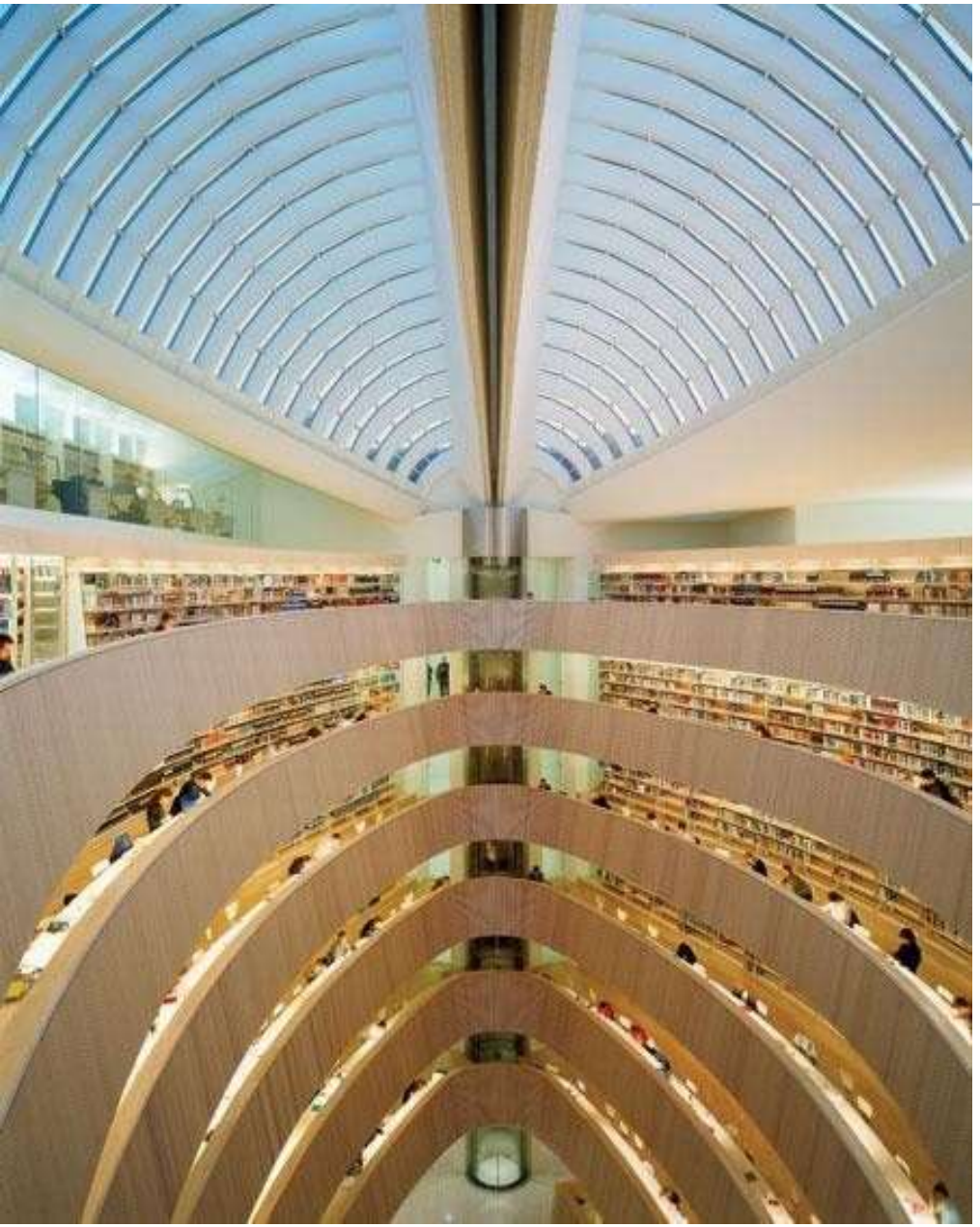


Universität Zürich[UZH]

Alternatives to Incorporation

Dr David Roth
Principles of Corporate Law
Fall Semester 2025
Lecture 4

Review (Lectures 2 and 3)

- Conduct and review standards
- Another aspect of corporate groups
- Societas europaea

Fiduciary duties and liability

- Standard of conduct
  - Directors
  - (Controlling) shareholders
- Standard of review

  → Test for evaluating whether standard of conduct was met
- Burden of proof

Standard of conduct

- Starting point: “The business and affairs of every corporation […] shall be managed by or under the direction of a [BoD]” (§ 141[a] Delaware General Corporation Law [DGCL])
- But how? By promoting
  - the *long-term value* of
  - the *corporation*
  - for the benefit of its *shareholders*

  → Directors owe fiduciary duties to both corp. and shareholders (e.g. *Mills Acq. Co. V. Macmillan, Inc.*, 559 A.2d 1261 [1989]; doctrine: “to the ultimate benefit of stockholders”)

  → “Ultimate benefit” of the entirety vs. particular interests of (controlling) shareholders (i.e. independent fiduciary judgment)

Standard of conduct

- However, (controlling) shareholders may exercise control in a way (by vote or influencing BoD) that favours their interests
- Hence, fiduciary duties are extended to controllers
  - → *Sears Hometown and Outlet Stores, Inc. Stockholder Litigation* 2024 WL 262322 (Del. Ch.; «Sears»; cf. L6)
  - → *Richard J. Tornetta v Elon Musk, et al.* (i.e. directors) 2024 WL 343699 (Del. Ch.; «Tesla Comp. Plan»; cf. L3)
    Note: Musk is controlling shareholder and BoD member/CEO
- Unlike e.g. Switzerland, cf. art. 680 I CO

