



Henry Peter
Carlos Vargas Vasserot
Jaime Alcalde Silva
Editors

The International Handbook of Social Enterprise Law

Benefit Corporations and
Other Purpose-Driven Companies

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Foreword

This book is a testimony to the scale, significance, and scope of the social enterprise movement around the world. It is a movement that is driven by a recognition that the purpose of business extends beyond its financial performance to embrace its broader role in society and the natural world.

Purpose is why a business is created, why it exists and its reason for being. The founders of social enterprise are inspired by a vision of answering those questions by addressing the most challenging human and planetary problems we face. They seek innovative ways of working with people to gain a deep understanding of the difficulties they encounter and the most effective methods of addressing them. But, in addition, they must establish processes and procedures that are not only effective but also commercially viable and profitable.

The B Corp movement is the largest manifestation of this development. Since its inception in 2006, it has grown to include some 4800 enterprises around the world. The process of certification has provided an important form of authenticating the non-financial as well as financial benefits that B Corps confer on their stakeholders and shareholders.

But this handbook is about more than social enterprises and the B Corp movement. It is about social enterprise law. From the outset, it was recognized that something would need to be done to corporate law if B Corps were to be able to embrace and commit to their objectives. The response was the emergence of the public benefit corporation in the United States as an alternative to the conventional corporate legislation associated most frequently with the State of Delaware, where the largest number of corporations in the United States are incorporated.

The drive reflected a recognition of the need for B Corps to be able to incorporate around corporate purposes and fiduciary responsibilities that include a public benefit as well as a conventional one of promoting the success of the corporation and its shareholders. Public benefit corporations are therefore able to state and implement a public in addition to their commercial objectives.

In essence what the law does is to provide a means by which B Corps can establish a legal commitment to a public purpose that otherwise lacks the credibility

and assurance that investors, employees, suppliers, communities, and customers might reasonably expect of them. This lends much greater flexibility to a social enterprise defining its priorities beyond profit than a regulatory system can achieve. It is not a substitute for regulation, but an important complement that encourages companies to go beyond the straitjacket of regulatory priorities to embrace those that are important to the founders, investors, and stakeholders of a firm.

What this book does is to provide a very comprehensive and authoritative account of the social enterprise movement, the contribution of B Corps to that movement, and the legal and regulatory context within which these developments are occurring. Furthermore, it describes the remarkable range of social enterprise initiatives that are occurring around the world and the various forms they take in different countries.

The importance of the handbook cannot be overstated. We are at a critical juncture in our economies, nation states, natural world, and environment. Business has a vital role to play in addressing the mounting challenges we face partly because governments clearly cannot address them on their own and partly because business can bring the knowledge, resources and capabilities that are needed to tackle them.

However, business is not presently well designed to do that because of the way in which we have structured our enterprises and corporations. We have placed financial performance and returns to shareholders as their overriding objectives. That has two consequences. The first is that business is often the cause rather than the solution to problems and, second, the single-minded pursuit of financial performance means that they are not primarily focused on addressing the most serious global, environmental, and social challenges we face.

It is critical that we retain the strong focus on profits that currently exists but recognize the need to combine and align that with the identification of solutions to global problems and the avoidance of their creation. The misalignment has been a source of many of the failings of economies, nations and societies and a cause of the inadequate attention that has been devoted to addressing them.

But as important as the beneficial effects of social enterprise on global outcomes is its impact on us as individuals and our mental as well as physical wellbeing. By combining social and public purpose with financial benefit, social enterprise unifies our rational reasoning and emotions. It is inspiring to work for enterprises that seek to address major humanitarian and natural world problems and even more so when it is also financially rewarding to do so. It is emotionally draining for our sentiments and sympathies to pull in the opposite direction from our rational desire to earn a decent income and support our families. That is too often the case when we know that our corporate behavior is at odds with our personal principles and values of what is right and what it means to do good.

We are increasingly seeing a change in corporations' perception of their purposes. However, turning a massive multinational corporation is a complex and extended process. Entrepreneurship and new enterprises on the other hand offer not only greater opportunities but also the potential to experiment and innovate in a way that is often difficult to achieve in a bureaucratic business. Faced with the radical uncertainty created by biodiversity, environmental, public health, geopolitical and the many other future crises we will encounter, we need to recognize that we cannot

predict what will happen or know how to respond when it does. Instead, we should use a combination of accumulated knowledge and wisdom together with a rapid process of experimentation, learning and adjustment to guide our reactions.

Social enterprises are uniquely well placed to provide the combination of agility and awareness that is required to do this. But social enterprises are fragile enterprises sitting uncomfortably between the worlds of the social and philanthropic, and the commercial and financial. All too easily they can be deflected too much in one or other direction. That is why the focus of this handbook on social enterprise law is so critical because it is the law that both defines the enterprise and can help ensure that it survives and thrives.

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Jaime Alcalde Silva is an associate professor of private law at the Pontificia Universidad Católica de Chile, Faculty of Law. For 15 years, his teachings and publications have focused on the law of contracts, land law, company law, and social enterprises and cooperatives. In these two last matters, he worked as a consultant to the Minister of Economy, Development, and Tourism of the Republic of Chile between 2014–2015. In 2015, he coordinated the commemoration of the 150th anniversary of the Chilean commercial code. Since 2016, he has participated in the commission to elaborate on the project of the new Commercial Code for Chile.

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Introduction



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Over the last two decades, entrepreneurs' activities and business approaches have evolved considerably. Since the 2008 crisis, and even more so due to the awareness and expectations derived from adopting the United Nations' Sustainable Development Goals (SDGs) in 2015, entrepreneurship has shifted toward more social, environmental, and (good) corporate governance. Many researchers have suggested that laws should be adapted for this new paradigm. The objective is to go beyond the corporate social responsibility practices that a particular company can or has to adopt as a unilateral and external commitment. Therefore, company law has been amended to create new forms or statuses for social enterprises. However, this (r)evolution is far from complete. Different initiatives, including legal reforms in fields other than company law (e.g., public procurement law or competition law), and the commitment from the business community itself, are spreading these ideas as part of the new theory of the firm reflecting companies' new role in society. The reception of the United Nations' SDGs foretells that we are facing a paradigm shift in the expectations of companies to obtain a social license to operate. It also exceeds the legal sphere and poses important economic challenges.

Social enterprises (SEs) cover an increasingly extensive and multiform spectrum of economic activities. However, the difficulty in analyzing them begins with the concept's boundaries, as it alludes to different realities that depend on the context in which the term is used. There is no consensus on the concept of social enterprise.

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Through their design of public policies, academics, and even social entrepreneurship, national legislation and governments highlight different patterns as essential features of the phenomenon. Unsurprisingly, the specific legal forms emphasize different characteristics in terms of quantity and type. Cooperatives and mutual societies have the highest features, while different emerging forms insist on income generation through unconventional structures and social innovation. In both cases, they are considered social enterprises. The universe is quite wide: blended firms, low-profit limited liability companies (e.g., L3C), benefit corporations, dual- or multi-purpose entities, and flexible- or social-purpose corporations, to name the most well-known forms of recognized social enterprises. In addition, this conceptual difficulty becomes more complex when we consider the cultural realities of different countries. The recent publication of a comparative report titled “Social enterprises and their ecosystems in Europe” (2020) by the European Commission charts the diffuse content of social enterprises within the internal laws of states.

A first attempt to define the concept of social enterprise leads to identifying two main approaches that can be geographically connected to the Anglo-Saxon world and continental Europe.

The Anglo-Saxon world tends to adopt a functional approach and focuses on the objectives pursued by social enterprises. A company is considered social if it targets the creation of societal value independent of the legal form adopted. Thus, the company is social by its purpose and not by the way it is organized. Companies are therefore recognized as social enterprises, even if they have a non-profit purpose flanked by an economic activity that generates income exclusively allocated to this purpose. However, for-profit companies coupled with an activity that intentionally results in positive social and environmental impacts can be considered social enterprises. Companies involved in social innovation can also be regarded as social enterprises. Attention is paid to the entrepreneurs and the social changes they produce through their economic activities.

Meanwhile, in the continental tradition, social enterprises are defined through an institutional approach. The focus is either on the social inclusion of given invisible or marginalized groups with public aid that allows this to be done or on some intrinsic social, economic, and governance characteristics, marking the boundaries of social enterprises. Following this institutional approach, most social enterprises are private non-profit organizations that provide goods and services aligned with their explicit purpose of benefiting the community. Within this context, the spectrum of social enterprises depends on the confluence of economic (ongoing production of goods or provision of services, high degree of autonomy, significant level of economic risk, and minimal amount of paid work), social (the explicit aim of benefitting the community and initiative promoted by a group of citizens), and governance (decision-making power separate from capital ownership, participatory nature, and limited distribution of profits) factors.

The Anglo-Saxon approach to social enterprises has materialized in various ways. One of the most widespread is that of the certified benefit corporation and that of the benefit corporation legal model. *Certified benefit corporations* (also known as B Corporations or B Corps) are companies that obtain a particular certification from a

non-profit entity. B Lab and Sistema B in Latin America are part of a global network to transform the global economy to benefit people, communities, and the planet. Their private certification system is based on the so-called benefit impact assessment (BIA), which helps enterprises measure their impact on several areas, such as the environment, communities, customers, employees, and governance. B Corps are usually referred to as “triple impact companies” because they pursue the development of a given economic activity and induce a positive transformation in the community and environment. These are commercial companies where transparency, worker participation, and social or environmental purposes are considered together with the profit-making goal, creating community well-being that can be quantified under generally acceptable metrics and verifiable standards by any stakeholder. Hence, the three main characteristics of this form of entrepreneurship are (i) beneficial purpose, (ii) social balance, and (iii) transparency for any stakeholder. These companies are certified in the United States, Canada, Europe, Australia, and New Zealand through B Lab, a non-profit organization based in Wayne (Pennsylvania). In Latin America, certification comes from Sistema B (B System) with the support of B Lab. B Corp’s long history and extensive coverage have consolidated it as one of the most known and respected global standards to recognize public purpose-driven companies. In Europe, the model based on a certification process is gaining strength among some companies, especially in the United Kingdom, Italy, the Netherlands, France, Spain, and Germany, thereby expanding the list of social enterprises.

The second form, born within the Anglo-Saxon context, is the Benefit Corporation legal model, which emerged in the aftermath of the subprime crisis in 2010, with the state of Maryland enacting the first law, recognizing *benefit corporations* as a differentiated type of company. As of 2013, 37 states within the United States (in addition to the District of Columbia) have joined the movement. In another four, there are currently bills on the topic under discussion. The majority of laws enacted in the U.S. are inspired by the Model Law prepared by William H. Clark Jr., with the support of B Lab and the American Sustainable Business Council. The U.S. design has been inspirational for Canada, Italy, France, and several Latin American countries, such as Colombia, Ecuador, Peru, and Uruguay, which have recognized similar corporate forms or statuses. Legislative policies in Latin America have not ignored this phenomenon. The Ibero-American General Secretariat (SEGIB) and the United Nations Development Program (UNDP) conducted a research project to support 22 governments in Latin America, Portugal, and Spain, creating a regulatory and legislative framework that recognizes and dynamizes public-purpose-driven companies.

This handbook aims to serve as a map that helps navigate the *archipelago* of social enterprises. This is divided into three parts. The first one describes different aspects of the social enterprise movement. The term is assigned to it by sociology. It is designated as an informal network (or a set of networks), characterized by a continuous commitment of individuals and groups who seek to promote collective action to pursue a common goal. **Livia Ventura** explains the link between the social enterprise movement and the birth of hybrid forms of organization that materialize

altruism in the market. **Carlos Vargas Vasserot** describes the gradual recognition of social enterprises in the European Union and their importance through specific regulatory models. **Giulia Neri-Castracane** deals with the governance dimension of social enterprises with two proposals to reconcile American and European approaches to the concept. **Sigrid Hemels** addresses social enterprises' controversial tax treatment. **Mathieu Blanc**, **Jean-Luc Chenaux**, and **Edgar Philippin** develop another increasingly interesting theme within social enterprises projected for any company, the corporate purpose and how social administrators must achieve this as part of the governance system. From a general perspective, **Millán Díaz-Foncea** and **Carmen Marcuello** explain the conceptual debate and approaches generated by social enterprises. This is complemented by the chapter in which **Antonio Fici** describes the situation in the European Union after the 2011 Social Business Initiative. **Daniel Hernández Cáceres** traced the link between social enterprises and cooperatives. Finally, **Federica Massa Saluzzo**, **Daide Luzzini**, and **Rosa Ricucci** conducted a comparative analysis between for-profit and non-profit firms to demonstrate how social entrepreneurs create a systemic change in the economy.

The second part of the handbook deals with benefit corporations and B Corp certification. It begins with a presentation of trends and perspectives on the phenomenon by **Mario Stella Richter**, **Maria Lucia Passador**, and **Cecilia Sertoli**. This phenomenon requires a suitable behavior framework that B Corps have in the market; this innovative analysis has been conducted by **Maria Cristiana Tudor**, **Ursa Bernardic**, **Nina M. Sooter**, and **Giuseppe Ugazio**. The B Corps movement began as a private certification process led by B Lab and its subsidiaries worldwide. It has not stopped even when the figure, with the same or different name, has been taken onboard by legislation. **Ana Montiel Vargas** explains the role of the B Lab and the process of certificating B Corps. The following three chapters, address different legal aspects related to this form of company. **Luis Hernando Cebriá** introduces the Law of benefit corporations and other public purpose companies. **Brian M. McCall** explains their reception in the Common Law Tradition. **José Miguel Embid Irujo** explores the viability of benefit corporations in systems where the figures have no legal recognition. Finally, **Jonathan Normand** and **Veronica Devenin** provide real-world lessons on stakeholder capitalism, demonstrating how the B Lab & B Corp movement catalyzes societal change.

Finally, the third part provides an international overview of purpose-driven companies worldwide. The chosen method consists of selecting relevant countries whose list follows an alphabetical order and requests one or more local authors to describe the situation of their respective legal systems. In some countries, laws and regulations of various nature dealing with social enterprises or some of their forms already exist; in others, it is still a custom that delineates their physiognomy. The list of selected countries is as follows: Argentina (**Dante Cracogna**), Australia (**Ian Ramsay** and **Mihika Upadhyaya**), Brazil (**Rachel Avellar Sotomaioir Karam** and **Calixto Salomão Filho**), Belgium (**David Hiez**), Canada (**Cynthia Giagnocavo**), Chile (**Jaime Alcalde Silva**), China (**Jian Li**, **Meng Zhao** and **Caiyun Xu**), Colombia (**Francisco Reyes Villamizar**), Ecuador (**Esteban Ortiz Mena** and **José Ignacio Morejón**), France (**David Hiez**), Germany (**Gerald Spindler**), Hong

Kong (**Ka Kui Tse, Rebecca Choy Yung, Yanto Chandra and Gilbert Lee**), India (**Puneeta Goel, Rupali Misra, Suman Lodh, Monomita Nandy, and Nandita Mishra**), Italy (**Livia Ventura**), Japan (**Nobuko Matsumoto**), Luxembourg (**David Hiez**), Mexico (**Luis Manuel C. Méjan**), Peru (**Claudia Ochoa Pérez and Juan Diego Mujica Filippi**), Portugal (**Deolinda Meira and Maria Elisabete Ramos**), South Africa (**Richard S. Bradstreet and Helena Stoop**), South Korea (**Hyeon Jong Kil**), Spain (**Paula del Val Talens**), Switzerland (**Henry Peter and Vincent Pfammatter**), The Netherlands (**Coline Serres and Tine De Moor**), The United Kingdom (**Stelios Andreadakis**), The United States (**Alicia E. Plerhoples**), and Uruguay (**Carlos de Cores Helguera, Patricia Di Bello and Natalia Hughes**). To close the third section, **Carlos Vargas Vasserot** refers to the situation in other European countries (Finland, Slovenia, Denmark, Romania, Greece, Latvia, Slovakia, Bulgaria, and Lithuania).

As editors, we hope that this handbook will contribute to the international knowledge and debate on social enterprises in general and benefit corporations and other forms of purpose-driven companies in particular.

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Part I
The Social Enterprise Movement

The Social Enterprise Movement and the Birth of Hybrid Organisational Forms as Policy Response to the Growing Demand for Firm Altruism



Livia Ventura

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1 Introduction: Definition of Social Enterprise

Social enterprise (SE) can be described as a complex and variegated phenomenon marked by different extensions and connotations according to the legal system of reference. The definitions of social enterprise indeed are numerous and differently characterised in the various legal systems.¹ For example, with regard to the countries

¹See e.g., the definition of Paul Light (Light 2008), who describes SE as organisations or ventures that achieve their primary social or environmental missions using business methods, typically by operating a revenue-generating business. SE entities are entities seeking to blend the production of shareholder wealth with social and environmental goals under the umbrella of a single entity.

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belonging to the Western legal tradition, Europe and the United States have different approaches towards SE.²

In Europe, social enterprise is traditionally considered an alternative to charities,³ while the United States has embraced a broader view of SE, including profit-oriented businesses organisations involved in socially beneficial activities, hybrid dual-purpose businesses mediating profit goals with social objectives, and non-profit organisations engaged in mission-supporting commercial activity.⁴ However, from a general perspective, it is possible to identify a common element characterising social enterprises regardless of the legal structure used, namely, the positive impact generated by the entity in the territory and the community in which it operates, through the creation of positive externalities or the reduction of negative externalities.

In this contribution, a broad definition of SE is accepted. Moving from such broader definition, the focus will be on a specific area of the social enterprise spectrum, that of the hybrid dual-purpose businesses, thus conceiving social enterprises as private organisations, particularly profit-making companies, that carry out commercial activities—with an economic method—to pursue economic, as well as social and environmental objectives.⁵ Companies with a double (or blended) purpose, profit-making and “common benefit”, operating in accordance with the so-called “triple bottom line” scheme (the 3P scheme, regarding people, planet, profit), which takes into consideration the social, environmental, and economic result of the company.⁶

2 The Evolution of Social Enterprise Hybrid Legal Forms: A Comparative Law Perspective

From a legal perspective, the development of laws aimed at regulating social enterprises is related to the debate on the use of existing entities, particularly for-profit legal structures, for the conduct of “hybrid” (profit and non-profit) businesses.

²On the issue of SE see e.g., Plerhoples (2012), pp. 228 et seq.; Murray (2014), pp. 347–348; Fishman (2007), p. 600; Katz and Page (2010), p. 59; Esposito (2013), p. 646.

³On the issue, Kerlin (2006), pp. 247–263; Esposito (2013), pp. 646–647; Defourny and Nyssens (2008), pp. 202 et seq. E.g., in Italy, the reference to “social enterprise” has a specific meaning, i.e., an entity that, according to the law, can be structured as a for-profit entity although it pursues a non-profit purpose (see D.Lgs. 24 March 2006, n. 155, now D.L. 3 July 2017, n. 112). Moreover, according to the definition developed in the UK in 2002 by the former Department of Trade and Industry, social enterprises are “a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximize profit for shareholders and owners” (cfr. Dep’t of Trade & Indus., *Social Enterprise: A strategy for Success*, 2002, p. 7).

⁴See the definition of Kerlin (2006), p. 248.

⁵Katz and Page (2010), pp. 61–62; Cummings (2012), pp. 578–379; Plerhoples (2012), pp. 230–231; Yockey (2015), p. 772.

⁶Elkington (1997). On the issue, see also Fisk (2010); Slaper and Hall (2011), pp. 4 et seq.; Brakman Reiser (2010), p. 105; Katz and Page (2010), pp. 61–62.

Some legal systems, such as the United States, Germany, and Switzerland, do not have problems of systematic interpretation related to the logical coherency of the system itself in the use of for-profit structures by social enterprises because they generally allow the use of the business structures (e.g., corporations/companies limited by shares, or limited liability companies) for non-profit activities. Other legal systems, such as France and Italy,⁷ provide for the use of for-profit structures mainly (unless specific exceptions are prescribed for by law) for the pursuit of profit-making purposes (although business companies may seek social benefit, e.g., through philanthropy or other corporate social responsibility (CSR) activities,⁸ not as their primary objective but as a secondary and eventual objective), and reserve other legal forms (i.e., non-profit legal forms) such as associations and foundations for philanthropic activities.

However, a significant body of scholarship and business leaders argue that the existing for-profit entities, also in countries allowing their use for hybrid purposes, are not sufficient for the development of the modern social enterprise sector.⁹ The most relevant issues about the use of for-profit organisations concern: *i*) the safeguarding of the “fidelity to the mission” following a change of control,¹⁰ and *ii*) the predominance of the shareholder wealth maximisation principle as a parameter that directors must consider in their decisions, to avoid claims for breach of fiduciary duties.¹¹

⁷Under the French and Italian Civil Codes, for profit structures can be used only to pursue profit-making activities (unless the law—D.L. 3 July 2017, n. 112—provides for specific exceptions in this regard, such as the so-called “*impresa sociale*” in Italy), see Art. 2247 Italian Civil Code (“*Con il contratto di società due o più persone conferiscono beni o servizi per l’esercizio in comune di una attività economica allo scopo di dividerne gli utili.*”) and Art. 1832 French Civil Code (“*La société est instituée par deux ou plusieurs personnes qui conviennent par un contrat d’affecter à une entreprise commune des biens ou leur industrie en vue de partager le bénéfice ou de profiter de l’économie qui pourra en résulter.*”).