Standard of review

- Three tiers of review
  - Business judgment rule
  - Enhanced scrutiny
  - Entire fairness

  → The lens through which courts determine whether directors/controllers meet their standard of conduct:

  Standard of review is in tendency more forgiving of shareholders/controllers than standard of conduct, although it often entails:
- (Shift in) burden of proof

Business judgment rule

- Situations where directors(/controllers) are personally disinterested and independent
- Presumtion that in making a business decision the BoD
  - "acted on an informed basis,
  - in good faith and in honest belief that the action was
  - in the best interests of the company"
- If no rebuttal of any element:
  Any "rational conceivable basis" for a dumb decision suffices
- Burden of rebutting: Plaintiff
- Rationale: see L3

Enhanced scrutiny

- Situations, in which directors/controllers face potential conflicts of interest
  → Specific, recurring, and readily identifiable situations
- Examples:
  - Directors' actions against a hostile takeover (*Unocal*)
  - Directors selling a company (*Revlon*)
  - Controller blocking BoD's plan to sell a company (→ *Sears*)
- Shift in burden of proof to defendant:
  "[B]urden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective"
  (*Mercier v Inter-Tel [Del.], Inc.*, 929 A.2d 786 [Del.Ch. 2007])

Entire fairness

- Situations where directors/controllers confront actual conflicts of interest
- Objective standard: (Not even) honest belief that the transaction was entirely fair does shield directors (*Gesoff*)
- Examples:
  - Controller's acquisition of a company (→ *Sears*)
  - Compensation package to CEO/controller (→ *Tesla Compensation Package*)
- Burdens of proof:
  - *Shareholder plaintiff* must prove that there were not enough independent and disinterested individuals among the directors, which compromised the board majority (*Aronson*, 273 A.2d)
  - If successful, shift to *director/controller defendant*: Defendants must establish "to the court's satisfaction that the transaction was the product of both fair dealing and fair price" (*Cinerama, Inc.* 663 A.2d)

Burden of proof CH

- E. Rules of evidence
- I. Burden of proof
- Art. 8

Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

Effects on e.g. “Swiss business judgment rule”

- No presumption
- Burden of proof lies with plaintiff
- But: courts apply restraint when *ex post* evaluating BoD decisions → duty to act informed and in good faith, i.e. no lowering but limitation to duty of care to avoid hindsight bias

Apple Inc.‘s tax avoidance/evasion

- Apple Inc. subsidiaries incorporated in Ireland (Apple Sales International [ASI], Apple Operations International [AOI] and Apple Operations Europe [AOE])
- Ireland‘s then statutory tax rate: 12.5 %; but:
  tax rulings on Apple in 1991 and 2007: Result was an effective tax rate on European profits of 1 % in 2003, 0.005 % in 2014 (EC)
- Criticism by U.S. Senate and European Commission starting from 2013
- Ireland came under pressure and reluctantly began to change its tax rules, however „grandfathering provisions“ (no taxation until 2021 when companies incorporated in Ireland are „managed and controlled in another jurisdiction“) and tax write-offs for IP acquisitions
- Paradise papers show (according to The Guardian [2017]): Apple moved ASI and AOI to Jersey; ASI sold IP rights to AOE in order for AOE to receive tax write-offs
- 2016: European Commission (EC) sentenced Apple to pay Euro 13 billion to Ireland; tax rulings qualify as illegal state aid; both Apple and Ireland appealed
- Jul 2020: EU General Court overturned Commission ruling; Commission filed appeal

Case C-465/20 P of September 10, 2024
Commission vs Ireland et al.

- CJEU sets aside General Court decision
- 1991 and 2007 tax rulings are
  - a «selective advantage» towards Apple Group as they reduced the tax burden compared to Irish standalone companies, and
  - internationally not «at arm's length»
- Fact-specific judgment, but in line with recent int. developments (see below)
- Competition Commissioner Vestager: «The Commission will continue its work on harmful tax competition and aggressive tax planning»
- Apple: «We always pay all the taxes we owe wherever we are required to pay it to. […] The European Commission is trying to retroactively change the rules. […] We are disapppointed […]»
- Ireland reported it will now recover ca. Euro 14.1 Billion (Euro 13 Billion plus interests) from Apple

The „ethics of tax evasion“

Argument: Tax evasion is sometimes ethical

- State is evil or corrupt or engages in unjust wars
- Taxation is „excessive“/Mainly natural persons profit from governmental spendings (Health care, pensions, defense, education etc.)
- BoD has a fiduciary duty to shareholders to safeguard company assets
- Utilitarian ethics: Paying taxes shifts the funds from the more efficient private sector to the less efficient public (governmental) sector

(*McGee*, The Panama Papers: A Discussion of Some Ethical Issues [2017])

By the end of 2013, U.S. companies had total offshore profits of
+/- USD 2‘000‘000‘000‘000 – larger than the GDP of whole India (*Ruben* [2014])