⁸On the issue Peter and Jacquemet (2015), pp. 170–188.

⁹Kelley (2009), pp. 340–341; Esposito (2013), p. 645; Yockey (2015), pp. 771–772.

¹⁰Following a change of corporate control, the new controller can decide to terminate the original social mission and to pursue only the profit purpose, which is the only corporate purpose provided in the articles of incorporation and bylaw of an ordinary business entity. See Cummings (2012), pp. 589–590.

¹¹The shareholder primacy model has become the predominant model accepted by corporate law in the major legal systems belonging to the Western legal tradition (see Hansmann and Kraakman 2001, pp. 440–441, according to which “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”). On the shareholder primacy model, see Friedman (1970), and Jensen (2001), pp. 32–42. The shareholder primacy originates in the United States and has been first articulated by the Michigan Supreme Court in 1919 in *Dodge v. Ford Motor Co.* 204 Mich. 459, 170 N.W. 668 (Mich. 1919) and reaffirmed in *Unocal Corp. V. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *Katz v. Oak Indus.*, 508 A.2d 873, 879 (Del. Ch. 1986); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

To overcome all these limitations and the dissatisfaction with the for-profit/not-for-profit dichotomy, in the past few decades, several legal systems from the Americas to Europe, have introduced new hybrid entities designed to adequately meet the needs of social entrepreneurs and capable of bringing together social and environmental aims with business approaches.

Since the 1980s, the United States has experienced rapid growth in the modern SE movement with the proliferation of new hybrid forms, such as the low-profit limited liability company (L3C)¹² introduced for the first time in Vermont in 2008,¹³ the social purpose corporation (SPC) introduced in California in 2011 (formerly known as the flexible purpose corporation),¹⁴ and the benefit corporation introduced in Maryland in 2010.¹⁵ The latter is reflected in a more comprehensive model legislation (the Model Benefit Corporation Legislation – Model Act¹⁶), and currently implemented by 36 states plus Washington DC and Puerto Rico.¹⁷ In North America, British Columbia – Canada, followed the U.S. example introducing the “benefit companies” in 2020.¹⁸

With regard to Europe, sustainable development has long been at the heart of the European project, but European countries and Institutions have long adhered to a narrow view of the social enterprise, considering it as a synonym for charitable

¹²L3Cs are companies aimed primarily at performing a socially beneficial (charitable or educational) purpose and not at maximising income. The L3C legal form is designed to make it easier for socially oriented businesses to attract investments from foundations, simplifying compliance with the Internal Revenue Service’s Program Related Investments’ (PRI) regulations (I.R.C. §§4944(c); 170(c)(2)(B); 26 CFR 53.4944-3(b) Ex. (3)). Indeed, thorough PRIs private foundations can satisfy their obligation under the Tax Reform Act of 1969 to distribute annually at least 5% of their assets for charitable purposes. Investments in L3Cs that qualify as PRIs can fulfil this requirement while allowing the foundations to receive a return from the investment. L3Cs have been widely criticised for their unclear regulation under tax law and did not have huge success among practitioners. See Esposito (2013), pp. 682–688; Murray (2016), pp. 545–546; Kelley (2009), p. 356.

¹³See Vt. Stat. Ann. Tit. 11, §3001(27). Other states such as Illinois, Louisiana, Maine, Michigan, Rhode Island, Utah, and Wyoming introduced the L3C statute. On L3Cs, see Lang and Carrott Minnigh (2010), p. 15.

¹⁴Then introduced in Washington in 2012, and in Florida in 2014. The SPC is a corporate entity enabling directors to consider and give weight to one or more social and environmental purposes of the corporation in decision-making. Unlike the L3C, where the charitable purpose overrides profit maximisation, the SPC give directors the discretion to choose social and environmental purposes over profits. See Esposito (2013), p. 693.

¹⁵Md. Code Ann., Corps. & Ass’ns §5-6C.

¹⁶The Model Act has been proposed by B Lab with the support of William H. Clark (Of Counsel at Jr. Drinker Biddle & Reath LLP) and the American Sustainable Business Council, available at http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (accessed 4 January 2022).

¹⁷Among the U.S. states introducing benefit corporation statutes, it is worth mentioning Delaware (see Subchapter XV of the Delaware General Corporation Law (Del. Code Ann. Tit. 8, §§ 361–368).

¹⁸The *Business Corporations Amendment Act* (No.2) 2019 (Bill M209), which introduced *benefit companies* within the *Business Corporations Act* (see *Chapter 57, Part 2.3*, §§ 51.991–51.995), received the *Royal assent* on May 16, 2019, and entered into force on June 30, 2020.

activities rather than a genuine blended-value enterprise.¹⁹ As a result, the social enterprise movement in Europe is mainly focused on the development of third sector services, on areas from which the welfare state had retreated, and operates through non-profit associations, foundations, or cooperatives, which are generally characterised by the non-distribution constraint.²⁰

A different approach has been taken by the United Kingdom, which in 2004 introduced a new hybrid model specifically designed for SE, the “community interest company” (CIC), consistent with the evolution of the SE movement towards blended enterprises aimed at pursuing social and environmental goals as well as generating shareholder wealth.²¹ CICs represent the first step towards a new blended-value entity, but they have as primary purpose the pursuit of social and environmental objectives and are characterised by limits to the distribution of dividends.

From this perspective, the most innovative legal structure introduced in Europe in 2016 is the Italian “*società benefit*” (SB), which is the legal transplant of the

¹⁹Recent measures suggested by the European institutions to boost the growth of the social enterprise sector, such as the Europe 2020 Strategy for smart, sustainable and inclusive growth (Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020, 3 March, 2010, p. 2), the Single Market Act (Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence, COM(2011) 206, 13 April, 2011, pp. 24–25), and the Social Business Initiative (Social Business Initiative: Creating a Favorable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation, COM(2011) 682, 25 October, 2011, p. 2), continue to reflect this narrow view of the SE movement. The numerous communications released by the European Commission suggest the creation of a comprehensive European legal framework to promote the development of the SE sector and facilitate investments in these enterprises at a European level. Moreover, the Commission suggests reforming the statute of the European Cooperative Society considering that many social enterprises operate in the form of social cooperatives. Thus, the European Commission focused the development of an organisational form characterised by the non-distribution constraint with limits on the distribution of profits. On this issue, see Esposito (2013), pp. 679–680.

²⁰Citing Kerlin (2006), pp. 252–254. See also Defourny and Nyssens (2008), pp. 206–208; Esposito (2013), pp. 671–674.

²¹See Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 27, §26. CICs are blended legal structures (companies limited by guarantee or companies limited by shares) for businesses that primarily have social and environmental objectives and whose surpluses are principally reinvested in the business or in the community, rather than being driven by the need to maximise profit for shareholders. CICs can raise equity capital as for-profit companies but at the same time their use ensure that company’s assets are dedicated to public benefit. Thus, the distribution of dividends is capped at 35% of the aggregate total company profits (Office of the Regulator of Community Interest Companies, Community interest companies: guidance chapters, Chapter 6: The asset Look, pp. 6 et seq.) and, in the event of dissolution, CICs’ assets must go to similar entities pursuing community benefits. Moreover, CICs are overseen by the CIC Regulator, which ensures compliance with the “community interest test” (verifying, according to the Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 27, §35(2), that CIC’s activity is carried on for the benefit of the community) and receives the CIC’s annual report. It is worth noting that CICs do not have tax advantages and are subject to the corporation tax regime. In legal literature, see Lloyd (2010), p. 31; Esposito (2013), pp. 674–678.

U.S. benefit corporation.²² A few years later, in 2019, also France, going further the development of the “*Économie Sociale et Solidaire*”,²³ introduced a new hybrid legal status similar to that of the benefit corporation, the “*entreprise à mission*”, allowing for-profit companies to incorporate social and environmental aims into their corporate purpose.²⁴

Latin American countries are also exploring new models of growth that focuses not solely on making profits but also on a social and environmental mission.²⁵ A legal model designed for SE is pending introduction in several states, such as Argentina²⁶ and Chile,²⁷ while, between 2018 and 2020, benefit corporations have been transplanted in Colombia,²⁸ Ecuador²⁹ and Perú³⁰ through the introduction of the “*Sociedades de Beneficio e Interés Colectivo*” (BICs).

Finally, the spread of new hybrid legal structures also reached the African continent. At the beginning of 2021 in fact, Rwanda passed the benefit corporation legislation introducing the so-called “community benefit company” and becoming the 7th country in the world to provide this option.³¹

²²Law No. 208 of December 28, 2015, “*Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Legge di Stabilità 2016)*” Art. 1, paragraphs 376–384.

²³Law No. 2014-856 of July 31, 2014. The “*Économie Sociale et Solidaire*” (ESS) (literally, Social and Solidarity Economy) encompasses all the entities whose status, organisation and activity are based on the principles of solidarity, equity and social utility. The ESS is composed of not-for-profit and for-profit structures. SSE entities adopt participative and democratic governance mechanisms and are characterised by strict limitations to the distribution of profits.

²⁴Law No. 2019-486 of May 22, 2019, Art. 169. See the amendment to Civil Code Arts. 1833 and 1835, and French Commercial Code, Arts. L. 225-35, L. 225-64, L. 210-10, L. 210-11. To acquire the status of *entreprise à mission* the articles of association of a for-profit company must specify the peculiar *raison d'être* of the company and one or more social and environmental purposes that the company want to pursue in the framework of its activity. Moreover, the publication of an annual report on the company’s social mission assessed against an independent third-party standard, and the creation of a special committee (“*comité de mission*” or “*réfèrent de mission*”) separate from the other corporate bodies, which is exclusively responsible for monitoring and reporting the pursuit of the social mission is required.

²⁵On the issue, see Alcalde Silva (2018), pp. 381–425.

²⁶See Bill No. 2498-D-2018, approved by the *Cámara de Diputados* in December 2018, which is pending approval in the *Senado*.

²⁷Bill No. 11273-03, of May 2017.

²⁸Law No. 1901, of June 8, 2018.

²⁹See the Resolution of the *Superintendencia de Compañías, Valores y Seguros* No. SCVS-INC-DNCDN-2019-0021, of December 6, 2019, and Law January 7, 2020 (so-called “*Ley Orgánica de Emprendimiento e Innovación*”), published in the *Registro Oficial Suplemento* No. 151, of 28 February 2020.

³⁰The Bill No. 2533/2017-CR, so-called *Ley de Sociedades de Beneficio e Interés Colectivo*, has been approved on October 23, 2020 by *Congreso de la República*.

³¹See Chapter XIII “Community Benefit Company”, Articles 269–273 of Law N° 007/2021, of 5 February 2021 (Official Gazette n° 04 *ter* of 08/02/2021).

3 Philanthropic Purposes and For-profit Corporation

Observing the convergence of the legal systems in the implementation of hybrid entities statutes to support the development of SE one wonders why in the context of the for-profit sector, traditionally characterised by a self-interest purpose (materialised in the maximisation of profits and their distribution to the shareholders), the need has been felt to introduce altruistic or philanthropic aims right into the articles of association's corporate purpose clause.³²

It is particularly difficult to find an answer analysing the phenomenon through the inflexible lenses of the economic analysis of law (EAL) or the neoclassical economics and its *homo economicus* paradigm, according to which human beings are rational and selfish actors, focused entirely on maximising their own material well-being.³³ Once accepted the rational choice theory³⁴ indeed, appears to be difficult to justify those human conducts led by altruistic and disinterested behaviours (such as the inclusion of altruistic purposes within the corporate purpose of business companies).

Nonetheless, the observation of the reality shows that the unselfish prosocial behaviour is very common in human social life (as also demonstrated by several social dilemma experiments),³⁵ suggesting the need for re-thinking the behavioural paradigm of the *homo economicus* that is not apt to explain inclination towards altruism and cooperation that is, to the contrary, a fundamental and universal aspect of human behaviour, as much as selfish conduct and the pursuit of material well-being.³⁶

In this sense, new behavioural models suitable for explaining the physical and juridical world can be found both in the studies of Behavioural Law and Economics (aimed at highlighting the cognitive variables within the decision-making processes of individuals³⁷ and the reasons underlying human behaviours³⁸), as well as in the

³²On this issue Ventura (2018), pp. 545–590.

³³On the *homo economicus* model Stout (2014), pp. 195–212.

³⁴See Friedman (1953), pp. 15 et seq.; Hargreaves Heap et al. (1995); Posner (1998), p. 3; Ulen (2000), pp. 790–791; Shavell (2004), p. 1.

³⁵Stout (2014), pp. 198–200.

³⁶In this sense Resta (2014), p. 151. For further reading on this matter, see Solomon (1998), pp. 520 et seq.

³⁷See the studies by Simon (1955), pp. 99 et seq.; Simon (1957), pp. 270 et seq.; Kahneman and Tversky (1974), pp. 1124 et seq.; Kahneman and Tversky (1984), pp. 341 et seq.; Kahneman (2011). In general, on *Behavioral Law and Economics*, see Thaler (1996), pp. 227 et seq.; Sunstein (1997), pp. 1175 et seq.; Sunstein et al. (1998), pp. 1471 et seq.; Korobkin and Ulen (2000), pp. 1051 et seq.; Sunstein (2000); Parisi and Smith (2005); Thaler and Sunstein (2008); Zamir and Teichman (2014).

³⁸Fehr and Gächter (2000a), pp. 159 et seq.; Fehr and Gächter (2000b), pp. 980 et seq.; Fehr and Fischbacher (2003), pp. 785 et seq.; Gintis et al. (2003), pp. 153 et seq.; Fehr and Schmidt (2006), pp. 615 et seq.

“multi-faceted approach” to juridical phenomena that is typical of the Yale School of economic analysis of law (the so-called “*Law & Economics*”).³⁹

Regarding this latter, an impressive starting point for the reconstruction of the phenomena of altruism and beneficence, useful for our purposes, is offered by a recent contribution of Guido Calabresi.⁴⁰ According to the author, altruism, beneficence, and similar values exist in the empirical reality not simply as “means” for the production of other goods and services, but also because they constitute “ends in themselves”, they are desired as “goods in and of themselves” to satisfy the desire of which individuals are willing to pay a price.⁴¹

Using the arguments employed by Calabresi, hybrid entities (or SEs), although apparently in contrast with the concept of maximising individual, are therefore made logical when considered as the products of a new way of interpreting economics, in which the purposes, selfish (profit-making) and altruistic (public benefit), are both desired by the shareholders as goods in and of themselves. Both purposes enter the company’s articles of association and by-laws, legitimising the pursuit of business strategies that can turn out to be less profitable in terms of immediate profit and maximisation of wealth for the shareholder,⁴² but also capable of generating wealth to be shared with the community and the territory. Hence, if we look at the public benefit purpose pursued by social enterprises as a good in and of itself, desired by members/shareholders, the social enterprise model cannot be deemed irrational merely because it does not correspond to the behavioural model of the *homo economicus*.

In his analysis of altruism, beneficence, and non-profit institutions, Calabresi also underlines how the individuals’ need for altruism as good in and of itself⁴³ shows in several forms: the desire of individual altruistic behaviors’ (private altruism), altruistic behaviours by the State (public altruism) and altruistic behaviours by private firms (firm altruism). In this last case, it can show both as non-profit companies and as philanthropic activity undertaken by for-profit companies.⁴⁴

³⁹In addition to the volume by Calabresi (2016), for a description of the approaches to the economic analysis of law of the two schools of Yale (of *Law & Economics*)—using economics to understand the law as it is in the reality—and of Chicago (*Economic Analysis of Law*)—using the economic paradigms to adjust the law, identifying the best choices in terms of efficiency, according to Pareto optimality—see the contribution of Alpa (2016), pp. 599–601.

⁴⁰Calabresi (2016), pp. 90–116.

⁴¹Calabresi (2016), pp. 90–91.

⁴²For a summary of the several advantages, also economic, that a corporation can derive from good reputation in terms of social and environmental sustainability, see Monoriti and Ventura (2017), pp. 1125–1128.

⁴³It must be specified that according to Calabresi altruism does not constitute a single good, rather it constitutes a group of interrelated goods that can be placed on different levels: altruism as means—replaceable—for the production of other desired goods; and the altruism as end and good in and of itself, only partially replaceable depending on the type of desired altruism (*private, public, or firm altruism*), see Calabresi (2016), pp. 94, 98 et seq.

⁴⁴Calabresi (2016), pp. 93–94.

From the perspective of for-profit companies, traditionally, the answer to the request for firm altruism was embodied in “corporate philanthropy” activities and programmes, thus supporting beneficial causes and achieving a positive social impact through contributions in cash or in kind. But using the categories employed by Calabresi, it can be affirmed that social enterprise constitute a further manifestation of firm altruism, more efficient (from a law and economic perspective) than the not-for-profit organisations, because devoid of the limits of the nondistribution constraint, and characterised, compared to philanthropy, by a deeper and lasting impact on environment and civil society, given the integration of altruistic values within the framework of the company purpose clause contained in the articles of association.

4 Social Enterprise as a Bottom-Up Process

Social enterprise statutes are thus the new legislator’s policy response to the growing demand for firm altruism emerging from civil society. SE law indeed, can be described as a bottom-up phenomenon.

In the last decades, especially due to the financial crisis, increased inequality, ethics-based corporate scandals, and the rise of awareness on climate change’s risks, a profound reconsideration of the current economy and the capitalist system has begun, pointing out the need for a broader and deeper involvement of companies in generating a positive impact on the environment and the society. The idea of corporations not only as a tool for maximising shareholders’ profits but also as an essential means for the resolution of social and environmental problems has spread, basically increasing and strengthening the demand for firm altruism.

Nowadays, many voices are supporting the cultural transition from the shareholders’ capitalism model to a new form of stakeholders’ capitalism. Among them, for example, it is worth mentioning the proposals offered by the Catholic social doctrine through Pope Francis landmark encyclical *Laudato si*⁴⁵ in which the predominant paradigm of the profit maximisation is placed in doubt in favour of an “integral ecology” (namely environmental, economic, social and cultural) aimed at the protection of the common good.⁴⁶

With regard to international institutions, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the International

⁴⁵Laudato si - Enciclica sulla cura della casa comune, 24 May 2015, Pope Francis, Italian edition Libreria Editrice Vaticana, Città del Vaticano, 2015.

⁴⁶On the Encyclica *Laudato si*, see also Toffoletto (2015), pp. 1203 et seq.

Labour Organisation,⁴⁷ the UN Global Compact,⁴⁸ and the UN 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs)⁴⁹ can be mentioned. As far as the European Union is concerned, the call for sustainability has been supported by the Europe 2020 strategy for a smart, sustainable and inclusive growth⁵⁰ and, recently, in the context of the recovery plan following the SARS-CoV-2 pandemic, by the Communication *Europe's Moment: Repair and Prepare for the Next Generation*.⁵¹

The increasing desire of firm altruism seems also confirmed by several market studies.⁵² People hold companies as accountable as governments for improving the quality of their lives⁵³ and the improvement of society is considered the first goal that every company should pursue according to a study conducted among millennials from eighteen different countries.⁵⁴ Regarding consumers, a growing number already aligns its purchases with its values and consider sustainability in its purchasing decisions.⁵⁵

Investors as well, are increasingly interested in financing socially conscious businesses, see e.g., the BlackRock statement of February 2019 on sustainability

⁴⁷ Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

⁴⁸ The UN Global Compact was officially launched at UN Headquarter in New York City on 26 July 2000.

⁴⁹ See A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, launched by a UN Summit in New York on 25–27 September 2015.

⁵⁰ Commission Communication of 3 March 2010 on “Europe 2020. A strategy for smart, sustainable and inclusive growth”, COM(2010) 2020.

⁵¹ Commission Communication of 27 May 2020 on “Europe’s moment: Repair and Prepare for the Next Generation”, COM(2020) 456.

⁵² See, among others, Ernst & Young, *Climate Change and Sustainability: Seven Questions CEOs and Boards Should Ask About “Triple Bottom Line” Reporting* (2010), pp. 7–9; *The 2010 Cone Cause Evolution Study*, available at <https://www.conecomm.com/2010-cone-communications-cause-evolution-study-pdf> (accessed 4 January 2022). Among scholars, see Grant (2012), pp. 591–597; Kerr (2008), pp. 832 et seq.; Jackson (2010), pp. 92 et seq.

⁵³ See Accenture, Havas Media RE:PURPOSE, *The Consumer Study: From Marketing to Mattering*, The UN Global Compact-Accenture CEO Study on Sustainability, available at <https://webcache.googleusercontent.com/search?q=cache:2tvcvHIRST4J:https://sustainability.glos.ac.uk/wp-content/uploads/2017/07/Accenture-Consumer-Study-Marketing-Mattering-2.pdf+&cd=1&hl=it&ct=clnk&gl=it&client=firefox-b-d>, pp. 7–8 (accessed 4 January 2022).