OECD international tax reform

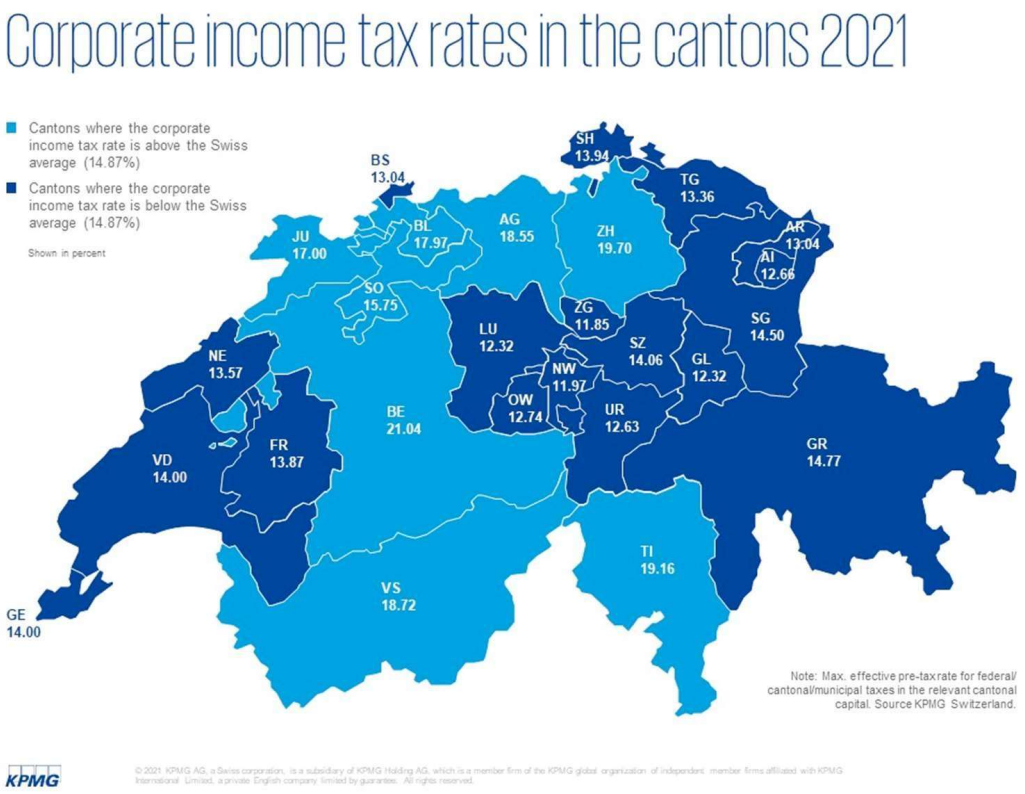
„Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy“

- Joined by 136 jurisdictions on Oct 8, 2021 + some late movers
- Pillar one:
  Re-allocation of taxing rights regarding 25 % of profits from states of incorporation to market states *if* MNC‘s global sales are above EUR 20 billion 10 %
  and profitability above10 %
- Pillar two:
  Global minimum tax rate: „21 %“ → „at least 15 %“ → „15 %“
  if MNCs‘ annual revenues are over EUR 750 million
- Removal of „Digital Service Taxes“ / No new alike taxes until end of 2023
- OECD „hard“ deadline of mid 2023 for pillar one;
  pillar two was supposed to enter into force in 2024/2025

Members of the OECD/G20 Inclusive Framework on BEPS joining the October 2021 *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* as of 8 October 2021

1. Albania
2. Andorra
3. Angola
4. Anguilla
5. Antigua and Barbuda
6. Argentina
7. Armenia
8. Aruba
9. Australia
10. Austria
11. The Bahamas
12. Bahrain
13. Barbados
14. Belarus
15. Belgium
16. Belize
17. Benin
18. Bermuda
19. Bosnia and Herzegovina
20. Botswana
21. Brazil
22. British Virgin Islands
23. Brunei Darussalam
24. Bulgaria
25. Burkina Faso
26. Cabo Verde
27. Cameroon
28. Canada
29. Cayman Islands
30. Chile
31. China (People's Republic of)
32. Colombia
33. Congo
34. Cook Islands
35. Costa Rica
36. Côte d'Ivoire
37. Croatia
38. Curaçao
39. Czech Republic
40. Democratic Republic of the Congo
41. Denmark
42. Djibouti
43. Dominica
44. Dominican Republic
45. Egypt
46. Estonia
47. Eswatini
48. Faroe Islands
49. Finland
50. France
51. Gabon
52. Georgia
53. Germany
54. Gibraltar
55. Greece
56. Greenland
57. Grenada
58. Guernsey
59. Haiti
60. Honduras
61. Hong Kong, China
62. Hungary
63. Iceland
64. India
65. Indonesia
66. Ireland
67. Isle of Man
68. Israel
69. Italy
70. Jamaica
71. Japan
72. Jersey
73. Jordan
74. Kazakhstan
75. Korea
76. Latvia
77. Liberia
78. Liechtenstein
79. Lithuania
80. Luxembourg
81. Macau, China
82. Malaysia
83. Maldives
84. Malta
85. Mauritius
86. Mexico
87. Monaco
88. Mongolia
89. Montenegro
90. Montserrat
91. Morocco
92. Namibia
93. Netherlands
94. New Zealand
95. North Macedonia
96. Norway
97. Oman
98. Panama
99. Papua New Guinea
100. Paraguay
101. Peru
102. Poland
103. Portugal
104. Qatar
105. Romania
106. Russian Federation
107. Saint Kitts and Nevis
108. Saint Lucia
109. Saint Vincent and the Grenadines
110. Samoa
111. San Marino
112. Saudi Arabia
113. Senegal
114. Serbia
115. Seychelles
116. Sierra Leone
117. Singapore
118. Slovak Republic
119. Slovenia
120. South Africa
121. Spain
122. Sweden
123. Switzerland
124. Thailand
125. Togo
126. Trinidad and Tobago
127. Tunisia
128. Turkey
129. Turks and Caicos Islands
130. Ukraine
131. United Arab Emirates
132. United Kingdom
133. United States
134. Uruguay
135. Viet Nam
136. Zambia

Switzerland by Canton (including federal tax)



Switzerland - implementation

- Federal Council Maurer: „attack on Switzerland“;
  Council of States Ettlin: „devilish plan“

→ Why? Tax increase to 15 % is voluntary for member states, *but*:

Global minimum tax rate (i.e. difference between CH tax and 15 %
to be imposed by other market states)

- Expected additional tax revenues in Switzerland: 1.5 to 2 billion CHF p.a.
- How to split these between federation and cantons?