⁵⁴ Deloitte, Millennial Innovation survey, January 2013 available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/dttl-millennial-innovation-survey.pdf>, p. 9 (accessed 4 January 2022).

⁵⁵ Accenture, Havas Media RE:PURPOSE, *The Consumer Study: From Marketing to Mattering*, The UN Global Compact-Accenture CEO Study on Sustainability, cit., pp. 9–10; *The 2010 Cone Cause Evolution Study*, cit., p. 5.

as the future of investing.⁵⁶ This contributed to the growth of the socially responsible investing (SRI) movement,⁵⁷ the emergence of specific stock markets (i.e., Social Stock Exchanges) and indices (e.g., the Dow Jones Sustainability Indices and the Financial Times Stock Exchange 4Good), as well as the development of ESG criteria (with reference to environmental, social and governance) and sustainability assessment tools (such as the Global Impact Investing Rating System (GIIRS), the Global Reporting Initiative (GRI) Standards, the Sustainability Accounting Standards Board (SASB) standards, or the “B Corp” certification issued by B Lab).

Even in the labour market, an additional value is recognised by students and employees to companies that can make a positive social and environmental impact.⁵⁸

Moreover, in the last years, the debate about corporate purpose and the “problem of shareholder primacy” has intensified among legal academics and business scholars,⁵⁹ and the relevance of firm altruism has been recognised also by the business community. In 2018, BlackRock CEO, Larry Fink, called for companies, together with delivering financial performance, to pursue a “social purpose”, a positive contribution to society.⁶⁰ While in August 2019, nearly 200 CEOs representing the largest U.S. companies that are members of the Business Roundtable released a “Statement on the Purpose of a Corporation”, which moves away from shareholder primacy and includes a fundamental commitment to all of a company’s stakeholders.⁶¹

The answer of the law to this strong demand for firm altruism coming from the civil society has been the introduction of new hybrid organisational forms suitable for the social enterprise and characterised by a governance structure appropriate for incorporating within the decision-making process altruism as good in and of itself, as

⁵⁶ See The BlackRock Investment Institute, *Sustainability: The future of investing*, February 2019, showing how assets in dedicated sustainable investing strategies have grown at a rapid pace in recent years. On the issue, Reints (2019); Whelan and Kronthal-Sacco (2019).

⁵⁷ E.g., see the growth of the US Responsible and Impact Investing movement, which has expanded to encompass about 33% of U.S. investments, roughly \$17.1 trillion, as highlighted by the *US SIF Foundation’s 2020 Report on US Sustainable, Responsible and Impact Investing Trends, Executive Summary*, available at <https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf> (accessed 4 January 2022).

⁵⁸ See *The 2010 Cone Cause Evolution Study*, *cit.*, pp. 19–21; Net Impact’s Talent Report: What Workers want in 2012 available at <https://www.netimpact.org/research-and-publications/talent-report-what-workers-want-in-2012> (accessed 4 January 2022); Clemente (2013), p. 17; Montgomery and Ramus (2007).

⁵⁹ On the recent debate on corporate purpose, see e.g., Mayer (2013); Mayer (2017), pp. 157–175; Mayer (2018); The British Academy, *The Future of the Corporation: Principles for Purposeful Business* (Nov. 2019), available at <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business> (accessed 4 January 2022); Bebhuk and Tallarita (2020), pp. 91–178; Rock (2020); Lund and Pollman (2021).

⁶⁰ See <https://corp.gov.law.harvard.edu/2018/01/17/a-sense-of-purpose/> (accessed 4 January 2022).

⁶¹ See the Business Roundtable statement available at <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (accessed 4 January 2022).

a new company purpose equivalent and complementary to the profit-making purpose.

The hybrid forms regulated by the legislators in the various legal systems can be characterised by different features due to path dependency but it is possible to identify a certain level of convergence on issues such as the dual company purpose,⁶² new duties of conduct for directors⁶³ and disclosure requirements.⁶⁴ This convergence is due to the circulation of legal models, particularly that of the U.S. benefit corporation, and to the actual global dimension of markets and economies.

5 New Challenges for the Social Enterprise

The spread of the social enterprise phenomenon and the hybridisation process of business companies' purpose has given new life to the old debate on the nature and the purpose of the corporation⁶⁵ (and, generally, of for-profit entities). The emergence of new hybrid entities together with the growing awareness of the risks of climate change and the role of sustainability in businesses has led to an evolution of corporate and financial law towards the acceptance of the environmental and philanthropic dimensions.

⁶²With regard to the entity purpose, hybrid entities' statutes generally provide for a dual-purpose clause combining profit-making and pursuit of the public benefit, but they do not clearly indicate how these different interests should be prioritised, giving directors a large degree of flexibility. Furthermore, most of the legislations do not address dissenters' rights for shareholders who oppose the transition to or from the hybrid status but usually require a special majority vote in case of fundamental changes to the entity purpose clause, such as for the introduction or deletion of the social mission.

⁶³As for directors, they are required to consider or to balance the impact of their decisions not only on the company and the shareholders, but also on other stakeholders (like workers, customers, communities, suppliers and the environment) and the pursuit of the public benefit/s indicated in the company agreement. Thus, directors have great discretion in achieving a higher purpose than simply maximising shareholder value. Moreover, they are generally protected from claims of external stakeholders that generally have no standing to sue both the company and its directors for failing to pursue the company's social mission. Only shareholders have standing to bring derivative suits alleging breach of fiduciary duties or violations of the duty to pursue the public benefit.

⁶⁴For greater accountability and transparency, most statutes require hybrid companies to publicly report about their social and environmental performance using a third-party standard, so customers, workers, investors, and policymakers can assess the company impact.

⁶⁵On the different theories on the nature of the corporations, such as the concession theory, aggregate theory, or real entity theory see e.g., Millon (1990), pp. 201–262; Padfield (2014), pp. 327–361; Padfield (2015), pp. 1–34. For a deeper analysis of the famous debate on the issue in the 30s, see Berle (1931), pp. 1049 et seq.; Dodd (1932), pp. 1145 et seq.; Berle (1932), pp. 1365 et seq. On the evolution of Berle's thought Berle (1954), p. 169; Berle (1959), pp. ix, e xii. For more recent contributions on the issue, see Sommer Jr (1991), pp. 33 et seq.; Harwell Wells (2002), pp. 77 et seq.; Bratton and Wachter (2008), pp. 99 et seq.

An example can be offered by the European Union path in the harmonisation of company law that over recent years seems to have opened to a more comprehensive protection of stakeholders' interests in for-profit entities, almost bringing traditional business companies closer to the social enterprise model.

The growing importance of sustainability and its perception as an added value for profit-making companies triggered an intense activity of revisioning and updating the European rules applicable to financial markets and company law. From an initial promotion of voluntary CSR programmes through the development of soft law instruments such as the European Strategy on Corporate Social Responsibility,⁶⁶ the focus has been shifted to the introduction of mandatory rules requiring the adoption of sustainable business practices. Among them, the Directive on non-financial reporting,⁶⁷ the Directive on long term shareholder engagement,⁶⁸ the Regulation on sustainability-related disclosures in the financial services sector,⁶⁹ and the recent Regulation on the establishment of a framework to facilitate sustainable investment.⁷⁰ Moreover, a directive on corporate sustainability reporting,⁷¹ a directive on supply chain due diligence,⁷² and a directive on directors' duties and

⁶⁶See e.g., the Green Paper "Promoting a European framework for Corporate Social Responsibility", 18.7.2001, COM(2001) 366; the Commission Communication of 15 May 2001 on "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development", COM(2001) 264; the Commission Communication of 13 December 2005 "On the review of the Sustainable Development Strategy – A platform for action", COM(2005) 658; the Commission Communication of 25 October 2011 on "A renewed EU strategy 2011-14 for Corporate Social Responsibility", COM(2011) 681.

⁶⁷Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups ("the Non-Financial Reporting Directive").

⁶⁸Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

⁶⁹Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

⁷⁰Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the "EU Taxonomy Regulation"). See also the Commission Communication of 21 April 2021 on "EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal", COM(2021) 188.

⁷¹See the Proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, of 21 April 2021, COM(2021) 189, 2021/0104 (COD), reviewing the Non-Financial Reporting Directive.

⁷²See the *Study on due diligence requirements through the supply chain: Final Report* (2020), published on 20 February 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (accessed 4 January 2022); and the European Parliament resolution (P9_TA(2021)0073) of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL)).

sustainable corporate governance⁷³ are currently under consideration by the EU institutions.

Given the global nature of markets, it is possible to identify two new challenges that the social enterprise will have to face, i.e., the harmonisation of SE organisational forms, and the relevance and comparability of impact assessment metrics.

The first concerns the utility of some forms of unification or harmonisation of the fourth sector organisational forms, the social enterprise sector, in which firms integrate social and environmental purposes with the business method. From the international perspective, the unification/harmonisation of domestic regulation of hybrid companies can help foster a common approach for the development of a strong fourth sector, thus increasing trust and facilitating cross-border investment and trading within the sector itself. From the domestic law perspective, the introduction of a well-known and recognised international hybrid entity model may play an important role in the development of a domestic fourth sector and in enhancing the credibility and branding aspect of these companies in a global market perspective.

The second challenge is related to the essential role of reliable impact assessment metrics and their comparability. It is essential that positive effects generated by social enterprises and communicated to third parties through periodic reports are evaluated through metrics suitable for appraising the real impact generated on several areas (such as the environment, the community, and the employees and other stakeholders) and capable of guiding firms to improve their strategy and performances. Moreover, the freedom for companies to choose the impact assessment metric to use and the global market perspective emphasise the importance and the necessity of metrics comparability. They should be recognised internationally to boost public trust in social enterprises. The large number of private standards and frameworks in existence make it difficult for the public to understand and compare companies' results. For this reason, the trend towards a worldwide convergence and simplification and standardisation of impact assessment metrics and sustainability reporting standards must be supported and strengthened.

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⁷³See the *Study on Directors' Duties and Sustainable Corporate Governance: Final Report* (2020), published on 29 July 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> (accessed 4 January 2022). For a critique of that study, see Roe et al. (2020).

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Social Enterprises in the European Union: Gradual Recognition of Their Importance and Models of Legal Regulation



Carlos Vargas Vasserot

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1 The Doctrinal Concept of Social Enterprise in Europe

In Europe, the origin of the doctrinal recognition of social enterprise is usually said to have started in 1990 in Italy with the launch of the scientific journal *Impresa Sociale* upon the initiative of the *Centro Studi del Consorzio* (CGM).¹ CGM elaborates the concept of a social enterprise that is attached to the traditional figure of cooperatives, but with a change in orientation to respond to social initiatives not satisfied by the market, especially in the field of labor integration and social services. When the law governing social cooperatives was passed in 1991, this doctrinal concept quickly gained legal recognition in that country, and an initiative was later

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¹For more detail: <https://www.rivistaimpresasociale.it/chi-siamo>.

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adopted by other European countries.² However, following this initial approach, different doctrinal conceptions of social enterprise developed in Europe, with a distinction being made between more open-minded positions and others that have attempted to link them to the social economy movement.

In this process, an extensive European network of researchers called *Emergence des Entreprises Sociales en Europe*, created in 1996 within the framework of an important research project of the European Commission, whose acronym was maintained when the project ended in 2000, became an international scientific association under the name *EMES Research Network for Social Enterprise*, which still operates with considerable academic intensity.³ The EMES network made a commendable effort to identify entities that could be qualified as social enterprises in the 15 countries that made up the European Union (EU) at that time and with a multidisciplinary theoretical-practical approach. Considering the different perceptions of social enterprise in the various countries analyzed, EMES was able to identify nine indicators that serve to define the three dimensions of social enterprise, which are listed below without going into their individualized content:⁴

1. The economic and entrepreneurial dimensions of social enterprises:
 - (a) A continuous activity producing goods and/or selling services
 - (b) A significant level of economic risk
 - (c) A minimum amount of paid work
2. The social dimensions of social enterprises:
 - (d) An explicit aim to benefit the community
 - (e) An initiative launched by a group of citizens
 - (f) A limited profit distribution
3. Participatory governance of social enterprises:
 - (g) A high degree of autonomy
 - (h) A decision-making power not based on capital ownership
 - (i) A participatory nature, which involves various parties affected by the activity

These indicators describe an ideal type of social enterprise, but they do not represent the conditions that an organization must necessarily meet to be classified as such, nor are they intended to provide a structured concept of social enterprise. Rather, they serve to indicate a range within which organizations can move to be classified as social enterprises. As has been graphically pointed out by two of the leading European authors on the subject, *such indicators constitute a tool that is somewhat analogous to a compass, which helps the researchers locate the position of the observed entities relative to one another and eventually identify subsets of*

²On these origins of social enterprise in Europe see Defourny and Nyssens (2012), p. 13.

³For more detail: <https://www.emes.net>.

⁴For which I refer to Borzaga and Defourny (2001).

social enterprises they want to study more deeply, allowing new social enterprises to be identified and old organizations to be restructured by means of new internal dynamics to be designated as such.⁵ This doctrinal concept of social enterprise had a great influence on several European Union documents and on the content of some of the different laws passed by European countries to regulate them, as we shall see below.

However, this concept of dominant social enterprise in Europe responds, to a certain extent, to a tradition linked to the traditional forms of social economy, such as cooperatives, mutual insurance companies, and company foundations, which are those that usually comply with the organizational and financial requirements that are demanded by law (limits to the profit motive, voting of members not based on capital stock, etc.). This European doctrinal concept contrasts with the dominant one in North American literature, which focuses more on the achievement of a social purpose or on the way to achieve it than on the formal requirements to be met by the entities that achieve it.

In the United States, there are two main doctrinal approaches to social enterprises.⁶ The first school of thought, known as the *social enterprise school of thought*, considers the use of business activities for profit to achieve a fundamental social purpose. Although this vision of a social-mission-oriented business strategy focused only on nonprofit organizations, it gradually expanded to encompass all organizations that seek to achieve a social purpose or mission, including for-profit organizations, such as corporations. The second doctrinal perspective on social enterprise is known as the *social innovation school of thought*, which emphasizes the profile and behavior of *social entrepreneurship* based on Schumpeter's theory of the innovative entrepreneur and focuses more on the social impact generated by the development of a socially innovative activity (new services, production methods, forms of organization, markets, etc.) than on the income generated by the entity, even if it serves to support a social mission.⁷ However, as noted above,⁸ the differences between the two North American schools are neither so great nor so obvious since they have ended up imposing an expanded vision of the social purpose of companies in the sense that they can produce both economic and social value, which has been called the double (or triple if environmental value is broken down into a separate category) impact or *blended value* of companies.⁹

As a corollary to this epigraph, I will take up the definition of social enterprise provided by two well-known economists, which serves to highlight the enormous and diverse concepts of social enterprises. Bill Drayton, founder of Ashoka, a

⁵Defourny and Nyssens (2012), p. 15.

⁶On this distinction Dees and Anderson (2006), pp. 39–66; Defourny and Nyssens (2010), pp. 32–53; Defourny and Nyssens (2012), pp. 8–10.

⁷Many relevant authors have aligned themselves with this current thought since the foundational work of Young (1986), pp. 161–184; Dees (1998), p. 4, Austin and Ezequiel (2009), p. 1.

⁸Defourny and Nyssens (2012), p. 11.

⁹Concept developed in an intense way by Emerson (2003), pp. 35–51 and in later works.

nonprofit organization that brings together social entrepreneurs from all over the world and promotes innovative ideas for social transformation, considers social entrepreneurs to be *people taking an innovative approach, with all their energy, passion, and tenacity, to solve the most important problems of our societies*.¹⁰

Muhammad Yunus, recipient of the 2006 Noble Peace Prize for implementing the concept of microcredit beginning in 1974 and founding the Grameen Bank (village in his native language) in 1983, simply defined social enterprise as *non-loss, a non-dividend enterprise is designed to address a social objective*.¹¹

2 Promotion and Recognition of Social Enterprise by the European Union: From the SBI Initiative to the New Action Plan for the Social Economy

In the European Union, the “Social Business Initiative. Creating a favorable climate for social enterprises, key stakeholders in the social economy and innovation” (2011),¹² cited as SBI, launched 11 years ago in the midst of the economic crisis, is a milestone in promoting recognition of the importance of social enterprises and social innovation in the search for original solutions to social problems and, specifically, in the fight against poverty and social exclusion. However, there were several initiatives to promote social enterprises developed by different EU bodies and institutions prior to the SBI, although none were important. Two of them can be pointed out: “European Parliament resolution on Social Economy” (2009)¹³ and “The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion” (2010).¹⁴

Among other objectives of the SBI, the need to improve the legal framework for social enterprises at the European level is highlighted since neither the EU nor the national level had sufficiently considered this alternative form of enterprise. Without claiming to be normative, the SBI proposes a description of social enterprises based on a series of common characteristics, such as those:¹⁵

- In which the social or societal objective of the common good is the reason for commercial activity, often in the form of a high level of social innovation
- Where profits are mainly reinvested with a view to achieving this social objective
- Where the method of organization or ownership system reflects their mission, using democratic or participatory principles, or focusing on social justice

¹⁰Drayton and MacDonald (1993).

¹¹Yunus (2012), p. 13.

¹²COM (2011) 682 final, 25.10.2011.

¹³2008/2250(INI). P6TA (2009)0062.

¹⁴SEC (2010) 1564 final.

¹⁵Pp. 6 et seq.

These companies, SBI continues, can be of two types:

- “Businesses providing social services and/or goods and services to vulnerable persons” (access to housing, health care, assistance for elderly or disabled persons, inclusion of vulnerable groups, childcare, access to employment and training, dependency management, etc.); and/or
- “Businesses with a method of production of goods or services with a social objective (social and professional integration via access to employment for people disadvantaged in particular by insufficient qualifications or social or professional problems leading to exclusion and marginalization) but whose activity may be outside the realm of the provision of social goods or services,” such as companies dedicated to the labor market integration of people at risk of exclusion, which is known as work integration social enterprises (WISE)

After the enactment of the SBI, numerous official documents of the European Union were drafted to insist on the promotion and recognition of social enterprises and social entrepreneurship. Without being exhaustive, in the first post-SBI stage, the Opinion of the European Economic and Social Committee on “Social entrepreneurship and social enterprise” (exploratory opinion) (2011)¹⁶ and the European Parliament resolution on “Social Business Initiative – Creating a favorable climate for social enterprises, key stakeholders in the social economy and innovation” (2012)¹⁷ are worth mentioning because of their significance. In the Resolution (paragraph 3 of the Introduction), it is stated that *social enterprise* means an undertaking, regardless of its legal form, that:

- Has the achievement of measurable, positive social impact as a primary objective in accordance with its articles of association, statutes, or any other statutory document establishing the business, where the undertaking provides services or goods to vulnerable, marginalized, disadvantaged, or excluded persons, and/or provides goods or services through a method of production, which embodies its social objective
- Uses its profits first and foremost to achieve its primary objectives instead of distributing profits, and has predefined procedures and rules for any circumstances in which profits are distributed to shareholders and owners, which ensures that any such distribution of profits does not undermine its primary objectives
- Is managed in an accountable and transparent way, in particular by involving workers, customers, and/or stakeholders affected by business activities

In 2013, several official documents recognizing the importance and interest of social enterprises were promulgated by different European Union bodies, such as the following: Communication from the Commission “Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund

¹⁶(2012/C 24/01).

¹⁷(2015/C 419/08).

2014–2020,”¹⁸ Regulation (EU) No. 346/2013 of the European Parliament and of the Council on “European social entrepreneurship funds,” and Regulation (EU) No. 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation (“EaSI”) and amending Decision No. 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion Text with EEA relevance. Article 2 of the latter regulation states that social enterprise means an undertaking regardless of its legal form:

- In accordance with its articles of association, statutes, or with any other legal document by which it is established, its primary objective is the achievement of measurable, positive social impacts rather than generating profit for its owners, members, and shareholders, which provides services or goods that generate a social return and/or employs a method of production of goods or services that embodies its social objective;
- Uses its profits primarily to achieve its primary objective and has predefined procedures and rules covering any distribution of profits to shareholders and owners that ensure that such distribution does not undermine the primary objective; and
- Is managed in an entrepreneurial, accountable, and transparent way, particularly by involving workers, customers, and stakeholders affected by business activities.

Subsequently, other documents have continued to be issued that refer, in one way or another, to the role that social enterprises should play in the European economy; however, in several of them, there has been an evolution toward the absorption of *social enterprise* by the broader concept of *social economy*, which in many cases is now referred to as *solidarity-based*. There is a paradoxical process of broadening the subjects that can form part of the social economy (already admitting trading companies when they meet certain conditions) but simultaneously reducing its scope to organizations more oriented toward the general interest or public utility that has a lasting and positive impact on economic development and the welfare of society and not only those that seek a mutualistic objective of satisfying the interests of the members.¹⁹

An example of this can be found in the European Parliament resolution of September 10, 2015, on social entrepreneurship and social innovation in combating unemployment,²⁰ which with regard to *social and solidarity-based economy enterprises* notes, in its introduction, that:

They do not necessarily have to be non-profit organizations; they are enterprises whose purpose is to achieve their social goal, which may be to create jobs for vulnerable groups,

¹⁸(COM(2013)0083).

¹⁹On the renewed concept of the social and solidarity economy Campos (2016), pp. 6–15; Chaves and Monzón (2018), pp. 5–50.

²⁰(2014/2236(INI)).

provide services for their members, or more generally create a positive social and environmental impact, and which reinvest their profits primarily in order to achieve those objectives.

It is characterized by its commitment to the classic values of the social economy: the primacy of individual and social goals over the interests of capital, democratic governance by members, the conjunction of the interests of members and users and the general interest, the safeguarding and application of the principles of solidarity and responsibility, the reinvestment of surplus funds in long-term development objectives or in the provision of services that are of interest to members or of general interest, voluntary and open membership, and autonomous management independent of public authorities.

Another clear example can be noted in the European Parliament resolution with recommendations to the Commission on a “Statute for social and solidarity-based enterprises” (2018),²¹ which in its first recommendation points out that the *European Social Economy Label* that is intended to be created will be optional for enterprises based on the social economy and solidarity (social and solidarity-based enterprises), regardless of the legal form they decide to adopt, provided that they comply with the following criteria in a cumulative manner:

- The organization should be a private law entity established in whichever form is available in Member States and under EU law, and should be independent from the state and public authorities;
- Its purpose must be essentially focused on the general interest or public utility;
- It should essentially conduct a socially useful and solidarity-based activity; that is, via its activities, it should aim to provide support to vulnerable groups, combat social exclusion, inequality, and violations of fundamental rights, including at the international level, or to help protect the environment, biodiversity, climate, and natural resources;
- It should be subject to at least a partial constraint on profit distribution and to specific rules on the allocation of profits and assets during its entire life, including dissolution. In any case, the majority of the profits made by the undertaking should be reinvested or otherwise used to achieve its social purpose;
- It should be governed in accordance with democratic governance models involving employees, customers, and stakeholders affected by its activities; members’ power and weight in decision-making may not be based on the capital they may hold.

And this first recommendation of the Resolution ends by stating that:

The European Parliament considers that nothing prevents conventional undertakings from being awarded the European Social Economy Label if they comply with the abovementioned requirements, particularly regarding their object, the distribution of profits, governance, and decision-making.

What happens is that the rigid conditions that are intended to be required to obtain the European social economy label (with a restricted list of public utility activities or the need for voting at shareholders’ meetings not to be linked to the ownership of share capital) seem designed for the classic organizational forms of the social economy (especially cooperatives), which limits entry into this supposed European

²¹(2016/2237(INL)).

category of social economy enterprises to conventional commercial enterprises, as many social enterprises tend to be.

Recently, in December 2021, the European Commission presented an “Action Plan for the social economy -Building an economy that works for people,” which aims to implement concrete measures to help mobilize the full potential of the social economy based on the results of the SBI initiative. This document reflects the relationship, in the opinion of the European Commission, between the social economy and social enterprises:

Traditionally, the term *social economy* refers to four main types of entities providing goods and services to their members or society at large: cooperatives, mutual benefit societies, associations (including charities), and foundations. However, now, *social enterprises* are generally understood as part of the social economy. Social enterprises operate by providing goods and services to the market in an entrepreneurial and often innovative fashion, with social and/or environmental objectives as the reasons for their commercial activity. Profits are mainly reinvested to achieve societal objectives. Their method of organization and ownership also follows democratic or participatory principles or focuses on social progress.

As pointed out earlier, on the one hand, there is an undeniable tendency to overcome the initial restriction of the company to specific legal forms (cooperatives, associations, foundations, etc.), and there is a clear recognition of the possibility that any type of private law entity can obtain the status of social enterprise. On the other hand, the European Union itself recommends that social enterprises, in addition to having a purpose oriented toward the general interest or public utility, must meet a series of requirements or conditions in their operation, essentially the priority of reinvesting profits in this objective and management with democratic governance criteria. Thus, it is clear that compliance with these will be easier for entities that are set up using the typical associative formulas of the social economy. In my opinion, the European Union offers member states a flexible scope for the regulation of social enterprises, and at the same time, it is restricted by the principles it imposes as operating features of this type of entity.

3 Models of Legal Regulation of Social Enterprises in Europe

In the European Union, apart from the official documents mentioned above, neither directly applicable regulations nor directives of necessary transposition have been enacted to unify or harmonize the legal status of social enterprises. Hence, there is great freedom in the way in which the member states can regulate these alternative forms of enterprise.²² On the one hand, within the aforementioned margin of flexibility, a large number of countries have not issued specific rules for social

²²For details of this diversity of approaches to the legal regulation of social enterprises in Europe, see Borzaga et al. (2020) and Fici (2015, 2020a, b).

enterprises, as has occurred in several central and northern European countries (Germany, Austria, the Netherlands, Sweden, etc.). On the other hand, other countries have created specific formulas for social enterprises, and three models of regulation can be distinguished: those that have legally recognized specific organizational figures or legal structures as prototypes of social enterprises, as has occurred in several countries with social cooperatives; those that have enacted a special law to regulate social enterprises; and those that have integrated social enterprises into a general law on the social economy.

Aside from this possible classification of legislative modes, one must consider the existence in Europe of a wide range of legal forms that are considered social enterprises, and the fact that they are legally regulated in the same way (for example, by a special law on social enterprises) or given the same name does not imply that their content is homogeneous in different legal systems. The specific regime for social enterprises in each country depends on a wide variety of national circumstances, such as prevailing political and ideological interests, legal traditions, and pressure from certain business sectors. It is therefore necessary to understand what legal concept of social enterprise exists in each legislation, if any; the legal forms recognized as such; and, in particular, what requirements each of them must meet in order to qualify as social enterprises. An example can clarify this.

Finland was the first country in Europe to regulate social enterprises through a special law (Law 1351/2003), which recognizes that any corporate form can be recognized; thus, the law is very broadly subjective. However, the social purpose of these entities is limited to offering employment opportunities to people with disabilities and the long-term unemployed. Spain, on the other hand, which has no special regulation for social enterprises, regulates social initiative cooperatives in Law 27/1999 on cooperatives. Although it obviously requires these entities to have the legal form of cooperatives and impose certain additional organizational and financial requirements (nonprofit), they can have as their corporate purpose the satisfaction of any social need not met by the market, so the regulation is very broad in this respect. Then one may ask which of these two types of social enterprises (social enterprise proper versus social cooperative) is more social. Well, we will have to go case by case and legislation by legislation to obtain an answer that a priori is not simple. That is why it is so important to undertake, as this book does, a comparative study of social enterprises in different countries around the world.

In this chapter, located in the introductory part of the social enterprise movement and before the part dedicated to the study of the legal situation of social enterprises in different legal systems around the world, it seems interesting to develop in greater detail the aforementioned classification of the different models of legal regulation of social enterprises in Europe and to conclude a table containing the results obtained from the analysis. I have looked into 14 European legal systems that have legally regulated social enterprises.

3.1 *Regulating Social Enterprises as Social Cooperatives*

The first model of the regulation of social enterprises in Europe corresponds to countries that have regulated them through the creation of a special form of cooperative, the so-called social cooperative. Moreover, this model chronologically emerged earlier in Europe with the enactment in 1991 in Italy of the *Disciplina delle cooperative sociali* law (1991), a pioneering norm in adapting the legal form of cooperation to the characteristics of social enterprises. The Italian initiative was imitated, with greater and lesser intensity, by other European countries, such as Portugal with the *cooperativas de solidariedade social* (1997), Spain with the *cooperatives of social initiative* (1999), France with the *société coopérative d'intérêt collectif* (2001), Poland (2006), Hungary (2006), Croatia (2011), Greece (2011), and the Czech Republic (2012).²³

This model is currently no longer in demand since, as we have seen previously, more ambitious perspectives of social enterprises are being imposed in terms of legal entities that can be recognized as such. Surprisingly, however, in Belgium's 2019 *Code des sociétés et des associations*, only cooperatives can be legally recognized as social enterprises. It should be recalled that this country was one of the first countries in the world to legally recognize social enterprises through the enactment in 1995 of a law that amended its commercial company law by inserting a section entitled *sociétés à finalité sociale* and in 1999 became part of the *Codes des Sociétés*. With the new code, the concept of a company with a social purpose has been replaced by that of the *entreprise sociale*. The most striking aspect, as has been pointed out, is that only cooperative companies can be classified as such; therefore, it has been established that within a maximum period of 5 years (until 2024), existing social purpose companies that wish to be recognized as social enterprises must transform themselves into cooperatives.²⁴

3.2 *Regulation of Social Enterprises by a Special Law*

The second model in European comparative law for the regulation of social enterprises, which is clearly growing after the publication of the SBI initiative and with a recognizable influence of other European Union documents on social enterprises that we have mentioned *above*, corresponds to the countries of the European Union that have regulated them through a special or specific law. Although there are great differences in the requirements that each law demands of an entity to be a social enterprise, they all have one thing in common: they do not create new types of

²³On social enterprises in cooperative form, see Fici (2016-2017), pp. 31–53, and in this publication, see chapter by Hernández, this volume, on social enterprise in the social cooperative form.

²⁴For more information on the regime of social enterprises in Belgium after the enactment of the Code, see Thierry et al. (2020), p. 98.

companies but are companies of whatever legal form, including commercial or trading companies, which, if they meet a series of conditions and formally request it, can obtain official recognition as a social enterprise through registration in the corresponding registry. Entities with the status of social enterprises usually obtain privileged tax treatment and are beneficiaries of certain aid packages from public administration authorities.

The European countries that have issued special laws for social enterprises include Finland (2003), the United Kingdom (2005), Slovenia (2011), Denmark (2014), Luxembourg (2016), Italy (2017), Latvia (2017), Slovakia (2018), and Lithuania (2019). As can be seen, some of these countries are of relative economic²⁵ importance, but others, such as the United Kingdom and Italy, have a large economic and political dimension. Let us briefly look at some aspects of the legal regime of these two countries to confront two different ways of regulating social enterprises in their content, but not in their form, since both enacted special laws.

The United Kingdom was one of the first European jurisdictions to regulate social enterprises, and it did so in 2005 through the Community Interest Company Regulations 2005. This legal formula, known as CIC, was designed *ad hoc* so that *limited liability* companies could conduct activities for the benefit of the community.²⁶ Without going into detail in its regulation, the entity in the so-called *community interest statement* must state that it will conduct its activities for the benefit of the community or a sector thereof and indicate how it intends to do so. The requirements imposed by law on this type of entity are quite light in comparison with other systems. In particular, there are essentially two financial requirements that CICs must meet to ensure that the community will benefit from the main community purpose of the CIC: the existence of certain *asset locks*, which, if transferred to third parties, must be at market value and, in the event of dissolution, must be allocated to another entity of the same type and have a maximum limit on the distribution of profits to its members. The current number of CICs (close to 19,000) and their spectacular growth in recent years²⁷ are proof of the undoubted success of this social enterprise model.

In 2017, Italy approved the *Codice del Terzo settore*, with the aim of systematizing and reorganizing the various entities that make up the third sector in Italy, in which, together with other entities (volunteer organizations, social promotion associations, philanthropic entities, mutual aid societies, and associative networks),

²⁵I will devote a special chapter to the legal regulation of social enterprises in most of these countries at the end of Part III of this study, under the title “Legal Regulation for Social Enterprises in Other European countries”.

²⁶The history of the origin of the legal figure is very amusingly collected by one of the promoters of the initiative, Lloyd (2011), pp. 31–43, where he explains that the initial name he had thought of was *Public Interest Company* (PIC) with the idea of showing that the interest of the companies was not private but that with those same initials at that time there was a ministerial project underway and so they had to change the name to CIC.

²⁷Which has been spectacular in 2020 with a 20% increase over the previous year with the approval of some 5000 new CICs Data obtained from *Regulator CIC* (2020).

social enterprises are included. On the same date as the *Codice*, a legislative decree of *Revisione della disciplina in materia di impresa sociale* was approved, repealing the previous law of 2006 on social enterprises, with the intent of making their regime more flexible and regulating tax incentives to contribute to the take-off of the social enterprise in the form of a capital company.²⁸ The main requirement for obtaining the legal status of social enterprises in Italy under the new law is that the entity must carry out an entrepreneurial or commercial activity of *general interest*, a term developed in the law itself with an extensive list of entrepreneurial activities that are presumed to be of this type.

With respect to the conditions required for an entity to be classified as a social enterprise, the primary condition is that it must be nonprofit making, and therefore, as was the case in the previous law, the distribution of profits and surpluses among partners, workers, and managers is prohibited. However, this principle is subject to an important exception, with respect to social enterprises in the form of partnerships, which is a major novelty. In these cases, unlike associations or foundations of social enterprises, dividends may be distributed up to 50% of annual²⁹ profits and surpluses. In addition, Italian law establishes other limitations or conditions for social enterprises, such as, among others, that the bylaws must provide for forms of participation in the management of workers, users, and other interested parties, ranging from simple consultation mechanisms to the participation of workers and users in meetings and even, for entities of a certain size, the appointment of a member of the management body. The legal discipline of the *società benefit* (2015) remains in force, with a regime similar to that of benefit corporations in the United States; in Italy, there are several legal avenues for developing social entrepreneurship.³⁰

3.3 *Regulation of Social Enterprises Within a Social and Solidarity Economy Law*

Finally, the other legislative model for regulating social enterprises in the European Union is made up of countries that have regulated the legal status of this type of entity within the framework of a general law on the social and/or solidarity economy. Obviously, for this to happen, it is a requirement that a law of this type exists or is enacted, and this is by no means common in the European Union and only occurs in southern Europe, generally speaking. Spain was a pioneer in the legal recognition of the social economy and in promoting its development as an alternative form of economy (2011), followed by Greece (2011), Portugal (2013), France (2014),

²⁸Fici (2020a, b), p. 191.

²⁹As Fici (2020a, b), p. 191, points out, this is an important novelty with respect to the previous regime.

³⁰On the content of this rule, see Ventura (2016), pp. 1134–1167.

Romania (2015), and Greece again (2016), in addition to some countries that have regulated it by regional rules (Belgium and Italy).³¹

Of the five jurisdictions with a state law on social and/or solidarity economy, three have regulated the figure of the social enterprise in this law: France, Romania, and Greece. Again, as in the previous model, the regulations of social enterprises in each of these countries differ significantly. Let us now compare the cases of Greece and France.

In Greece, in 2016, the law on the social and solidarity economy repealed the 2011 law on *the social economy and social entrepreneurship*, which only recognized social cooperatives as social enterprises. However, legal reform has not meant a general change in orientation with respect to the previous law but an unambitious attempt to give entry to new subjects in the social³² economy. Specifically, in the list of social and solidarity economy entities contained in the law, together with the social cooperative enterprise that was there previously, other types of cooperatives and any other legal entity that has acquired legal personality and meets a series of conditions are included in a new way. However, if you look at the conditions that Greek law imposes on entities that want to be recognized as social enterprises, they are very demanding (essentially decision-making according to the principle of one member one vote, restrictions on the distribution of profits, and significant wage limits for workers), which social cooperatives will find it easier to meet because these requirements are intrinsic to this corporate form.

In France, according to *Loi relative à l'économie sociale et solidaire* of 2014, the subjects of the social and solidarity economy are both traditional figures of the social economy and commercial companies that, in addition to complying with the conditions of the social and solidarity economy, apply additional management principles (in particular, endowing certain funds and mandatory reserves) and pursue social utility. These entities may qualify as *entreprises de l'économie sociale et solidaire*, also known as SSE enterprises, and benefit from the rights that are inherent to them, in particular, easy access to financing, tax and public procurement benefits, and visibility as enterprises included in the official lists of enterprises of this type. The law itself makes it possible for a "social and solidarity economy enterprise" to be approved as an *entreprise solidaire d'utilité sociale*, known by the acronym ESUS, when it cumulatively meets a series of additional requirements (that social utility be the main objective of the entity, demonstrating that its social objective has a significant impact on the income statement, having a limited wage policy, etc.), thus obtaining certain financial advantages.

In 2019, Law No. 2019-486 on the growth and transformation of companies, better known as Pacte Law after the acronym of the action plan in which it originated

³¹ In Hiez (2021), pp. 46 and 47, with a map showing the countries in Europe that have enacted a social and solidarity economy law and those that have a draft law; and on pp. 30 and 31 the world map, which shows a growth in the number of laws and draft laws on social economy in Latin America and Africa.

³² Fajardo and Frantzeskaki (2017), pp. 50 et seq.

(*Le Plan d'action pour la croissance et la transformation des entreprises*), was enacted in France. This law is considered the most important French economic law of the decade and was the result of a major intersectoral growth pact after a long debate. One of the ambitious objectives of the law was to rethink the place of companies in society, and it included measures to promote the development of social activities and purposes by private and commercial enterprises, such as the incorporation of a new form of social enterprise in the *Code de Commerce* outside the social and solidarity economy law, known as *the Société à mission*. This can be translated as a company with a mission or purpose and whose regulations bear obvious similarities to the laws on public benefit corporations in the United States. The absence of any reference in the Pacte Law to social and solidarity economy enterprises is evidence of the critical perception of the law by Nicole Notat (President of Vigeo-Eiris, a world leader in environmental, social, and governance analysis, data, and evaluations) and Jean-Dominique Senard (president of the Michelin Group), who were the main authors of the report entitled *L'entreprise objet d'intérêt collectif*, which gave rise to a new legal regulation. It seems worthwhile to transcribe some of the reflections made by these two well-known French entrepreneurs on the advisability of regulating social enterprise formulas outside the scope of social economy:³³

The social and solidarity economy statutes present a high degree of exigency that is unsuitable for all business leaders, some of whom wish to remain as close as possible to a traditional commercial enterprise. It must be possible for there to be enterprises registered in a patient economy that are willing to forgo short-term profits to aim at sustainable value creation, without necessarily having cooperative governance or wage oversight.

For its part, Spain is currently studying how to incorporate social enterprises into its legislation, and the most plausible option, although there are doubts as to how to do it, is to amend *Law 5/2011 on the Social Economy* to broaden the scope of entities that can be considered to form part of the social economy, which is currently limited to the traditional and typical formulas of this type of economy (cooperatives, foundations, labor companies, mutual societies, etc.) and does not include capital companies.³⁴ As early as 2009, in one of the proposals for the drafting of the law made by a group of academic experts,³⁵ “social enterprises” were included in the list of social economy entities, but this mention was finally excluded from the final text of the 2011 law, apparently due to the lack of foresight and maturity at the time of its concept and delimitation.³⁶ Later, the Spanish Social Economy Strategy 2017–2020³⁷ regained interest in the possible framing of social enterprises within

³³Notat and Senard (2018), pp. 8–9.

³⁴Atzela (2020), pp. 129–130. On the various options available to the Spanish legislator, Vargas Vasserot (2021), pp. 137–139.

³⁵Available in Monzón et al. (2009).

³⁶Fajardo (2018), pp. 119 et seq.

³⁷Approved by Resolution of 15 March 2018 of the Secretary of State for Employment.

the framework of the Social Economy Law,³⁸ and work is being done along these lines; however, there are still no legislative results.

3.4 Summary Table of the Analysis of European Legal Systems

Next, at the end of this chapter, the results obtained from the comparative law analysis of the laws of 14 countries that regulate social enterprises in the form of a table will be presented. Table 1 shows the basic characteristics and requirements for a company in order to be recognized as a social enterprise in the different legal systems analyzed, and, as can be seen, there has been little uniformity.

³⁸Measure No. 14: ‘Study of the concept of social enterprise in the Spanish framework and analysis of its possible relationship with the concepts of social enterprise at the European level. The possible implications of the recognition of the concept of social enterprise as defined by the “Social Business Initiative” (Initiative in favor of Social Entrepreneurship) and its framework, if applicable, within the framework of Law 5/2011, on Social Economy, will be analyzed’.