„Politicians are attracted by additional tax revenues like insects by the light“
(NZZ of Sep 29, 2022)

Most recent developments

- As of today: Only 50 of 140 OECD member states have implemented pillar two

  + : i.a. all EU member states, CH

  – : i.a. U.S., B(razil)R(ussia)I(india)C(hina)S(South Africa, Egypty, Indonedia, U.A.E. etc.)
- Trump administration: implementation is «unfair practice»

  → Penalty taxes for foreign companies and investors (sec. 889 «One Big Beautiful Bill»)
- G7 Agreement (16/17 June 2025) to avoid penalty taxes:
  - U.S. corporate groups are exempted,
    i.e. they pay taxes only in the U.S. (regardless of where profits were made)
  - The end of the framework (at the very least pillar two)?

Societas Europaea

- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company
- No comprehensive unified set of rules → European framework that must be filled in by the national law of the respective member states; various legal foundations lead to a coexistence of European and national law
- Hierarchy of legal norms according to art. 9 I SE Regulation
- The Regulation ist directly applicable law in every EU member state, without the need for national implementation

Societas Europaea

- Nature and structure of the Societas Europaea
  - SE is a supranational legal form for companies that operate or wish to operate in various member states of the European Union
  - It offers the possibility to establish companies within the European Union in accordance with largely uniform legal principles
- In many aspects, the SE is comparable to a national public company: Taxation, insolvency rules, and to a large extent also the applicable corporate law are identical to the rules for a national company
- Applicable law: Regulation and Directive / where no provision is made: law of the registered office

Societas Europaea

- Separate legal entity
- Minimum share capital of € 120’000, divided into shares (mandatory)
- Registered office in an EU member state; relocation to another member state possible
- Basic shareholder rights must be exercised at the Annual General Meeting
- Transferability of assets in accordance with the respective national regulations; a stock exchange listing is not mandatory
- Two possible types of management:
  - Dualistic system (the management board manages the business and is controlled by the supervisory board)
  - Monistic system (an administrative body consisting of at least three directors, including the managing director, assumes responsibility for the management of the company)

Societas Europaea

- Four different ways to establish a Societas Europaea:
  - Merger of existing companies
  - Establishment of a holding company
  - Establishment of a joint subsidiary by several companies or by an already existing Societas Europea
  - Conversion of a national stock corporation
- In principle, only companies from EU and EEA member states can participate in the establishment; another essential requirement is a cross-border element, which depends on the respective form of establishment

Societas Europaea

- Advantages of the Societas Europaea
  - Possibility of detachment from national roots (among others, fiscal reasons)
  - Possibilities for structuring corporate governance (especially in Germany)
  - Autonomy of agreement with regard to the structure of employee participation rights
  - Possibility to choose between a dualistic and a monistic system for the management structure
- Disadvantages of the Societas Europaea
  - Lack of uniform statute
  - Complexity due to the various standard layers

Main Points (Lecture 4)

- Two forms of regulatory competition
- Reasons not to incorporate
- Lines of evolution
- Partnerships: Sources and characteristics
- Hybrids
- The «uncorporation» – a contractarian narrative
- Decentralised autonomous organisations (DAOs)
- Entity proliferation and the *numerus clausus*

Two forms of regulatory competition

- Horizontal dimension
  - (Corporate and securities) regulation in different jurisdictions
  - Incorporation theory (internal affairs doctrine) vs *siège réel* (real seat) theory
  - Risk of «race to the bottom» («Delaware effect»)
- Vertical dimension
  - Partnerships and hybrids as alternative business entities
  - Organisational simplifications / limitations to structural characteristics of corporations
  - *Numerus clausus* principle

Applicable law in company matters (Switzerland)

- III. Applicable law
- 1. In general
- Art. 154

[1] Companies are governed by the law of the state under which they are organised, provided they fulfil the publicity or registration requirements of that law or, where such requirements do not exist, if they have organised themselves pursuant to the law of that state.

[2] A company which does not fulfil these requirements is governed by the law of the state in which it is administered in fact.

Recap: The corporation and its core characteristics

- Legal personality
  → Corporations are separate legal («artificial») persons; distinct rights and obligations, hence:
- Limited liability
  → Shareholders' liability is limited to their investment; no corp. liability for shareholder debts
- Transferable shares
  → Entrance and exit of shareholders does not affect viability
- Shared ownership
  → Majority control and minority rights
- Delegated management
  → Structural separation between ownership and control

Reasons for business associations not to incorporate

- Informal establishment
  → No written deed / public registration; accelerated venture taking, less transaction costs
- Active control
  → Management and representation of the firm by members, and closely tied:
- Personal continuity
  → members' fixation; may affect credit standing
- Taxation aspects
  → Avoiding «double taxation»

Three independent lines of evolution (in the «West»)

- Ancient Roman law:

  societas, societas publicanorum (for public services), *peculium*
- Family and house associations in Tuscany (14th century):

  compagnia («*cum panis*» → bread communities)
- Maritime trade of Italien city-states (11th century),
  merchant associations in Venice (14th century):

  commenda, società in accomandita

Sources of partnership law (selected jurisdictions)