Table 1 Analysis of European legal systems

Countries	Rule/date	Possible legal forms	Activity/social purpose	Governance	Workers	Profit sharing
Finland	SEL/2003	Anyone	WISE		30% vulnerable persons Typical sector salaries	
United Kingdom	SEL/2005	CC	Benefit to the community	Control remuneration administrator		Limit 35%
Slovenia	SEL/2011	Anyone	Social effects	1 member, 1 vote Involvement of workers and other stakeholders in the governing body		Forbidden
Denmark	SEL/2014	Anyone	Social purposes	Involvement of workers and other stakeholders in the governing body		Limit 35%
France	LSE/2014	Anyone	Social utility		Fair salaries	Limit 50%
Romania	LSE/2015	Anyone	Social purposes and general interest		Fair salaries	Limit 10%
Greece	LSE/2016	Anyone	Collective and social benefit	1 member, 1 vote	Salaries similar to those of the sector	Forbidden
Luxembourg	SEL/2016	CC	WISE and/or social or environmental objectives			Limit 10%
Italy	SEL/2017	Cooperative Anyone	General interest		Salaries similar to those of the sector	Limit 50%
Latvia	SEL/2017	CC	Positive social impact	Involvement of workers and other stakeholders in the governing body		Forbidden

Slovakia	SEL/2018	Anyone	Positive social impact	1 member, 1 vote Participation of workers and other stakeholders in the Board		Limit 50%
Bulgaria	SEL/2018	CC	Added social value	Involvement of workers and other stakeholders in the governing body	30% vulnerable persons	Limit 30% or 50%
Lithuania	SEL/2019	Anyone	WISE		30% vulnerable persons Fair salaries	
Belgium	Companies Code/2019	Cooperative	Positive social impact	Voting limit per member		After reservations to specific destinations

SEL social enterprise law, *WISE* work integration social enterprises, *CC* capital company, *LSE* law on social and/or solidarity economy

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The Governance Patterns of Social Enterprises



Two Proposals to Reconcile the US and European Approaches

Giulia Neri-Castracane

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1 Introduction

The rise in popularity of the movement of doing business while achieving a social and economic impact, as part of the social entrepreneurship movement,¹ social innovation,² or business for good,³ has contributed to enlarging the concept of social enterprises (SEs), adding another layer of complexity in the task of defining what an SE is. In reality, mapping SEs is like mapping the stars and constellations in the galaxy.⁴

To draw the limits of this galaxy, scholars have suggested both organizational and sector-specific definitions. The arrival of business-oriented players in SEs has had a notable impact on organizational definitions, which are based on the European Commission's three pillars of SEs: social, economic, and governance dimensions. The growing corporate social responsibility (CSR) requirements imposed on for-profit organizations have also challenged the theoretical basis for a distinction between for-profit and not-for-profit sectors.

The dimension of SE governance deserves more attention. Research has focused on the importance of balancing the economic and social dimensions of "dual" entities⁵ or the involvement of stakeholders in decision-making.⁶ An analysis of how the legislation and existing status have been drafted in that respect is relevant, given the scarcity in research on the implementation of the governance dimension.⁷ Those performed from a legal perspective tend to be limited to the US/UK⁸ or European approach,⁹ without comparing the two.

The present work aimed to propose a legislative and regulatory analysis of the way in which the governance dimension is framed in common and continental law countries with respect to stakeholders' inclusiveness and asset distribution. The goal is to elucidate whether approaches in common and continental law countries can be distinguished and whether distinctions may be reconciled for a way forward in the promotion of the SE movement. The countries selected for this comparative legal analysis are France, Italy, the United Kingdom, and the United States, for the

¹The concepts of "social entrepreneurship" and "social entrepreneur" do not refer to an organization but rather to an approach. If the aim is to drive positive social change, individuals with this mindset do not necessarily want to adhere to the economic dimension of SEs.

²Social innovations refer to new ideas that meet social needs, create social relationships, and form new collaborations.

³Business for Good refers to a movement with a certain vision of the economy and its mission. The moral mission is that of a more sustainable economy. It captures enterprises that do not have a distribution constraint.

⁴Defourny et al. (2021), p. 6.

⁵See Doherty et al. (2014) and Pestoff and Hulgard (2016).

⁶See Diochon (2010), Fazzi (2012), Low (2006), and Kopel and Marini (2016).

⁷See Glerup et al. (2019), Defourny and Nyssens (2017), Pestoff and Hulgard (2016), and Sacchetti and Birchall (2018).

⁸Ebrahim et al. (2014).

⁹Del Gesso (2020).

following reasons. They are (1) countries with a broad approach to SEs, where SEs are not limited to the nonprofit sector but also include legal forms originating from the business sector, (2) countries with economic and political powers and abilities to influence future legislation, and (3) countries that can be considered as leaders in the innovation of SEs. This selection is also representative of the two legal national tendencies in favor of the institutionalization of SEs. France and Italy belong to the countries that have created one or more institutionalized legal forms and dedicated status, whereas the US belongs to the countries having created either a legal form or status.¹⁰ This study focuses only on the legal forms. A similar study for dedicated statuses (e.g. the French *société à mission* or ESUS statuses or the Italian *impresa sociale* or *società benefit* statuses) would be of added value to complete the research. The legal comparison is thus limited to the following legal forms: the US low-profit limited liability company (L3C), benefit corporation,¹¹ UK community interest company (CIC) and community benefit society (CBS), French community interest cooperative (called *société coopérative d'intérêt collectif* (SCIC)), and Italian A-cooperative.

2 Governance Dimension in SEs: Theoretical Background

The concept of governance has evolved drastically over the past decade. Models of governance have been shaped along the distinction between for-profit and not-for-profit sectors. This distinction touches on the organizational structure of these entities. Meanwhile, the increase in CSR-related requirements for for-profit organizations has been a game changer.

2.1 Evolution of the Concept of Governance

The evolution of the concept of governance started as a check and balance administrative framework. Following various scandals in the private sector, notably Enron and WorldCom and the 2008 crisis, a new concept of good governance model has emerged to favor an equilibrium between the economic, societal, and environmental dimensions of the organization.

¹⁰Countries having renounced the creation of any legal form or status are thus not represented but are worth mentioning as an existing category to evince the possibility of growth of the SE movement.

¹¹Social Purpose Corporations and the Californian Flexible Purpose Corporation are not mentioned as they are less strict versions of benefit corporations in terms of social purpose and social contribution.

Within this perspective, the governance concept was thus defined as “the purposeful effort to guide, steer, control, or manage (sectors or facets) of societies,”¹² “the relationship among various participants in determining the direction and performance of corporations,”¹³ or even “the holding of the balance between economic and social goals and between individual and communal goals.”¹⁴ Put differently, governance is the framing of the exercise of power for the close alignment of the interests of individuals, corporations, and society, resulting in an economic necessity, political requirement, and moral imperative.¹⁵ Governance thus opens the possibilities of a sustainable equilibrium between diversified and divergent interests.¹⁶

This evolved notion of governance touches all sectors and organizations, even those far beyond the for-profit world.¹⁷ Thus, it is also true for SEs, which blend economic and social goals.¹⁸

2.2 *Social Enterprise Governance Theories*

Literature on SE governance identifies three main theories:¹⁹

- **Stakeholder approach:** within the stakeholder theory, an organization has responsibilities toward many stakeholders, beyond the shareholders.²⁰ Consequently, a governance structure should be modeled to determine appropriate stakeholder management. A stakeholder approach does not impose nor prevent stakeholder participation at the board level. Measurement processes are also of utmost importance to ensure appropriate and effective stakeholder management. Directors must be held accountable for their decisions, which should be made after the integration of stakeholders’ interests. Accountability is demanded by several stakeholder groups.²¹ This may be achieved through inclusive and democratic board elections. Stakeholders’ interests may be integrated into the decision-making process either by representation at the board level or consultation (e.g., advisory board, interviews).

¹²Kooiman (1993), p. 2.

¹³Monks and Minow (1995), p. 1.

¹⁴Cadbury (2003), p. VI.

¹⁵Charkham (1994), p. 366.

¹⁶Neri-Castracane (2016), p. 45.

¹⁷Low (2006), p. 376.

¹⁸Borzaga and Defourny (2001), p. 350.

¹⁹Mason et al. (2006).

²⁰Freeman and Reed (1983) and Donaldson and Preston (1995).

²¹Sternberg (1997).

- **Stewardship approach:** SEs are mainly viewed as stakeholder organizations.²² They are described as organizations owned by the community as a whole²³—that is, organizations whose assets are held in trust in the community.²⁴ The stewardship approach assumes that managers and directors are trustworthy and have a sincere intention to pursue the interests of the organization as a whole.²⁵ This relationship of trust provides the theoretical justification for any asset lock or distribution constraint rules,²⁶ as well as board composition. In this approach, inclusive representation at the governing body level is not necessary, given that the governing body carries “skills set that can more effectively manage the entire operation.”²⁷
- **Institutional approach:** within this approach, the governance structure is aligned with the concepts of citizenship, participation, and legitimacy.²⁸ An organization is not an economy but rather an entity that is adaptable to social systems.²⁹ The structure becomes an echo of the expected social behavior. The institutional values of an organization influence the construction and maintenance of the same organization.³⁰ The constituent values provide the theoretical justification for any asset lock or distribution constraint rules³¹ as, within a legitimacy perspective, assets are used by those for whom the organization (here the SE) was created.³² The same is true for board composition from the perspective of democratic value. From this perspective, the board should be modeled as a democratic participation tool.³³ The issue is no longer about a board made of persons elected for their competencies deciding, in a balanced way, how to allocate the profits, per the original stakeholder theory³⁴ or stewardship theory.³⁵ The organizational structure echoes the democratic nature: the board is composed of representatives of the stakeholders, independent of their competence. With the same democratic aim, the assets are locked in to prevent shareholders from having a claim on them. As Suchman³⁶ put it, organizational structure leads to organizational legitimacy.

²²Low (2006), p. 379.

²³Pearce and Hopkins (2013), p. 284.

²⁴Dunn and Riley (2004), p. 633.

²⁵Davis et al. (1997), pp. 24–25.

²⁶Dunn and Riley (2004), p. 645.

²⁷Mason et al. (2006), p. 290.

²⁸Parkinson (2003).

²⁹Mason et al. (2006), pp. 291–292.

³⁰Berger and Lukmann (1966) and Silverman (1971).

³¹Dunn and Riley 2004, p. 645.

³²Mason et al. (2006), p. 295.

³³Low (2006), p. 378.

³⁴Freeman (1984).

³⁵Donaldson and Davis (1991).

³⁶Suchman (1995), p. 571.

2.3 *CSR Paradigm and Theoretical Implications for SE Governance*

CSR-related requirements represent a new paradigm in corporate governance. These CSR rules require a sustainable and community-oriented approach, which bears a direct impact on the governance process and board members' fiduciary duties. The new CSR paradigm is both the fruit and seeds of a new approach to corporate governance, and CSR requirements have led to the integration of democratic governance features. Societal expectations must be integrated into managerial decisions. Societal interests are voiced during the decision-making process. The concepts of separation of powers, representation (notably, diversity), and transparency have been used to shape the new corporate governance model.³⁷ CSR-related requirements have thus brought a democratic dimension to corporate governance, as well as a proactive citizenship reality. The latter is mainly permitted through transparency and disclosure requirements. Environmental, social, and governance (ESG) factors, namely, identification and impact measurement, impose a new form of mandatory stakeholder participation. Stakeholder implications arise not from a direct presence at the board level but from the board's consultation processes (which are increasingly mandatory) as well as from stakeholders' voices as investors, consumers, or contractors. Disclosure and transparency are supposed to render any organization responsive and allow citizens to engage in the governance process, so long as the data are understandable and comparable. Transparency is a means of citizen engagement and a component of stakeholders' implication process. For instance, for the AA1000 standard, the leading methodology for sustainability-related assurance engagements, stakeholder involvement is performed by identifying, understanding, and responding to issues and concerns regarding sustainability as well as through reporting, explaining, and being available to answer to stakeholders concerning the entity's decisions, actions, and performance.

The CSR paradigm and related concerns have helped reshape theories in favor of a major integration of stakeholders into the organization and into the decision-making process. This is true for business theories. The team production model of Blair and Stout³⁸ (as renewed), the coproduction model of Pestoff,³⁹ and Creating Shared Value of Porter and Kramer⁴⁰ share a new partnership vision of society's actors. This is also true at the state and institutional levels. These new corporate governance theories are aligned with the spread of network society⁴¹ and new public governance.⁴² The cocreation and community-oriented approach has also been set as

³⁷ Gomez and Korine (2005), p. 741.

³⁸ Blair and Stout (1999).

³⁹ Pestoff (2012).

⁴⁰ Porter and Kramer (2011).

⁴¹ Hartley (2005).

⁴² Osborne (2006, 2009).

a priority goal at the global level with UN Agenda 2030 and SDG 17 dedicated to partnership. Thus, a form of democratic dimension has pervaded the corporate governance model through CSR. CSR requirements have, to a certain extent, transformed for-profit organizations into SEs.

The new CSR paradigm raises the question of what type of stakeholder participation is required to qualify as an SE. Is it stakeholders' involvement or inclusion? Stakeholders' inclusion is more than the process of involving stakeholders in decision-making. Stakeholders' inclusion requires stakeholders to participate in identifying problems and contribute to the management of solutions in organizations. It consists of cooperation at all levels. The AA1000 standard suggests that an organization should establish a governance framework to achieve better results. The second related question is what kind of stakeholder empowerment is required to qualify as an SE. Stakeholder empowerment may result from the right to a voice based on the organization's reported results, a voting right, and/or a presence at the governing body level (with or without voting rights).

2.4 Main Governance Challenges of SEs

The main governance challenges of SEs relate to (1) membership/stakeholder representation, (2) the balance between social and business goals and the related risk of mission drift, and (3) board recruitment.⁴³ SEs are a type of hybrid reality between traditional not-for-profit entities and traditional for-profit entities. This hybrid reality generates challenges, even as the CSR movement has made stakeholders' representation a challenge for traditional for-profit entities.

The purpose of traditional business firms is to create value for their owners or shareholders. In contrast, the purpose of charitable organizations is to serve the public rather than private interests.⁴⁴ Given this difference in their purpose, accountability and success measurements are also different. Within business firms, accountability centers on financial performance, and within charitable organizations, on protecting the social mission—exercising care, loyalty, and obedience in serving the social purpose of the organization.⁴⁵ Success is defined in terms of progress toward the social mission, even if success measurement is complicated by a lack of common standards or benchmarks for social performance measurement, along with the general difficulty of comparing social performance across organizations.⁴⁶ This hybrid reality challenges the importance given to the social mission, be it in terms of inclusion of stakeholders (at the board level or in terms of voting rights) or in terms of the predominance of the social mission in case of misalignment of the two

⁴³Spear et al. (2007), p. 22; Ebrahim et al. (2014), p. 82.

⁴⁴Fremont-Smith (2004), p. 3; Hansmann (2000), p. 228.

⁴⁵Chisolm (1995); Fremont-Smith (2004), p. 198.

⁴⁶Ebrahim and Rangan (2014).

Table 1 SE dilemma on the misalignment of purposes

Low social profit/high financial profit?	High social profit/high financial profit? Always
Low social profit/low financial profit? Never	High social profit/low financial profit? Yes

purposes. The board shall solve the dilemma of making a decision that could result in a high financial profit but low social profit and/or high social profit and low financial profit. This situation renders board recruitment a challenging task and raises the question of representation of stakeholders (notably in favor of the social mission) at the board level. On the merits, the dilemma remains a question of the predominance of one purpose in case of misalignment of the two. Table 1 summarizes the dilemma. The difference between an SE and a CSR-oriented enterprise is the predominance of the social purpose in case of conflicts.

2.5 Selected Governance Criteria

The main challenges of SEs are echoed by the following governance criteria within the approach of the EMES International Research Network, which supplement the three pillars of social, economic, and governance dimensions that support the ideal type of SEs proposed by the European Commission:⁴⁷

- **A high degree of autonomy** (i.e., management independent of public authorities or other organizations): this is mainly relevant to organizations related to the state
- **A participatory nature**, or involving persons affected by the activity⁴⁸
- **A decision-making process not based on capital**: reference is usually made to the *one member, one vote* principle,⁴⁹ and
- **A limited profit distribution**

Not everyone considers the last two criteria as governance criteria.⁵⁰ Some scholars treat these as social features.⁵¹ The present study considered them as governance patterns. Governance is a tool that guarantees accountability and compliance with the purpose. It is also about balancing the interests of the organization's stakeholders, which in turn guarantees accountability to all stakeholders. The decision-making process primarily helps balance the interests of the organization's stakeholders, whereas the way profit is treated and restrictions on its use are shaped

⁴⁷The three pillars of the European Commission have a total of nine criteria.

⁴⁸Defourny and Nyssens (2012), p. 14.

⁴⁹*Ibid.*, pp. 14–15.

⁵⁰Of this opinion, Gleerup et al. (2019), p. 5.

⁵¹For instance, Defourny and Nyssens (2012), p. 14 described the limited profit distribution as a social criterion.

help determine the purpose of the organizations and limit the freedom of board members. Nonprofit charities are typically subject to legal prohibitions on distributing their profits and assets and are thus prevented from any form of equity financing or ownership that would compromise their public purpose for private gain.⁵² Meanwhile, business organizations are characterized by important freedom in profit allocation. This freedom goes beyond profit allocation and covers asset allocation and dissolution distribution. The way these distribution constraints are managed and legally framed is thus of interest when distinguishing SEs from standard for-profit and not-for-profit entities. It is a matter of organizational governance that ensures the overall direction and accountability of the organization.⁵³

3 Governance Dimension in SEs: Legal Comparative Implementation

To compare the legal implementation of the SE governance dimension, this study focused on EMES criteria, considered here as governance features (see Sect. 2.3), with the following approach:

- Autonomy is analyzed in terms of public authority participation.
- Participatory nature is translated as the representation of stakeholders at the governing body level and if a reporting duty is imposed as a supplemental or additional means for securing stakeholders' interests.
- The decision-making process not based on capital is analyzed through the access, type of members, and voting rights under selected legal forms of SEs.
- The limited profit distribution constraint lens is enlarged to cover any distribution constraint on profit, asset, and dissolution.

3.1 *Autonomy*

Among the analyzed SE legal forms, only the French SCIC provides for the participation of state and public authorities. That said, the French SCIC, inspired by the cooperative model, stipulates that public authorities, their groupings, and territorial public establishments may not hold more than 50% of the capital of each of the cooperative societies of collective interest.⁵⁴ Considering the limitations of this public participation, the French SCIC shall be viewed as an autonomous legal form.

⁵²Brakman Reiser (2010), p. 20; Fishman (2003), p. 79.

⁵³Cornforth (2014), p. 2.

⁵⁴*Ibid.*

Table 2 Representation in governing body and transparency

	Representation in governing body	Transparency (report)
US L3C/benefit corporation	No/no	No/yes
UK CIC/CBS	No/no	Yes/no
French SCIC	No	Yes
Italian A-cooperative	No	Yes

Regarding the UK CBS, Italian A-cooperative, US L3C, US benefit corporation, and UK CIC, all benefit from a high degree of autonomy.

3.2 Representation at Governing Body Level vs. Disclosure

In the SE laws under review, there is no legal requirement for the inclusion of stakeholders in the governing body. However, a reporting duty is typically imposed and includes an explanation as to how the SE's purpose (or benefit to the community) is carried out. This does not apply to US L3C and UK CBS, as the former has no reporting duty and the latter, a limited one on returns and accounts (i.e., no report on how the benefit for the community is achieved). Table 2 summarizes the findings of the legal comparative analysis on these aspects of the democratic governance dimension of SEs.

3.2.1 L3C

L3C is not required to include noninvestor stakeholders at the governing body level. States do not require L3Cs to register and provide annual financial reports.⁵⁵

3.2.2 US Benefit Corporation

The board is responsible for ensuring that the dual purpose—the general and more specific public benefits—are pursued. There is no requirement for the representation of stakeholders at the board level.

All benefit corporations are required to create a benefit report to be made available to the public and assessed by a third-party standard (except in Delaware, where the release of the report to the public or the use of a third-party standard as an assessment

⁵⁵Pearce and Hopkins (2013).

tool is not mandatory). The standards for reporting and assessing the public benefit and positive impact are set by these independent third parties, such as B Lab and the Global Reporting Initiative.⁵⁶ There is no requirement for certifications or audits.

Some states require that a benefit director be designated to prepare the benefit report. This report will include the benefit director's view on whether the corporation has successfully pursued its benefit.

3.2.3 UK CIC

A transparency requirement is imposed on CICs.⁵⁷ A CIC shall complete its annual report with a regulator, which makes it available for public scrutiny.⁵⁸ The director's pay (aggregate and highest values), how the community benefit is achieved, how stakeholders are involved, the dividend paid, and any information on asset transfer must be reported.

The stakeholders' involvement is part of the "community interest test" that is verified by the regulator. The latter may alter the board composition if they consider that the test is not fulfilled.⁵⁹ The stakeholders' involvement requirement does not impose a representation at the board level. The involvement may be performed through meetings, consultations, advisory boards, committees, or online surveys. In sum, "CIC includes provisions for gathering stakeholder input towards community interest test, but there is no requirement for empowering stakeholders other than investors."⁶⁰

3.2.4 Italian A-Cooperative

Since the end of 2017, all Italian cooperatives have had a board of directors composed of at least three directors elected for a maximum term of 3 years.⁶¹ The deed of incorporation or bylaws may provide that one or more directors be chosen from the pool of members from the various categories of members. The appointment of one or more directors may be assigned by the articles of association or bylaws to third sector entities (ETS) or nonprofit ones, to civilly recognized religious entities, or to workers or users of the entity.

⁵⁶Brakman Reiser (2011) and Olson (2011).

⁵⁷The Community Interest Company Regulations 2005, Section 26.

⁵⁸Companies (Audit, Investigations and Community Enterprise) Act 2004, Section 34(2).

⁵⁹Ebrahim et al. (2014), p. 92.

⁶⁰*Ibid.*

⁶¹Legge n. 205/2017 (art. 2542 Codice civile).

Since 2021, ETS, which include A-cooperatives, have been required to publish their social report⁶² based on certain guidelines.⁶³ The social report must be published on the institutional website of the organization and filed by June 30 of the following year with the Single Register of the Third Sector. The social report is conceived as a public document addressed to all stakeholders (from internal ones, such as workers or volunteers, donors, institutions, recipients of services, citizens of the territory in which the organization operates); it must provide useful information for the stakeholders to assess the extent to which the organization considers and pursues its objectives.

The guidelines identify the minimum content that each social report must contain. In brief, a social report of an A-cooperative must include the following:

- General information on the organization: name, territorial area and field of activity, mission, relations with other organizations, and information on the reference context.
- Governance information: data on the social base and direct and control bodies, aspects related to internal democracy and participation, and identification of stakeholders.
- Information on people: consistent and detailed data on workers and volunteers, work contracts adopted, activities carried out, compensation structure (including data on pay differentials, documenting that the highest pay is not more than eight times higher than the lowest), and reimbursement methods for volunteers. Specific forms of disclosure are provided for compensation to directors and officers.
- Information on activities: quantitative and qualitative information on the activities carried out, the direct and indirect recipients, and, as much as possible, the effects, indicating whether the planned objectives have been achieved and the factors that have facilitated or made it difficult to achieve them. This should include factors that threaten to undermine the organization's goals and actions taken to counteract the same.
- Economic and financial situation: data on resources separated by public and private sources, information on fundraising activities, any critical management issues, and actions taken to mitigate them.
- Other information: litigation, environmental impact (if applicable), information on gender equality, respect for human rights, and prevention of corruption.

3.2.5 UK CBS

There is no requirement for the representation of stakeholders in the governing body. CBSs are listed on the Financial Conduct Authority (FCA) website on the Mutuals Public Register. As such, they shall issue an annual report on returns and accounts.

⁶²Decreto legislativo 112/2017, Art. 9(2).

⁶³Decreto del 4 luglio 2019.

Table 3 Membership and voting rights

	Membership provisions	Influence beyond capital contribution (<i>one person, one vote principle</i>)
US L3C/benefit corporation	No/no	No (in practice, even more influence given to the senior tranche)/no
UK CIC/CBS	No/no	No/yes
French SCIC	Yes (limitation on public authorities' participation and three categories of members)	Yes (within colleges; each college may receive a different percentage in the general assembly vote)
Italian A-cooperative	Yes (three categories of members)	Yes (with exceptions)

This report is not similar to a CIC benefit report: it does not include any information on how the community benefit is achieved or on financial aspects for the pursuit of the community benefit (except the highest interest rate paid on shares).

3.2.6 French SCIC

An SCIC is managed by one (or several) manager(s), who can be chosen either from among the members or from outside the SCIC. SCICs must include in their annual management report, in addition to the inventory and annual accounts, developments in the cooperative projects carried out by the company.⁶⁴ The report also serves the review that is conducted every 5 years by a qualified auditor of the SCIC cooperative management.

3.3 Membership and Voting Rights

French SCIC and Italian A-cooperative laws impose three different categories of membership. The voting rights in the decision-making process show a clear trend between the legal forms inspired by the cooperative form and the other legal forms inspired by for-profit ventures. UK CBSs, French SCICs, and Italian A-cooperatives apply the *one person, one vote* principle, whereas US L3Cs, US benefit corporations, and UK CICs have voting rights based on capital. Table 3 summarizes the findings of the legal comparative analysis on the membership and voting rights aspects, as democratic governance tools.

⁶⁴Décret n° 2015-1381 du 29 octobre 2015° 47-1775. Art 19 terdecies.

3.3.1 L3C

L3Cs offer the flexibility of tranche investing in three tranche categories. The equity tranche contains investors (notably, investors applying the Principles for Responsible Investment (PRI)) accepting a low financial return while assuming a high risk to fund a specific social cause. Equity tranche investors give priority to creating a positive impact and take the risk of loss. These investors may be compared to venture capitalists or, more accurately, to venture philanthropists.

The mezzanine tranche includes investors accepting a low or even no financial return for doing social good. It offers modest financial returns. Dividends received by mezzanine tranche investors are below market rates.⁶⁵

The senior tranche contains investors seeking a market rate of return on their investment. This is made possible by a different risk allocation key, that is, between the three tranches and a greater assumption of financial risk by the other two tranches. The first tranche allows the L3C to attract investors in the next two tranches, which might otherwise find the social venture too risky.⁶⁶

In principle, voting rights are based on capital, without distinction between tranches. In practice, voting rights may differ as many L3C rules may be amended by membership agreements. A membership agreement may thus contain qualified voting rights, veto rights, and approval requirements in favor of investors of a certain tranche, especially the senior tranche.⁶⁷ Investors of the senior tranche may push to include in the membership agreement a right to be paid before the investors of the other two tranches.

3.3.2 US Benefit Corporation

The decision-making process of benefit corporations is based on capital. The decision-making process shall however fulfill the dual purpose, including thus the social mission. Stakeholders' interests, such as those of communities, society and the environment shall be considered from the outset to identify the social mission that goes hand in hand with the commercial purpose, to obtain the benefit corporation status.⁶⁸ For directors, the existence of a dual purpose for the company means that they have, under their duty of care, to consider the impacts of their decisions on a broader array of stakeholders rather than on only the interests of the shareholders. Board directors shall find a balance between the for-profit purpose and the public benefit purpose of the corporation.

⁶⁵Ebrahim et al. (2014), p. 92; Brakman Reiser (2010), p. 8.

⁶⁶Pearce and Hopkins (2013), p. 279.

⁶⁷*Ibid.*

⁶⁸Eldar (2014), p. 186.

3.3.3 UK CIC

Members of a CIC are shareholders who can elect or remove directors. Thus, voting rights are based on capital. Nonetheless, contrary to traditional private companies, CIC directors have the primary responsibility of implementing the social purpose of the company, monitored by its shareholders and regulatory authorities.

3.3.4 UK CBS

CBSs can issue share capital, provided the return to holders of shares is limited. This is comparable to the UK CIC. A CBS can issue withdrawable shares (up to GBP 100,000 per individual, with only a reasonable rate of coupons payable on that capital, with exceptions).⁶⁹ Thus, the holder of these shares may realize the value of the shares (which are not transferable, contrary to the shares of a typical for-profit company) by withdrawing the money held in their shares from the company. There are associated advantages (such as exemptions to regulated activity and financial promotion prohibitions under the Financial Services and Market Act 2000) and related restrictions (such as running a business of banking). Voting rights are exercised according to the *one person, one vote* principle, independent of the number of shares held by each person.

3.3.5 French SCIC

French law imposes three categories of members for a SCIC, each having a different relationship to the cooperative's activities. This minimum triple category mandatorily includes the beneficiaries of the goods or services (e.g., customers, suppliers, inhabitants) and the employees of the SCIC (or, in the absence of employees, the producers of the goods or services). Membership is open to any natural or legal person under private or public law.⁷⁰

Members vote according to the *one person, one vote* principle. An SCIC may create (by inserting a specific provision in the bylaws) voting colleges to count the votes during the general assembly of SCIC members. Each voting college shall apply the *one person, one vote* principle, but the percentage allocated to each subtotal "voting college" may differ. The percentage may range between 10% and 50% of the votes in the general assembly.⁷¹ The voting colleges should neither be a governance body nor be a part of the organization of an SCIC. The bylaws of an

⁶⁹ Cooperative and Community Benefit Societies Act 2014, Section 24.

⁷⁰ Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération. Art 19 septies.

⁷¹ *Ibid.* Art. 19 octies.

SCIC may also create specific shares with priority interest but without voting rights.⁷²

3.3.6 Italian A-Cooperative

A minimum of three members is required (a small cooperative has up to eight members).⁷³ Under the Italian Civil Code, cooperatives can create different categories of members. As a social cooperative, the Italian A-cooperative may have three kinds of members: (1) ordinary members participating in the mutualistic nature of the cooperative, (2) user members (unpaid), and (3) volunteers.⁷⁴ The number of volunteer members may not exceed 50% of the total number of members. The bylaws may also create other categories of investing (holders of assignable shares) and financing members (holders of participation shares).⁷⁵ As a matter of principle, Italian A-cooperatives adhere to the traditional *one person, one vote* principle.⁷⁶

However, an exception to this principle may be made for legal entity members.⁷⁷ Bylaws may attribute more votes in the assembly to certain members. In any event, voting capacity may not be increased to more than five votes per person. A person may not get more votes than the other remaining votes (e.g., if there are five members, including one legal entity, the legal entity may not have more than four votes attributed to it).⁷⁸

A further exception may also be allowed by the bylaws: i.e., in favor of cooperative members who achieve the mutualistic purpose through the integration of their respective enterprises.⁷⁹ In such cases, those benefitting from multiple votes may not use their votes for more than 10% of the total voting rights and not more than one-third of the present or represented voting rights.

3.4 Distribution Constraints

Laws regulations SEs impose asset and profit distribution constraints with various approaches. Their differences merit close scrutiny, and trends cannot be identified without taking a bird's-eye view of such differences. From a schematic perspective, the country's position on the globe seems to make a more significant difference in

⁷² *Ibid.*, Art. 11 bis.

⁷³ Legge n. 266/1997, Art. 21.

⁷⁴ *Ibid.*, Art. 2.

⁷⁵ Legge n. 59/1992, Art. 4 and 5.

⁷⁶ Codice Civile, Art. 2538 para. 2.

⁷⁷ *Ibid.*, Art. 2538 para. 3.

⁷⁸ Mosconi (2019), p. 4.

⁷⁹ Codice Civile, Art. 2538 para. 4.

Table 4 Distribution constraints

	US L3C/benefit corporation	UK CIC/CBS	France SCIC	Italy A-cooperative
<i>Dividend distribution constraint</i>	No/no	Yes/yes	Yes	Yes
<i>Allocation of asset/profit distribution constraint</i>	No/no (per dual purpose but no fixed percentage)	Yes/yes (not to members)	Yes	Yes
<i>Dissolution allocation constraint</i>	No/no	Yes/yes (optional)	Yes	Yes
<i>Transfer of asset constraint</i>	No/no	Yes/yes (not to members)	Yes	Yes

this debate compared with the relevant legal form. Put differently, SE legal forms resulting from a twisted version of a cooperative are not the only ones that can include asset distribution constraints, given the case of the UK CIC legal form.

This study identified US and European (from a geographical perspective) trends when it comes to asset distribution constraints. Table 4 gives the summary of the results of the legal analysis. All European SE laws under review impose an asset distribution constraint covering four aspects. Meanwhile, US legal forms do not restrict the use of assets and their transfer beyond the companies’ social purpose.

3.4.1 L3C

The regulation of L3Cs’ is based on the principles of self-regulation and self-financing. Therefore, there are no mandatory distribution constraints (whether on dividends, profits, or assets and whether at dissolution or at the time of transfer). Members are free to set constraints in the membership agreement.

3.4.2 US Benefit Corporation

There are no distribution constraints. Ebrahim, Battilana, and Mair concluded that “the strength of the benefit corporation legal status in enabling dual performance stands on its requirement that a company amend its charter to specify social and environmental interests.”⁸⁰

3.4.3 UK CIC

A CIC’s assets are regulated through a system called asset lock, which was put in place to ensure that the CIC uses its assets and profits for the community’s benefit. It

⁸⁰Ebrahim et al. (2014), p. 86.

gives reassurance to investors, who want to ensure that the CIC continues to run its business and social operations. Asset lock means that the CIC's assets must be retained within the CIC to be used for the purposes for which the company was formed. If the assets are transferred out of the CIC, the transfer must satisfy one of the following requirements (to be included in the bylaws):

- It is made at full market value so that the CIC retains the value of the assets transferred.
- It is made to another asset-locked body (a CIC or charity, a registered society, or a non-UK-based equivalent) that is specified in the CIC's bylaws.
- It is made to another asset-locked body with the consent of the regulator.
- It is made for the benefit of the community.

CICs can also adopt asset lock rules that impose more stringent requirements, provided they also include the basic provisions mentioned above. The prohibition for the CIC's assets to be returned to its members, with the exception of the return of paid-up capital on liquidation and payment of dividends is part of the asset lock. According to statute, dividends may only be paid if they are authorized by the regulator. After the regulator approves a dividend payment, there are still three important restrictions:

- The dividend may not exceed 5% of the Bank of England base lending rate of the paid-up value of a share.
- The aggregate dividend cap is set at 35% of distributable profits.
- Unused dividend capacity can only be carried forward for 5 years.

The dividend restrictions and asset lock indicate that investors are only given rights to limited dividends and are not given access to the full profits of the CIC.⁸¹

3.4.4 UK CBS

CBSs may or may not adopt statutory asset locks.⁸² If a statutory asset lock is adopted, it shall be unalterable.⁸³ If it is not adopted, the CBSs not adopting it are required by the FCA to have rules preventing the distribution of profits or assets to its members. The statutory asset lock of CBSs is similar to that of CICs. Assets shall be used for the CBSs' purpose or, alternatively, for purposes that benefit the community. The transfer of assets is permitted only to other asset-locked bodies (namely, CBSs with restriction, CICs, charities, registered social landlords with restrictions on the use of assets, or equivalent bodies).⁸⁴ Payments to members are also prohibited,

⁸¹Pearce and Hopkins (2013), p. 286.

⁸²Co-operative and Community Benefit Societies Act 2014, Section 29 to be read with The Community Benefit Societies (Restriction on Use of Assets) Regulations 2006.

⁸³The Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, Part. 3 (7).

⁸⁴*Ibid.*, Part. 2(3) and Part 3(6)(b).

with the exception of the return of the value of the withdrawable share capital or the interest of such capital.⁸⁵ With regard to the interest on capital, there is no minimum guaranteed, and returns can be paid in cash or kind.

The withdrawal of withdrawable shares (which may not exceed GBP 100,000 per individual member)⁸⁶ is at the directors' discretion, provided there is enough cash available. The value of the shares is fixed (par value) and not subject to speculation. In the case of liquidation or winding up, assets may be used to pay creditors, and the balance, if any, shall be distributed to qualified entities.

The statutory asset lock allows CBSs to qualify for a social investment tax relief. However, it does not allow conversion into a charitable CBS, whereas the voluntary asset lock does.

3.4.5 French SCIC

SCICs must allocate at least 50% of their profits to the statutory mandatory reserve (so-called development fund)⁸⁷ and a minimum of 15% of their profits to the mandatory reserve.⁸⁸ They must also allocate at least 57.50% of their profits to nonshareable reserves. This allocation can reach 100%. The remainder can be served in the form of annual interest to the shares, the rate of which is capped according to the average rate of return on private company bonds calculated over the 3 calendar years preceding the date of their general meeting, plus two points.

SCIC bylaws may create nonvoting priority interest shares. It is also possible to create redeemable profit-sharing securities (if an SCIC takes the form of a company by shares or a limited liability company) or cooperative investment certificates. The first are redeemable only in the event of the liquidation of the company or, at its initiative, at the end of a period not less than 7 years and under the conditions provided for in the contract of issue⁸⁹ (Cf. article 228-36 C. com). Cooperative investment certificates are nonvoting securities redeemable at the time of the liquidation of the cooperative and are remunerated in the same way as the interest on the shares.⁹⁰

Retained assets are to be distributed to qualified entities. When a member leaves the SCIC, they may obtain only the nominal value of its shares.

⁸⁵ *Ibid.*, Part. 3 (6) (a).

⁸⁶ Co-operative and Community Benefit Societies Act 2014, Section 24.

⁸⁷ Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération, Art 19 nonies.

⁸⁸ *Ibid.*, Art 16.

⁸⁹ Code de commerce, Art. 228-36 C.

⁹⁰ Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération. Art 19 sexdecies to 19 dovicies.

3.4.6 Italian A-Cooperative

For ETS, assets and any profits must be used exclusively for activities in pursuit of civic, mutualistic, and socially useful purposes.⁹¹ As an exception to the prohibition of asset distribution, SEs, and thus Italian A-cooperatives (which are a specific group of ETS), can redistribute profits within certain limits. At least 50% of their profits shall be allocated to carry out their statutory activities or to increase their assets (this part is not subject to taxation). For SEs in the form of a company, this limited distribution of profits can occur:⁹²

- In the form of revaluation or an increase in the shares paid by the shareholder in cases of free capital increase regulated by law. According to the regulations, the SE can allocate a quota of less than 50% of the annual profits and of the management surplus (after deducting eventual losses accrued in the previous years, to a free increase of the capital), within the limits of the variations in the annual general national index of consumer prices for families of workers and employees, calculated by the National Institute of Statistics for the period corresponding to that of the fiscal year in which the profits and management surplus were produced. In this case, the shareholder retains the right to reimbursement of the share thus increased.
- In the form of a limited distribution of dividends to shareholders, including by means of a free share capital increase or the issue of financial instruments, which may not exceed the maximum interest rate on interest-bearing postal savings bonds, increased by two and a half points in relation to the capital paid up.

Moreover, SEs are allowed to allocate any profits and operating surpluses to purposes other than carrying out statutory activities or increasing assets. In particular, they can allocate⁹³ the following:

- A share of less than 30% of the profits and of the annual management surplus (after deducting possible losses accrued in the previous financial years) to free donations in favor of ETS other than SEs, which are not founders, associates, partners of the SE, or companies controlled by it, aimed at promoting specific projects of social utility.
- A share not exceeding 3% of the annual net profits (net of losses accrued in previous years) to funds for the promotion or development of SEs set up by the Fondazione Italia Sociale or other bodies. This share is specified as mandatory for social cooperatives (such as A-cooperatives).

In addition, social cooperatives may distribute transfers to members, provided that the methods and criteria for distribution are indicated in the articles of association or deed of incorporation. The distribution of transfers to members also needs to

⁹¹Decreto 112/2017, Art. 3 para. 1.

⁹²*Ibid.*, Art. 3 para. 3.

⁹³Codice Civile, Art. 2545 quarter.

be proportional to the quantity or quality of mutual exchanges. A mutual management surplus must be ensured.

As for any ETS, the indirect distribution of profits and management surpluses, funds, and reserves to founders, associates, workers and collaborators, administrators, and other members of the social bodies is prohibited. This applies also in case of withdrawal from the company or individual dissolution. The following are deemed indirect distributions of profits:⁹⁴

1. Payment to directors, auditors, and anyone who holds corporate offices of individual remuneration that is not proportional to the activity carried out, responsibilities assumed, and specific competences, or in any case higher than that envisaged in bodies operating in the same or similar sectors and conditions
2. Payment to subordinate or self-employed workers of salaries or remuneration 40% higher than those provided for, for the same qualifications, by collective agreements, except in the case of proven requirements relating to the need to acquire specific skills for the purposes of carrying out activities of general interest, such as health care interventions and services, university and post-university training, and scientific research of particular social interest
3. The purchase of goods or services for consideration that exceeds their normal value, without valid economic reasons
4. The supply of goods and services, at conditions more favorable than market conditions, to members, associates or participants, founders, members of administrative and control bodies, those who work for the organization or are part of it in any capacity, individuals who make donations to the organization and their relatives within the third degree and relatives-in-law within the second degree, as well as companies directly or indirectly controlled or connected by them, exclusively on account of their position, unless such transfers or services do not constitute the object of the activity of general interest
5. Payment to parties other than banks and authorized financial intermediaries of interest expense, in relation to loans of all types at four points above the annual reference rate. The aforementioned limit may be updated by the decree of the Minister of Labour and Social Policies, in agreement with the Minister of Economy and Finance

In the event of extinction or dissolution, the residual assets are devolved, subject to the positive opinion of the “competent structure” of the Single National Register of the Third Sector (RUNTS), and unless otherwise required by law, to other ETS in accordance with the provisions of the bylaws or a competent social body or, failing that, to the *Fondazione Italia Sociale*.⁹⁵ The deeds of devolution of residual assets carried out in the absence of or contrary to the RUNTS’s opinion are null and void.⁹⁶

⁹⁴Decreto 112/2017, Art. 3 para. 2.

⁹⁵Codice del Terzo Settore, Art. 9.