- UK:
  - Rules of equity and of Common Law (cf. Sec. 46 PA 1890)
  - Partnership Act (PA 1890), Limited Liability P. Act (LLPA 2000), Limited P. Act (LPA 1907)
- US:
  - Model acts by the Nat. Conference of Commissioners on Uniform State Law (NCCUSL):
    (Revised) Uniform Partnership Act ([R]UPA 1914/1997),
    (Revised) Uniform Limited Partnerships Act ([R]ULPA 1916/1976), 2nd revision: ULPA 2001
  - State implementations (with adaptions, or «independent» creations)
- DE: Bürgerliches Gesetzbuch (BGB); Handelsgesetzbuch (HGB);
  Partnerschaftsgesellschaftsgesetz (PartGG)
- CH: Obligationenrecht (OR)

Cascade of legislation / largely default rules

– Cross-referencing (converse to *lex specialis derogat legi generali*)

Limited Partnerships (sec. 9[1] LPA; § 161[2] HGB; art. 598[2], 603 OR; exception: [R]ULPA [2001])

⇩

(Commercial / General) Partnerships (§ 105[3] HGB; art. 557[2] OR)

⇩

Civil Law Partnerships

– Partnership agreements may often deviate from code law, namely as regards the relationship between the partners
→ contractual dimension of partnerships, creditor protection

Partnerships as default forms (if no choice or incorporation error)

US / Delaware:
«(a) Except as otherwise provided in subsection (b) of this section, the association of 2 or more persons (i) to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership» (RUPA 1997, sec. 202; Del. Code Ann. tit. 6, § 15-202)

Germany:
Commercial Partnership (if commercial purpose intended), else Civil Law Partnership
(no explicit provision)

Switzerland:
«A simple partnership within the meaning of this Title is any partnership that does not fulfil the distinctive criteria of any of the other types of partnership codified herein» (art. 530[2] OR)

Permissible activities

- Non-commercial purpose
  → DE / CH Civil Law partnerships (§ 705 BGB; CH: no explicite provision [comm. reg. (-)])
- «Liberal» professions (e.g. lawyers, physicians, architects and accountants)
  → DE professional partnership (§ 1 PartGG); UK limited liability partnership
- Commercial purpose
  → DE commercial/limited partnerships (§§ 105, 161 HGB)
- «Business» (including liberal professions)
  → UK / US partnerships (Sec. 45 PA 1890; § 102[1], [11] RUPA 1997)
- All activities
  → US limited liability partnership / limited partnership

Formal requirements (US / UK)

- None
  - UK, US partnerships (§ 202[1] RUPA 1997)
- Filing of statement of qualification
  - US limited liability partnership (§ 901[c] RUPA 1997)
- Registration / Filing for a «sworn certificate»
  - UK limited liability partnership (secs. 2, 3 LLPA), limited partnership (sec. 8 LPA 1907)
  - US limited partnership (§ 201[a] ULPA 2001)

Formal requirements (CH / DE)

- Commercial register and business (identification) register (U[I]D register)
  → UID register is younger and broader than commercial register:
  - Personal perspective: e.g. also medical personnel, the self-employed, public authorities
  - Material perspective: e.g. accounting documents, communications by FMA, see art. 8b HGB
- CH commercial register:
  - Civil partnership: no obligation and no eligibility for registration:
    registration results in general partnership (art. 553 OR)
  - Obligation: general and limited partnerships (declaratory effect);
    (LLC / company limited by shares: constitutive effect → necessary for acquisition of legal p.)
- DE commercial register:
  - Civil partnership: no obligation but
    eligible if intention to acquire a registered right (e.g. real estate; 2024 revision)
  - Obligation: commercial and limited partnerships (+ LLC / companies limited by shares)

Classes of partners

- (General) partners
  → US / UK / DE / CH all partnerships
- Additional limited partners («Kommanditisten» → multi-membership structure)
  → US / UK / DE / CH limited partnerships
- Solely limited partners
  → US limited liability partnership

Legal persons as general partners?

(+)

- UK partnership, limited liability partnership, limited partnership (LLP Reg. 2001, 2 I, Note to s. 288 CA; Sec. 4[4] LPA 1907);
- US / DE limited partnerships (§§ 102[7], [11], [15] ULPA 2001; § 19[2] HGB, 15a[1] InsO → «GmbH & Co. KG»)

(–)

- DE professional partnership (§ 1 PartGG);
- CH general / limited partnerships (artt. 552[1], 594[2] OR)

Management authority and authority to represent

- (+) (General) partners
  - UK partnership, limited liability partnership (sec. 24 PA 1890, sec. 7[3] SI 2001 No. 1090); US partnership / limited liability partnership / limited partnership (§§ 401[h], 301[l] RUPA 1997; §§ 406[a], 402[a], 404[a] ULPA 2001)
  - DE commercial/limited partnerships for «ordinary» matters; (§§ 116[2], 164 HGB) CH general/limited partnerships
- Designated partners with regard to certain tasks (appointing auditors, signing accounts etc.)
  - UK limited liability partnership (secs. 2[2][f], 8 LLPA)
- (–) Limited partners
  - UK / US limited partnerships (sec. 6[1] LPA 1907; § 302[a] ULPA 2001)
  - DE / CH limited partnerships (§ 164 HGB / art. 603 OR; i.e. no authority to represent)

Duty of loyalty / non-competition

- (General) partners: (+)
  - UK partnership (duty of «utmost» good faith «tried by the highest standard of honour»; *Blisset v. Daniel* [1853]; Sec. 46, 30 PA 1890);
    US partnership / limited liability partnership (§ 303[d] RUPA 1997)
  - UK limited liability partnership (sec. 7[8]-[10], SI 2001 No. 1090)
  - DE / CH Commercial/limited partnerships (§ 117 HGB; art. 538[1], 536 et 561 OR)
- Limited partners:
  - (–) DE limited partnership (§ 165 HGB)
  - (+) CH limited partnership (duty of non-competition, art. 561 OR)