⁹⁶*Ibid.*

4 Key Comments from the Legal Comparison

The key comments resulting from the comparative analysis of the governance structuration of the legal forms of SE under review are the following:

1. **From a very high-level perspective, the study identified US- and European-structured approaches to SEs.** US legal forms do not entail distribution constraints, whereas European ones do. All legal forms under review have a stakeholders' participation tool. However, contrary to US legal forms, in all European countries under review, SEs have a mandatory governance tool to secure stakeholders' participation (see item 3 below).
2. **A closer look revealed no uniform patterns in membership and voting rights, representation in the governing body, and distribution constraints.**

For instance, at the distribution constraint level, French SCIC law imposes that a maximum of 32.5% of all profits are redistributable, whereas with regard to UK CICs, dividends may reach a total maximum of 35% of the redistributable profits. For the UK CIC, unused amount may be carried forward for 4 years, allowing a reinvestment of earnings during the initial and maturity years and allowing larger dividends to be distributed in later years to shareholders.⁹⁷ This possibility does not exist in French SCICs and Italian A-cooperatives.

3. **No legal form under review *directly* mandates the inclusion of stakeholders at the governing body level. Stakeholders' participation and empowerment go from mere involvement in the decision-making process to quasi-inclusion.** Overall, US benefit corporations and UK CICs ensure stakeholder involvement during the decision-making process through consultation, notably when deciding how to pursue the community benefit purpose. UK CICs have a duty to report annually on how the benefit to the community was achieved, how stakeholders were involved, and which dividend payments or asset transfers occurred. Stakeholders' participation goes a step further in UK CBSs, with the decision-making process not based on capital. That being said, stakeholder involvement is a democratic participation tool emptied of its substance in the absence of a full information report that would allow members to identify problems and exercise their vote as active citizens. Therefore, the UK CBS probably achieves stakeholder involvement rather than stakeholder inclusion. French and Italian cooperatives are the forms that come closest to stakeholder inclusion. They achieve indirect stakeholder inclusion at the governing body level, given that they impose three categories of members who vote at the general assembly and elect the governing body.
4. **The reporting duty is considered by legislators as a governance tool and a stakeholder involvement tool.** It allows the organization to be accountable and the stakeholders to be provided with all necessary information to use their voice. This is seen as a participation and legitimacy tool. However, the style and content

⁹⁷The Community Interest Company Regulations 2005, Section 20.

of the report vary across countries, undermining its potential to be a proper stakeholder involvement tool. The key aspects are the report's availability, precision, comparability, and associated legal liabilities in case of misrepresentation or omission. These were the shortfalls noted in the implementation of the EU Directive 2014/95 on reporting nonfinancial information. In April 2021, the European Commission issued a first draft of the new CSR Directive with the aim of creating a European standard on which all reports will be based, to ease their comparison. There is no reason for the critiques of the CSR reports under the EU Directive 2014/95 to be inapplicable to social reports under SE laws, given that social reports are governed by different legal regulations.

5. **The differences in the implementation of stakeholder involvement reveal the difference in theoretical choice between the United States and Europe. "European" forms tend to reflect the stewardship theory, whereas US forms reflect the stakeholder theory.** In the European legal forms of the SEs under review, namely, French SCICs, Italian A-cooperatives, and UK CICs and CBSs, there is no need for a representation of stakeholders at the governing body level, owing to the trust given to managers, who genuinely pursue the ultimate social mission of the organization. This trust, along with the management orientation, is reflected in the distribution constraints. In the US legal forms under review, stakeholder involvement occur through a consultation that is considered *de facto* mandatory owing to the dual purpose/social mission of the organization and the director's related liability. This is in line with the traditional approach to stakeholder theory. In this sense, US L3Cs and benefit corporation adhere to the principle of freedom of organization espoused by the stakeholder governance theory.

5 Possible Options for SE Governance Patterns

The comparative study reveals the absence of uniform governance patterns. This is particularly true for stakeholders' participation and empowerment, which goes from (mere) consultation to what is close to inclusion at all levels of the organization. In view of this, two options seem possible, with drastic consequences on the possibilities to bring together all legal forms under an umbrella, and ultimately within an SE model law:

1. Define the governance patterns to be met to qualify as an SE and exclude from the definition of an SE all entities that do not meet these criteria. Under this option, all legal forms under review cannot be brought together under the same umbrella.
 - In terms of autonomy, this option entails defining the percentage of voting rights and/or representation at the board level (in relative terms) of public authorities. In any case, the percentage should be set below 50%.
 - In terms of stakeholder participation and empowerment, this option entails defining the required type of stakeholder involvement (involvement through consultation, advisory board, or inclusion at the governing body level with voting

rights). In this respect, a clear distinction from CSR-related requirements is necessary. In other words, stakeholders' participation must go beyond mere consultation, made indirectly mandatory through the managers' duties of care and diligence. The following possibilities can be envisaged, alone or together:

- Provide for the implementation of an advisory stakeholder's board that the governing body will have to consult, mandatorily, before every important decision.
- Attribute one or more seats in the governing body to the representative(s) of major stakeholders.
- Mandate an annual consultation of stakeholders on the program and planning of next year's commercial activities.
- Provide important stakeholders with a veto right on governing body decisions.
- Subject the report on stakeholders' participation to the auditing of a central authority, with the publication of both the report and the authority's opinion on the website of this authority.

With regard to the decision-making process, the legislator should decide whether a democratic principle (one person, one vote) is to be recommended, imposed, or abandoned. Knowledge and expertise have more to give than mere representations. A clear allocation of responsibility would be preferable. Instead of focusing on the power to be attributed to the assembly and the way to cast votes, the right of the general assembly to revoke the board members should be canceled, while the duties of care and loyalty of the board members should be ensured to converge toward the social mission. These will further limit the power of the capital holder in an SE. Therefore, the primary responsibility of a UK CIC of fulfilling a social purpose needs to be imitated. A priority amongst the purposes in favor of the social mission, in case of misalignment of the purposes, is more appropriate. An ideal scenario is to give stakeholders the right to sue members of the governing body for liability. This right of stakeholders to sue members of the governing body may derive from laws imposing reporting duties and prohibiting misleading information.

In terms of distribution constraints, the legislator should define whether such constraints are required and, if so, to what extent. The difficulty with SEs arises in the case of conflict of purposes, when the for-profit and social purposes are not aligned or not equally achieved. The difference between an SE and a CSR-oriented enterprise is the predominance of a social purpose in case of conflicts. To some extent, profit distribution constraints may help solve this conflict. A dissolution allocation constraint as well as a transfer of asset constraint should be imposed. Other profit and asset distribution constraints may be avoided if there is a mandatory hierarchy clause on the predominance of social purposes in case of conflict of purposes.

2. Reevaluate governance patterns as a tool for framing social means. The governance dimension of SEs may be adopted as a supportive pillar for the other two (social and economic dimensions) rather than as a separate founding pillar. This

allows for the regrouping of all kinds of SEs under the same umbrella, including all the legal forms under review. In other words, the idea is to adhere to the social innovation school of thought when defining SEs rather than adopt the democratic governance and participatory nature of EMES. This approach implies that the governance dimension of SEs should not be seen as a stand-alone pillar (as suggested by the European Commission) but rather as supportive of the social and economic dimensions. This may not be inconsistent with the organizational theory as it allows for different organizational and governance structural mechanisms, so long as they support a positive social impact mission and then legitimize it. Any form of stakeholders' involvement and empowerment, even though it does not reach the degree of inclusion at all organizational levels, may be considered as sufficient so long as social innovation is achieved. Social innovation may result from new services, a new quality of services, new methods of production, new production factors, new forms of organization or collaboration/participation, or new markets.

The governance mechanism will then adapt to social innovation and reflect the peculiarities of the latter. Schmitz's opinion⁹⁸ merits espousal: innovation will most probably be social at the input, means/processes, output, and outcomes levels. At the process level, innovation will imply stakeholders' involvement (and not necessarily inclusion) to achieve the "working together" suggested by Mulgan⁹⁹ and Johnson.¹⁰⁰ When assessing the output and outcomes levels, a regular reporting duty appears to be necessary, as well as a participatory tool and source of legitimacy toward the community. The necessity of mandatory distribution constraints would no longer hold interest, and the decision-making process not based on capital may take other forms than the *one person, one vote* principle, with different rights attributed to stakeholders depending on their importance in achieving the social innovation.

The advantage of option 2 is that it embraces all legal forms and types of SEs and does not risk weakening the movement. The social entrepreneurship movement will then not be considered a separate movement. Difficulties will remain in trying to grasp the concept of innovation within a legal framework or in defining which entity decides (e.g., public authority, market), and according to which criteria and timeline, to allow a project to reach maturity without resulting in a deficient project.

Option 1 has the advantage of offering a way to define SEs in organizational terms, with governance patterns. The forms linked to the social entrepreneurship movement (such as benefit corporations) may not be qualified as SEs unless it is renounced to the stakeholder's inclusion and distribution constraints. However, an organizational definition may justify the advantages and incentives. Option 1 may be used to draft an SE status instead of a new legal form. This way would be favourable to the social entrepreneurship movement and those other actors closer to the for-profit world and its mentality. Promotion may then take the form of a public

⁹⁸ Schmitz (2015), p. 36.

⁹⁹ Mulgan (2012).

¹⁰⁰ Johnson (2010).

support and incentives, competition laws tolerance, easier access to public procurement (reserved contracts), increase of points in a public procurement competition and even to tax advantages (either for the entity itself or for investors).

6 Conclusion

The present analysis found no common denominator in terms of governance structure that would allow the legal forms of SEs to be grouped under the same umbrella or an SE model law. Even at the European level, there is no uniformity in the governance patterns of the legal forms of SEs.

These distinctions in patterns explain the failure of the attempt to define SEs in organizational terms and the difficulty in conceptualizing instruments to promote the movement from an organizational perspective. The way stakeholders' participation is envisaged by each legal form is symptomatic of the inconsistency of the movement in governance terms. Such participation varies from consultation to quasi-inclusion at the governing body level. This diversity does not help promote the SE movement from a tax perspective. Thus, legal forms closer to not-for-profit organizations are treated like charities, whereas other forms are treated as pure for-profit entities.

Thus, this research identified two options: either define the governance patterns to be met to qualify as an SE and obtain any related advantages (whether under tax, public procurement, or other laws) or avoid an organizational definition and instead consider the governing dimension of SEs as a supportive pillar for the social and economic dimensions. As legal forms of SEs continue to multiply, a decision has to be made to avoid staying in a legal and conceptual limbo that is not favorable for the promotion of SEs. Pursuing the first option is highly recommended. That being said, a similar study on SE statuses would complete the research and help identify the legal forms to keep and those to abandon in favour of a legal status.

Materials

Community Benefit Societies (Restriction on Use of Assets) Regulations 2016

Co-Operative and Community Benefit Societies Act 2014

Companies (Audit, Investigations and Community Enterprise) Act 2004

The Community Interest Company Regulations 2005.

Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération

Loi n°2001-624 du 17 juillet 2001, portant diverses réformes d'ordre social, éducatif et culturel

Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération

Décret n°2002-241 du 21 février 2002 relatif à la société coopérative d'intérêt collectif

Code de commerce

Decreto legislativo 112/2017 (Decreto legislativo 3 luglio 2017, n. 112- Revisione della disciplina in materia di imprese sociale (a norma dell'articolo 1, comma 2, lettera c) della legge 6 giugno 2016 n. 106

Decreto legislativo 3 luglio 2017, n. 117 “Codice del Terzo settore”

Decreto 4 luglio 2019 Adozione delle Linee guida per la redazione del bilancio sociale degli enti del Terzo settore.

Legge 381/1991 (Legge 8 novembre 1991, n. 381) (Disciplina delle cooperative sociali)

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Codice civile

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Social Enterprises and Tax: Living Apart Together?



Sigrid Hemels

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1 Introduction

In general, tax legislation applies broadly. Companies that meet the requirements for corporate income tax are taxed, and so are transactions that meet the requirements of value-added tax (VAT). Most tax legislation predates the emergence of social enterprises. It does not always cater to the hybridity of social enterprises that pursue both a financial profit and a social benefit. Killian and O'Regan (2019) noted that for that reason, taxation can act as a, perhaps unintended, systematic constraint on social innovation within for-profit businesses. They define this hybridity as the combination of diverse elements. This includes combining goals of profit and of social value creation, elements that were traditionally housed in separate and separately taxed entities. In addition, social enterprises blur the lines between the public sector, the private for-profit sector and the charitable sector. Jurisdictions use different terms to address charities and the charitable sector, including philanthropic organizations, non-profit organizations, public benefit organizations and non-governmental organizations (NGOs). This chapter will use the term 'charities' to refer to these kinds of organizations without referring to a specific definition or legal context.

Some social enterprises may meet the definition of charity in certain jurisdictions and thus benefit from tax incentives for charities. Others might be able to benefit from specific, newly introduced, tax incentives especially adopted to further social enterprise models. The approach jurisdictions take is, as we often see in tax matters, quite diverse.¹ Many countries do not have specific tax benefits for social enterprises, but some do provide for such benefits. According to the European Commission (2020, p. 92), in the European Union (EU), the latter group includes Austria, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Spain. Such incentives include corporate tax exemptions for retained profits, VAT exemptions or reduced rates and tax deductions granted to private or institutional donors. However, the European Commission (2020, p. 92) observed that in most countries, the fiscal framework within which social enterprises operate is rather complex and fragmented. According to the Commission, few countries have developed a clear policy providing specific and consistent fiscal incentives for social enterprises that are designed to address the specific needs of social enterprises and help them grow. In the Action plan for the social economy, the European Commission (2021, p. 6) acknowledged that taxation is an important policy for the social economy, and it repeated that few countries have developed a specific and consistent taxation framework for social enterprises. The Commission added that many provide incentives, ranging from corporate tax exemptions on retained profits to VAT exemptions or reduced rates, social insurance costs reduced/covered by subsidies or tax reductions for private and institutional donors, but that access to these incentives can be complex. In addition, the Commission mentioned that the different actions do not always benefit from appropriate coordination. The European Commission aims to

¹European Commission (2020), p. 92.

publish guidance on relevant taxation frameworks for social economy entities based on available analysis and input provided by Member States' authorities and social economy stakeholders.² In addition, it wants to provide recommendations in relation to specific policies, such as taxation.

This chapter examines this complex relation between social enterprises and taxation and questions whether it can be characterized as living apart together. The focus is not on a specific country, although various examples will be mentioned. As specific tax measures for social enterprises are a form of tax incentives, Sect. 2 briefly discusses this public finance concept. Section 3 touches upon an important legal constraint on introducing such incentives for social enterprises in the European Union (EU): the prohibition of state aid. Section 4 focusses on the taxation of profits of social enterprises and Sect. 5 on the relevant tax aspects for their funders. Section 6 discusses value-added tax (VAT) issues social enterprises may encounter. The VAT that applies in the EU has been copied (with variations) by many non-EU Member States. For that reason, this chapter focusses on the EU VAT legislation as included in the VAT Directive³ in relation to social enterprises. Section 7 concludes the chapter.

2 The Public Finance Concept of Tax Incentives

The primary function of tax legislation is to raise a budget for government expenditures. In addition, tax legislation can be used to promote policy goals such as fostering social enterprises. This is called a tax incentive.⁴ The Organisation for Economic Co-operation and Development (OECD) (2010, p. 12) defined tax incentives as 'provisions of tax law, regulation or practices that reduce or postpone revenue for a comparatively narrow population of taxpayers relative to a benchmark tax'. Tax incentives can take various forms. Examples are exemptions from the tax base or from the definition of taxable subject, specific income deductions, tax credits and reduced rates.

Tax incentives may be perceived as free lunches, but they are not. A tax incentive reduces the tax income of the government, for which reason the government must increase the tax burden of other taxpayers, increase other taxes or reduce spending. Just as direct subsidies, tax incentives are a cost for the government. Government agencies sometimes prefer a tax incentive over a direct subsidy as these do not reduce their budget, but only the income of the Ministry of Finance. For the Ministry

²European Commission (2021), p. 8.

³Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as later amended (consolidated text as of 1 July 2021: <http://data.europa.eu/eli/dir/2006/112/2021-07-01>).

⁴One of the alternative terms is 'tax expenditure'. For a more elaborate discussion, I refer to Hemels (2017a).

of Economic Affairs, an ineffective tax incentive for social enterprises might, therefore, be more attractive than a more effective direct subsidy which reduces its budget. For the government as a whole, this is not desirable. Ideally, tax incentives are accounted for and controlled in the same way as direct subsidies to ensure efficient and effective use. This is often not the case.

Many tax experts are not in favour of tax incentives. Some of their arguments apply to direct subsidies as well, but others are more specific to tax incentives. The OECD (2010, pp. 25–34) identified the following theoretical and practical allegations against tax incentives:

- Fairness: lobby groups can have a strong political influence when pleading for tax incentives. The benefit of such an incentive is big for the small group that benefits, and the costs are borne by a large group of anonymous taxpayers.
- Efficiency and effectiveness: difficulty in evaluating existing tax incentives and weaknesses in reporting in the budget.
- Complexity: tax incentives can increase the complexity of the tax system.
- Revenue sufficiency: difficulty to estimate the costs of tax incentives.
- Growth of tax incentives: these tend to evade systematic and critical review. As a result, they can grow over time and avoid reform, reduction or repeal.

The OECD (2010, pp. 24–25) also identified conditions under which tax incentives are most likely to be successful policy tools to achieve their objectives:

- Administrative economies of scale and scope: tax incentives might lead to less administrative costs than direct subsidies.
- Limited probability of abuse or fraud: where detailed verification is not necessary, a tax benefit can be cost-effective, especially as information from third sources is available which can be used to check the claim of the taxpayer.
- A wide range of taxpayer choice: the distinctions among different activities that qualify for governmental support may not be considered important, in which case a simpler reporting and verification process through the tax system might be more efficient than a direct subsidy.

Tax incentives must be considered relative to alternative policy tools such as spending programmes, regulation, and information campaigns. They are not necessarily a better or worse policy instrument. Policy objects and fiscal policy considerations should determine the best instrument. In addition, tax incentives must be democratically controlled, accounted for and evaluated in the same way as direct subsidies. As this is currently not always the case, tax incentives are, in that respect, inferior to direct subsidies and should be used with care.

3 State Aid Constraints in the EU

EU Member States are not completely free to introduce support schemes for social enterprises. Among others, these must not infringe the state aid rules of Articles 107–109 of the Treaty on the Functioning of the European Union (TFEU).⁵ Article 107 TFEU prohibits granting aid through state resources, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. Durand et al. characterize competition and state aid rules as important constraints for the regulation and application of public interests.⁶

Several forms of state aid are allowed. Examples are aid with a social character that is granted to individual consumers without discrimination related to the origin of the products concerned,⁷ aid to make good the damage caused by natural disasters or exceptional occurrences,⁸ and aid not exceeding €200,000 over any period of 3 fiscal years per undertaking (de minimis).⁹ The latter might be useful when incentives are specifically aimed at small-scale social enterprises. The state aid regime requires sufficient evidence of market failure and the necessity and proportionality of the intervention.

Certain forms of aid may be allowed where it does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest. This includes several kinds of activities that might be conducted by social enterprises, such as aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and of certain regions in view of their structural, economic and social situation;¹⁰ aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;¹¹ and aid to promote culture and heritage conservation, where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.¹² Notification and approval of the European Commission are necessary before Member States can introduce such aid.

In addition, the General Block Exemption Regulation (GBER)¹³ provides that if certain requirements are met, several categories of aid are exempt from the notification obligation. This includes regional aid; aid to small and medium-sized enterprises

⁵For an elaborate discussion of these state aid constraints, I refer to Luja (2017).

⁶Durand et al. (2021), p. 560.

⁷Article 107(2)(a) TFEU.

⁸article 107(2)(b) TFEU.

⁹Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU to de minimis aid.

¹⁰Article 107(3)(a) TFEU.

¹¹Article 107(3)(c) TFEU.

¹²Article 107(3)(d) TFEU.

¹³Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

(SMEs) in the form of investment aid, operating aid and access of SMEs to finance; aid for environmental protection; aid for research and development and innovation; training aid; recruitment and employment aid for disadvantaged workers and workers with disabilities; social aid for transport for the residents of remote regions; aid for broadband infrastructures; aid for culture and heritage conservation; aid for sport and multifunctional recreational infrastructure; and aid for local infrastructures. This might give EU Member States the possibility to support specific activities or specific social enterprises without breaching the state aid prohibition.

4 Taxation of Profits of Social Enterprises

Profit taxes tax profits. They do this by applying a certain tax rate on the taxable base. Both the definition of the taxable base—profits—and the tax rates vary widely between countries. Some countries apply one profit tax rate, while others apply a different (higher or lower) rate for higher or lower profits. Profit taxes levied from legal entities go under various names, such as corporate income tax and corporation tax. This chapter uses the term ‘corporate income tax’.

Liability to corporate income tax is often primarily based on the legal form of a company. For example, a limited liability company (LLC) will usually be liable to corporate income tax. The aim of the company, whether it pursues a profit for its shareholders, social objects or both, may not be relevant. If the company does not, in fact, make profits (which may not be the same as not pursuing a profit), there is no tax base and, hence, no taxation. Gifts, subsidies and grants received may, under certain circumstances and depending on the legislation in a specific jurisdiction, be regarded as profit and thus, in principle, be taxable.