Liability

- Unlimited liability
  - UK / US partnership, general partners
    (Sec. 9 f. PA 1890; sec. 4[2] LPA 1907; §306[a] RUPA 1997; § 404[a] ULPA 2001)
  - DE / CH all partnerships (exceptions below)
- Limited liability
  - UK / US / DE / CH limited partners
    (sec. 4[2] LPA 1907; §§ 102[12], 303[a] ULPA 2001; § 161[1] HGB / art. 594[1] OR)
  - US limited liability partners, unless personal misconduct (§ 306[a] RUPA 1997)
  - DE professional partners, UK limited liability partners,
    unless personal malpractice (sec. 6[4] LLPA; if no malpractice insurance, § 8 PartGG)

Case study: Swiss private bankers («Privatbankiers»)

- Definition →Banks with personally (unlimitedly) liable partners
- Eligible legal forms (art. 1[1] BA): sole proprietorships, general and limited partnerships
- ≠ private banks (vs. public banks), «private banking»
- Five (remaining) banks (1971: 39, 1990: 22, 2002: 15):
  Baumann & Cie, Bordier & Cie, E. Gutzwiller & Cie, Rahn & Bodmer, Reichmuth & Co.
- 2019: Aggregate total assets of CHF 5.75 Mrd., employees: 534 (cf. UBS [2024]: USD 1'565 Mrd.; 108k)



Hybrids: LLC

- Limited liability company (LLC)

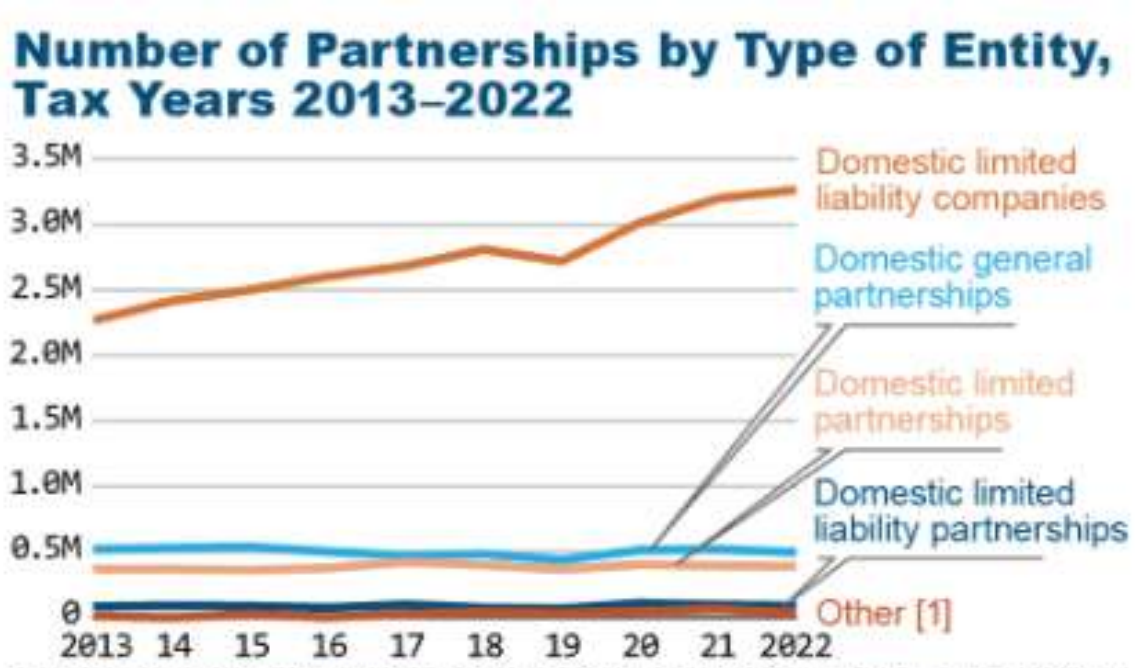
  as a combination of limited liability with central (non-delegated) management

  → «société de capitaux à charactère personnel» (art. 772[1] OR)
- DE: GmbHG (1892); France (1925); CH: art. 772 ff. OR (1936 / 1992)
- US: Wyoming (1977); (Revised) Uniform Limited Liability Company Act ([R]ULLCA 1994/2006)
  - «[L]egal entity distinct from its member or members» (sec 108[a] RULLCA 2006)
  - Establishment by drafting and approving a «certificate of organization and filing with the secretary of state (sec 201 RULLCA 2006) → much like incorporation
  - Member-management on the basis of a PoA (sec 301 RULLCA 2006)
  - Taxation options: Pass-through or corporate taxation

Hybrids: Partnership limited by shares

- Legally distinct from its members, with general and limited member(s; i.e. shareholders)
- DE / CH Partnership limited by shares
  - §§ 278 Aktiengesetz; art. 764 ff. OR
  - First Codification: § 173 ADHGB (1861)
- Management is «delegated» to general member(s)
- General member(s) bear unlimited – subsidiary – liability
- Low popularity – DE: ca. 140, CH: 10

Partnership statistics – United States (latest IRS data)



[1] Data for "other" partnerships include foreign partnerships, as well as partnerships which checked the "other" box, Form 1065, Schedule B, line 1, Type of Entity, or did not check a box.

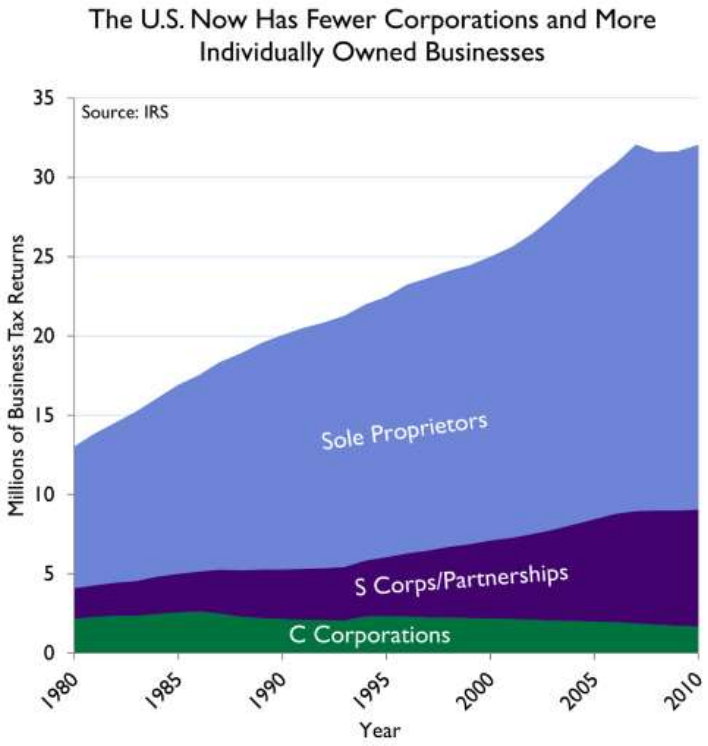
Handelsregister / registre du commere / Registro di commercio

Eingetragene Gesellschaften pro Rechtsform und Kanton / Sociétés inscrites par forme de droit et canton / Società iscritte per forma di diritto e cantone

Stand 1.1.2025, gemäss SHAB-Datum / Etat au 1.1.2025, selon date FOSC / Situazione 1.1.2025, secondo data FUSC

Rechtsform Forme juridique Forma giuridica	Total	AG	AI	AR	BE	BL	BS	FR	GE	GL	GR	JU	LU	NE	NW	OW	SG	SH	SO	SZ	TG	TI	UR	VD	VS	ZG	ZH
Einzelunternehmen Entreprise individuelle Ditta individuale	175'260	12'353	285	1'168	18'584	5'318	4'138	6'204	11'090	775	4'597	1'845	6'477	3'180	709	624	11'659	1'721	5'014	3'396	6'098	7'306	452	17'741	6'884	3'768	3'3874
Kollektivgesellschaft Société en nom collectif Società in nome collettivo	11'417	711	14	55	1'144	309	294	447	937	47	289	94	321	288	48	25	678	112	278	205	322	649	50	951	708	167	2'274
Kommanditgesellschaft Société en commandite Società in accomandita	1'115	69	1	8	108	38	32	17	142	9	30		28	13	12	5	76	5	30	28	31	36	8	21	42	46	280
Aktiengesellschaft Société anonyme Società anonima	243'658	12'897	1'034	2'274	18'831	5'278	5'008	7'899	19'731	1'281	6'940	1'859	12'074	3'534	2'661	1'965	13'152	1'805	4'971	9'209	7'008	16'536	733	17'620	10'348	21'756	37'254
GmbH Soc. à responsabilité limitée Soc. a responsabilità limitata	269'617	16'382	620	2'141	23'860	7'561	6'971	8'949	18'489	1'162	5'449	2'103	12'770	4'921	1'787	1'453	13'535	2'228	6'654	7'969	8'134	15'101	848	24'744	13'094	13'830	48'862
Genossenschaft Société coopérative Cooperativa	8'108	479	20	56	1'371	217	239	436	367	58	309	106	559	149	60	60	445	91	206	120	229	166	88	732	341	110	1'094
Verein Association Associazione	12'283	454	17	51	1'057	261	568	347	1'860	42	310	47	274	220	19	26	499	44	153	131	225	893	30	1'261	466	408	2'620
Stiftung Fondation Fondazione	17'842	745	47	146	1'824	466	1'130	493	1'627	156	669	145	785	367	133	109	717	155	388	432	345	909	77	1'576	701	610	3'090
Zweigniederlassung Succursale Succursale	14'605	678	47	114	1'186	390	386	561	873	57	726	148	681	336	107	95	1'002	131	365	269	444	702	94	1'657	1'105	412	2'039
Ausl. Zweigniederlassung Succursale étrangère Succursale estera	3'247	111	2	16	76	55	90	68	512	2	63	9	54	30	18	6	199	64	22	55	72	328	5	289	61	336	704
Andere Rechtsformen Autres formes juridiques Altre forme giuridiche	568	22	2	5	41	12	19	43	108	10	46	3	21	12	7	6	24	6	16	4	10	21	9	44	10	7	60
Total 1.1.2025	757'720	44'901	2'089	6'034	68'082	19'905	18'875	25'464	55'736	3'599	19'428	6'359	34'044	13'050	5'561	4'374	41'986	6'362	18'097	21'818	22'918	42'647	2'394	66'636	33'760	41'450	132'151

«The Rise of the Uncorporation»



- Title of book by Larry E. Ribstein, Oxford Univ. Press 2009
- «Uncorporations»: partnerships, LLCs and variations
- Arguments:
  - «Uncorporations rel[y] on contracts»
    (UPA few mandatory rules apply mostly to non-partnership parties; RUPA fiduciary duties are exceptions)
  - Corporations are «creatures of the state»
    (historical roots, concession theory; legislators have a lot to gain from guarding access to corporations)
  - Limited liability for members of uncorporations is the result of legislative competition; uncorporations' rising popularity shows preference for contractual freedom

Recap: The company as a «nexus of contracts» (1)

- Background:
  - *Coase*, The Nature of the Firm, 4 Economica 386 (1937):
    → Activities are included within a firm when the costs of using markets – i.e. contracts – are greater than the costs of direction by authority
  - *Alchian/Demsetz*, Production, Info. Costs, and Econ. Org., 62 Am. Econ. Rev. 777 (1972):
    → Objection to Coase; emphasis on team production within the firm and the role of agreement – i.e. contracts – and monitoring in team production
- *Jensen/Meckling*, The Theory of the Firm, 3 J. Fin. Econ. 305, 310 (1976):
  «Alchian and Demsetz […] object the notion that activities within the firm are governed by authority, and correctly emphasize the role of contracts as a vehicle for voluntary exchange. They emphasize the role of monioring in situations in which there is joint input or team production. [W]e believe the emphasis […] on joint input production is too narrow and therefore misleading. Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc.»

Recap: The company as a «nexus of contracts» (2)

- Two competing definitions / theories of the firm:
  - Coase (at 388): Activities under a person or persons who take the place of the price mechanism in the direction of resources (e.g. employees)
  - Jensen/Meckling (at 310-311): «The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships [among individuals]*»
- From description to normativity
  - «Contracting relationships ≠ «contract» in a legal-technical sense
    → rather «reciprocal arrangements» in a economical-descriptive sense
  - Term «nexus of contracts» may have persisted among (esp. certain Law&Econ) academics (→ contractarians) for its normative implications: contractual freedom, less state intervention
  - Problems: mandatory legal rules, shareholder as contractual parties vs ownership (! fid. d.)

Photographer: Petras Malukas/AFP/Getty Images

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Decentralized Autonomous Organizations: The New LLCs?

Andrew Gilbert
Croke Fairchild Morgan & Beres LLC

A new corporate structure designed to fit the culture behind blockchain has emerged called decentralized autonomous organizations, explains Andrew Gilbert, a partner at Croke Fairchild Morgan & Beres. He contends that while they are in their infancy now, DAOs could change corporate organization and stakeholder liability in the 2020s similar to LLCs in the 1990s.

Blockchain and smart contracts

- Broad interest in DAOs began in 2020 alongside cryptocurrencies, NFTs and DeFi
- Parameters of decision-making encoded on blockchain based on smart contracts
  - No physical headquaters, offices, or bank accounts
  - Investors («members») acquire tokens through contributions (of cryptocurrencies)
  - Self-executing management (no directors, hired managers etc.); members have pre-defined participation rights in DAO governance (e.g. proposal, vote)
  - Auditing is essentially accomplished on the blockchain

Corporation	**DAO**
shareholders/shares	members/tokens
BoD	smart contract
auditing	blockchain record

Legal challenges – Lack of legal status…

- Authority? (by the example of Switzerland)
  - Definitions: art. 150 Private International Law Act (PILA)
  - Jurisdiction: art. 151 ff. PILA
  - Applicable law: art. 154 ff. PILA
- Limitations on members' liability?
- Applicability of:
  - Securities laws? → US: «Howey test»; 2017 DAO Report
  - Tax laws?
  - Antitrust laws? → Single entity doctrine

Definition and jurisdiction of/in company matters (Switzerland)

- Chapter 10 Companies
- I. Definitions
- Art. 150

[1] For the purposes of this Act, a company is any organised association of persons and any organised unit of assets.

[2] Simple partnerships that have not provided themselves with an organisation are governed by the provisions of this Act relating to the law applicable to contracts (Art. 116 *et seq.*).

- II. Jurisdiction
- 1. In general
- Art. 151

[1] In disputes concerning company law, the Swiss courts at the seat of the company have jurisdiction to hear actions against the company, its shareholders or members, or persons liable under company law.

[2] Actions against shareholders or members or against persons liable under company law may also be brought before the Swiss courts at the domicile or, in the absence of a domicile, at the habitual residence of the defendant.

[3] Disputes regarding liability arising out of the public issue of equity or debt securities may also be brought before the Swiss courts at the place of issue. This jurisdiction may not be excluded by a choice of forum.

«Wrapping» or «Bridging» DAOs

- LLC adaptations:
  - Vermont blockchain-based LLC (BBLLC, 2018)
  - Wyoming limited liability autonomous organization (LAO, 2021/22);
    Wyoming decentralized unincorporated nonprofit association (DUNA, 2024)
  - Tennessee DAO LLC, 2022; Marshall Island DAO LLC, 2022
- Other formats:
  - Generic LLCs (e.g. Delaware)
  - Cooperatives (e.g. Colorado)
  - Foundations (e.g. Cayman Islands)
  - Associations (e.g. Switzerland)

numerus clausus (limited number) of company types

- Generally accepted – although often no explicit provisions (cf. «Partnerships as default forms»)
- But note: Great flexibility within the chosen company type and abroad options (incorporation theory)
- Historical examples of *numerus apertus* (open/unlimited number): Spain (until ca. 1950), Liechtenstein (until 1980), Denmark (until 2013)
- Reasons for *numerus clausus*: legal certainty, transparency about characteristics → interest of third parties vs (contractual) freedom
- Proliferation (cf. hybrid forms, DAO LLCs, international options etc.)
  - Hardly ever reductions (examples: P. limited by shares in Austria, Belgium, but not DE, CH)
  - «Excessive», entailing «costs of confusion»? → Optimal degree of standardisation?