The European Commission (2020, p. 94; 2021, p. 6) observed that few countries address tax measures only for social enterprises or design them specifically in coherence with the entrepreneurial nature of social enterprises. In some cases, a profitable social enterprise may benefit from tax incentives not specifically aimed at them to reduce their tax burden. As will be discussed in the remainder of this section, this may have serious drawbacks.

4.1 Tax Exemptions for Charities May Apply to Certain Social Enterprises

In several countries, carrying on a business does not necessarily lead to the loss of charitable status. Various jurisdictions even exempt charities from corporate income

tax. An example is Australia.¹⁴ As countries use different definitions of (and terminology for) charities, exemptions might have a narrow or wide scope depending on the specific jurisdiction. Some social enterprises may benefit from such an exemption, but others will fall outside the definition of ‘charity’.

A social enterprise that can meet the requirements and qualifies as a charity may make use of a corporate income tax exemption. This may not only entail that no tax is due, but it may also mean a liberation from administrative obligations. However, as specific administrative obligations may be in place for charities, this does not necessarily mean that such charities are completely free from administrative burdens.

In other jurisdictions, the business income of charities is taxed. For example, in the United States (US), this is taxable under the unrelated business income tax.¹⁵

As Gani (2021, p. 543) observes, the label of being tax exempt or of being a charity (which might, depending on the jurisdiction, coincide) indicates a recognition of the entity’s utilitarian status by the state. It is a form of, in Gani’s words, ‘State stamp’, which guarantees that the entity receiving it brings some kind of special utility through its activity. Not the tax benefits as such, but the label may be most relevant. According to Gani, this label is in Switzerland probably the most important reason to pursue a tax-exempt status. In the Netherlands, having a charitable status has a similar effect. For example, in the Netherlands, for both private and public (local authorities) funding, this status is often required to be eligible for grants. Both in Switzerland and the Netherlands, this might be problematic for social enterprises.

4.2 Legal Forms Required for Charities May Not Meet the Needs of Social Enterprises

Often, strict requirements are imposed on charities. These might not always suit social enterprises.

In Germany, the *gemeinnützige GmbH* (gGmbH), a non-profit company with limited liability under German law, is exempt from corporate income tax. However, the entity must pursue charitable purposes and promote the public benefit.¹⁶ It is bound by many restrictions. For museums, hospitals and educational organizations, the gGmbH is an attractive legal form,¹⁷ but for social enterprises with a more commercial character, it does not seem to be suitable.

¹⁴See for example the Australian High Court decision of *Federal Commission of Taxation v Word Investments Limited* [2008] HCA 55 as discussed in Martin (2021), pp. 525–526.

¹⁵Sections 511–514 Internal Revenue Code.

¹⁶§ 52 AO and § 53 AO Abgabenordnung.

¹⁷Firma.de (2020).

Several jurisdictions restrict the exemption to legal forms traditionally used by charities. This may be problematic for innovative business models that do not use the traditional legal forms for charities, such as foundations, but instead use legal forms that were traditionally used by for-profit corporations, such as limited liability companies. Killian and O'Regan (2019) observed in the context of Ireland that it raises concern of social enterprises that tax benefits only apply to certain legal forms whereas social enterprises prefer legal forms traditionally used by regular for-profit enterprises, such as the limited corporation.

In some cases, this may lead to social enterprises exchanging their hybrid origins for a structure that fits tax legislation better, e.g. a charitable part and a business part with the matching legal forms, such as a foundation and a limited liability company. Vitello (2011, pp. 568, 578) discusses such structures that consist of a joint venture between a non-profit and a for-profit company, each owning a share in a for-profit company that pursues a socially beneficial purpose but may not generate substantial revenue and a foundation and another tax-exempt organization investing in a for-profit LLC having a charitable purpose for its primary goal. Martin (2021, pp. 529–531) describes three Australian case studies on how some social enterprises carry on their businesses through either a charity, a for-profit entity or a hybrid structure. She discusses the limitations social enterprises encounter when they have to operate within the constraints of the charitable status, which might induce them to opt for a for-profit legal form. This, however, has other drawbacks (including the lack of tax incentives). The third case study she describes is a social enterprise with charitable status that incorporated a limited company that ran the business. She observes that running such a structure can be expensive as there will be a range of legal obligations that need to be complied with. She points out that such costs may stop newly incorporated social enterprises from adopting this model but that it may be a realistic option once the social enterprise becomes successful. Durand et al. (2021, p. 559) describe similar problems in France using the case study of the Simplon project, which was forced to create three organizations: a simplified limited liability company, an endowment fund and an association. This forced hybridization is perceived by the founder as the source of many complications in the management of the project, particularly in terms of governance and human resources.

Such workarounds may mean that tax barriers for social enterprises influence their legal structure, whereas the general idea is that the tax system should be neutral towards business decisions, such as on how an enterprise is legally structured. The European Commission (2020, p. 94) observed that tax benefits that only apply to certain legal forms may push social enterprises to choose legal forms that are not consistent with their aims.

4.3 Specific Legal Forms for Social Enterprises Often Not Eligible for Tax Benefits

Anheier (2021, p. 8) observed that most EU Member States were reluctant to propose policies that would address the shifting boundaries between public and private and between ‘not for profit’ and ‘for profit’. As is discussed in Part III of this book, some countries developed specific legal forms for social enterprises. However, these are usually not granted a special tax status. In the EU, this can partly be explained by state aid concerns, but competition concerns also cause non-EU jurisdictions to be cautious in this respect.

For example, the US low-profit limited liability corporation (LLLC) for organizations whose mission is primarily social and the benefit corporation for enterprises that combine a profitable trade with a social focus are not tax exempt because they are still for-profit entities. An LLLC may elect to be treated as a tax transparent partnership, in which case it will not be taxed itself but the partners will (depending on their tax status). The treatment of non-transparent LLLCs and benefit corporations thus differs from the US tax treatment of charities, which can obtain a tax-exempt status.¹⁸

Similarly, the UK community interest company (CIC), which is designed for social enterprises that want to use their profits and assets for the public good, is liable to UK corporation tax as a company and, unlike charities, is not entitled to any specific corporation tax exemption. A CIC cannot obtain charitable status, but a charity may own a CIC and such CIC is allowed to pass on assets to the charity.¹⁹ More in general, if a CIC donates surpluses to a charity, it may deduct the amount of such donations and thus reduce the taxable profit for corporation tax purposes.

The Netherlands is contemplating the introduction of a legal form for a limited liability company (BV in Dutch) with a societal purpose (*maatschappelijk doel* in Dutch), the BVm.²⁰ This would also not be given a special tax treatment and cannot obtain the Dutch charitable status.

4.4 Specific Tax Benefits for Social Enterprises

Some jurisdictions introduced specific corporate income tax exemptions for social enterprises that use the legal status developed for them. According to the European Commission (2020, p. 74), the tax breaks usually relate to exemptions for new social enterprises hiring (mainly disadvantaged) employees.

¹⁸Based on article 501(c)(3) Internal Revenue Code, which allows certain charitable organizations to be exempt from paying federal income taxes.

¹⁹Office of the Regulator of Community Interest Companies (2017), p. 8.

²⁰Available at <https://www.internetconsultatie.nl/bvm>.

Work integration social enterprises in Belgium may benefit from a tax reduction when they put part of their profits into an asset lock scheme.²¹ Italy exempts retained profits of entities with a social enterprise legal status from corporate income tax and applies corporate income tax on only 3% of the compulsory retained profits of social cooperatives.²²

However, the European Commission (2020, p. 94) observed that linking fiscal benefits to specific legal forms creates an uneven landscape as social enterprises adopt different legal forms. In some countries, social enterprise legislation defining new legal status/qualifications has failed to introduce an advantageous fiscal treatment for all the entitled entities. According to the European Commission (2020, p. 94), these circumstances contribute to explaining the scarce number of associations, foundations and limited liability companies that have chosen to register as social enterprises in Belgium and Italy.

According to the European Commission (2020, p. 70), recognition via legal status seems to have been not fully effective, especially in those countries where, out of fear of creating unfair competition with conventional enterprises, tight burdens and administrative constraints and irrelevant tax breaks have been introduced for social enterprises.

4.5 Other Tax Benefits

In some circumstances, social enterprises may apply tax benefits not specifically designed for them. An example is an exemption for small companies. However, if such exemption is linked to specific legal forms without shareholders, such as foundations or associations (as is the case in the Netherlands), social enterprises that prefer a shareholder structure are not able to benefit from these incentives. The same applies to incentives for start-ups that do not apply to mature social enterprises.

Some social enterprises may make use of research and development (R & D) incentives many²³ jurisdictions include in their corporate income tax (or other taxes). However, such incentives, specifically those related to patents, may not always foster knowledge sharing, open access and open source and thus not cater to innovative, social business models and newcomers but instead protect the interests (and profits) of established companies.²⁴ The requirements of such incentives might, for that reason, not fit the social goal of social enterprises.

²¹Nyssens and Huybrechts (2020), p. 45.

²²Borzaga (2020), p. 36.

²³De Boer et al. (2019), p. 37.

²⁴CPB Netherlands Bureau for Economic Policy Analysis et al. (2014), Bijlsma and Overvest (2018), and Hemels (2020).

5 Taxation and Funding of Social Enterprises

Just like any other enterprise, social enterprises need capital to work with. Because of their different earning model, social enterprises may not always be able to use the same arrangements to obtain their funding. The type of funding will often be related to the phase the social enterprise is in. The more mature and the less risky a social enterprise becomes, the more regular funding will be available. Some social enterprises will never (want to) reach that stage and will always rely on alternative funding. This section discusses the tax aspects of three different types of funding: donations, loans and investments.

5.1 Donations

In an initial phase, social enterprises might not have access to either capital markets or loan markets. The business model may be too risky for regular investors and banks. In those cases, companies, individuals and charities may donate a starting capital to the social enterprise. Such donations may also be used as seed money or growth finance, helping to reduce the initial risk and making it possible to attract other funding in the form of investments and loans. Gani (2021, p. 537) gives the example of social enterprises that want to develop devices for the world's poorest countries or that are seeking medicine for diseases that are only found in such countries. He observes that these companies generally operate with start-up capital that comes from a donation or public or private subsidies and that with this seed money, development is conducted and, in the best case, a product is developed and then sold at a price that is just enough to cover research and production costs and to enable the company to start researching a new product or drug.

A donation means that there will not be a direct financial return flowing from the social enterprise to the donor. Of course, there might be, just as with any donation,²⁵ an indirect benefit, such as a warm glow feeling, an increase in reputation or meeting the demands that society or the market make for a corporate socially responsible behaviour.

If the social enterprise does not have charitable status, gifts made by individuals will in most cases not be eligible for tax breaks for charitable giving. For example, as CICs cannot obtain charitable status in the UK, no Gift Aid can be claimed on donations to such CICs.

However, if there is a business rationale for the donation, such as corporate social responsibility (CSR) policy (which includes but is certainly not limited to sponsoring), companies in certain jurisdictions might be able to deduct the donation as

²⁵Bekkers and Wiepking (2011).

business costs.²⁶ Whether this is possible depends on the national corporate income tax law.

5.1.1 Charities Not Always Allowed to Donate to Social Enterprises

Not all jurisdictions allow charities to keep their charitable status if they make donations to social enterprises. Bitterová and Surmatz observe, based on a DAFNE/EFC survey, that some European countries²⁷ explicitly allow charities to give grants to for-profit organizations such as small green start-ups but that other countries²⁸ do not allow this kind of activity.²⁹ From the overview in the survey, it follows that in several countries,³⁰ it is allowed in theory but may be difficult in practice.

The Netherlands belongs to the last group. The Dutch tax administration can be reluctant to regard donations to for-profit entities as charitable. As the Dutch charitable status requires that at least 90% of the spending is for the public benefit, this point of view can be problematic. This might effectively make it impossible to fund social enterprises and help them up on their feet, not just in monetary terms but also in reputational terms. If a well-renowned charity has donated money to a new social enterprise, it might be easier for that social enterprise to attract funds from other market parties as well. As there is a clear rationale for such donations in specific cases, the Dutch philanthropic sector has asked the Dutch Ministry of Finance to regard donations to for-profit entities as charitable if the donation pursues one or more of the philanthropic objects of the charity. It is not clear whether the Ministry of Finance is willing to meet this wish of the sector.

5.2 Tax Assignment Systems

Instead of or in addition to tax incentives for charitable giving, some countries allow taxpayers to assign a certain proportion of their tax due to an organization of their choice. Originally, such tax assignment systems were introduced for churches, but nowadays, they also include other organizations. According to the European Commission (2020, p. 74), this may include social enterprises, although it might be that these are mainly social enterprises that fulfill charity requirements.

²⁶For a more elaborate discussion I refer to Hemels (2021).

²⁷Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Luxembourg, Liechtenstein, Montenegro, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Spain, Ukraine, United Kingdom.

²⁸Czech Republic, Denmark, Finland, France, Italy, Latvia, Malta, Sweden, Kosovo, and Turkey.

²⁹Bitterová and Surmatz (2021), p. 31 and the full overview on p. 97.

³⁰Estonia, Russia, Serbia, Switzerland.

Tax assignment systems make the decision-making on how to spend that portion of tax revenue more democratic. Usually, only one organization can be chosen. Italy has applied this system since 1985: first, only for designation of 0.8% of income tax to a church (*otto per mille*) but, as of 2006, also for designation of 0.5% of tax due to non-profit organizations (*cinque per mille*).³¹ Several countries, especially in Eastern Europe, apply this tax assignment system. Examples are Hungary, Lithuania, Poland, Romania and the Slovak Republic.³² In 1997, Hungary was the first eastern European country to introduce this system. If the designation option is not used, the tax goes to the state. According to Nährlich (2013), 25% of Romanian taxpayers (2011), 40% of Polish taxpayers (2008), 46% of Hungarian taxpayers (2007) and 54% of Slovak taxpayers used the assignment system. In Portugal, an allocation scheme has existed since 2001. Taxpayers can allocate 0.5% of their personal income tax to a church, religious community or charity.³³

According to the European Commission (2020, p. 74), this type of government grant for social enterprises is less important than other forms of public support, but it regards it as interesting for its potential impact on scaling.

5.3 *Investments and Loans*

Social enterprises that have some profit-making capacity may be able to attract investments or loans. For some social enterprises (depending on the phase they are in or the activity they perform), it will not be possible to provide an adequate compensation for the high risk linked to such investments or loans. This is, for example, reflected in lower interests than market rates for micro-finance.

As will be discussed in the remainder of this section, some countries apply special tax schemes to encourage investments in social enterprises.

5.3.1 **UK Social Investment Tax Relief**

A rather unique³⁴ scheme seems to be the Social Investment Tax Relief (SITR), which the United Kingdom (UK) introduced in 2014. The government wanted to enable individuals to invest in social enterprises that struggle to raise finance and that are unable to issue shares because of their legal structure.³⁵ SITR is one of four venture capital schemes to help small or medium-sized companies and social

³¹Mastellone (2013).

³²Nährlich (2013) and OECD (2020), p. 89.

³³OECD (2020), p. 89.

³⁴In the 2019 consultation of the scheme, none of the respondents mentioned being aware of directly comparable international examples of similar tax reliefs: HM Treasury (2021b), para 3.17.

³⁵For an elaborate discussion of the requirements see HM Revenue & Customs (2019).

enterprises grow by attracting investments. Under this scheme, investors can deduct 30% of the cost of their investment in new shares or debt from their income tax liability. In addition, individuals may defer capital gains tax (CGT) by investing a chargeable gain in a qualifying social investment. The tax incentive is thus obtained not by the social enterprise itself but by its investors.

The idea behind the incentive is that it will allow investors to agree on a lower return than would suit the risk related to the investment. New shares may not be preference shares, and a debt investment may not be secured on any assets and must not have an interest rate higher than a reasonable commercial interest rate. Neither a loan nor the shares may be paid back within 3 years after the investment.

CICs, community benefit societies with an asset lock and charities can make use of SITR. The entity or a qualifying subsidiary must use the money raised for a qualifying trade or for the preparation thereof. Many activities (both inside and outside the UK) qualify, but several do not. The reason for these exclusions is that because of the nature of the activity, the social enterprise has access to regular finance, or the activity is at risk of being misused by tax planners. A further requirement is that the entity tries to make a profit. In addition, the entity may not:

- Have more than £15 million in gross assets immediately before the investment is made
- Have 250 or more full-time equivalent employees at the time of investment
- Be controlled by another company
- Have more than £16 million in gross assets immediately after the investment is made

The maximum amount of investment over the lifetime of the social enterprise is £1.5 million. This includes money received by subsidiaries, former subsidiaries or acquired businesses.

SITR was notified state aid.³⁶ When the UK was still part of the EU, the aid qualified either as GBER state aid or de minimis state aid (for which further limitations of the maximum amount applied).

Limited Use of SITR

Only a limited number of social enterprises made use of the SITR. Between 2014 and the end of the tax year 2016–2017, around 50 social enterprises raised £5.1 million of investment through SITR.³⁷ The cost of the scheme in those 3 years was less than £2 million in total. However, the use of the scheme increased. In 2018–2019, 75 social enterprises received investment through the SITR scheme, and £3.6 million

³⁶See Sect. 3 for a general discussion on state aid for a discussion in relation to SITR HM Treasury (2021a).

³⁷HM Treasury (2019).

worth of funds were raised.³⁸ In 2020, it was calculated that since Sitr was launched, 110 social enterprises has raised funds amounting to £11.2 million through the scheme.³⁹ That was lower than anticipated when Sitr was introduced.⁴⁰

Floyd (2019) identified several challenges that might explain the limited use. These include a lack of awareness among charities and social enterprises, the slow pace of legislative change and Sitr not being sufficiently tailored to the needs of charities and social enterprises. In 2019, HM Treasury launched a consultation on Sitr.⁴¹ The outcome of this consultation was published in March 2021.⁴² Many respondents viewed investments through Sitr as an important funding option, though many reported relying on intermediaries to assist them (para 2.8). Most respondents felt that tax is an important lever for supporting social enterprise funding, though opinions varied on whether it is the most appropriate lever (para 2.28). For investors that are less motivated by the social aspects of enterprises, the tax relief could provide an added financial incentive. Other respondents were unsure about how far tax incentives would influence investor behaviour, with many emphasizing that investors were more interested in other issues (para 2.31). Some respondents felt that as a large number of their investors did not claim Sitr's income tax relief, the government should allow them to 'gift' the equivalent relief to the social enterprise as a corporation tax relief (para 2.34). A few respondents felt that many investors using Sitr are attracted by the social purpose first and that the tax relief is more 'nice to have' than the primary motivator (para 3.6). Poor awareness of Sitr among investors and social enterprises was seen as a major driver of the scheme's low take-up. One respondent's survey found that of 168 enterprises responding, 70% did not understand what Sitr is, 97% had never tried to use Sitr and 70% did not intend to use it in the next 12 months (para 3.14). Other respondents felt the low take-up was driven by the scheme's restricted eligibility criteria (para 3.16).

Considering the responses in the consultation and in recognition that, due to the ongoing effects of Covid-19, it was a difficult time for social enterprises, in April 2021, the UK government decided to extend Sitr for 2 more years (until April 2023) in order to continue supporting investment to social enterprises that are most in need of growth capital.⁴³ The government announced that it would continue to monitor the social investment market and assess the most appropriate form of support for the policy objectives that Sitr was introduced to achieve.

All and all, the Sitr experience in the UK does not seem to make a convincing point for introducing such a scheme to investors in other countries. As a matter of fact, the Netherlands had such a scheme between 1998 and 2007 for private investors

³⁸HM Revenue & Customs (2020), p. 12.

³⁹HM Revenue & Customs (2020), p. 12.

⁴⁰HM Treasury (2021b), p. 4.

⁴¹HM Treasury (2019).

⁴²HM Treasury (2021b).

⁴³HM Treasury (2021b).

in films. This tax incentive was rather costly and did not prove to be very effective and efficient and was replaced by a direct subsidy.⁴⁴

5.3.2 Charities Not Always Allowed to Invest in Social Enterprises

Also with respect to loans and investments, it is relevant for charities to know whether providing such funding to social enterprises may jeopardize their charitable status.

Bitterová and Surmatz (2021, p. 67) observed that in Europe, the legal and tax rules are not very clear-cut but that the requirement to preserve the value of the capital makes riskier investments more difficult. They mention an ongoing debate regarding the need for a more favourable environment for such investments. In the overview in the 2021 DAFNE/EFC Comparative Highlights of Foundation Laws,⁴⁵ it is stated that 26 European countries⁴⁶ allow (if certain requirements are met) foundations to allocate grant funds towards furthering their public-benefit purpose, which (can) also generate income such as recoverable grants, low-interest loans and equities. Seven European countries⁴⁷ do not allow this according to this overview. The overview might not tell the whole story for all countries as, for example, according to this overview, this would be allowed in the Netherlands, which may be correct from a pure civil law point of view, but for the charitable status (which is a tax status and not a civil law status), this is currently not clear-cut. For Sweden and Liechtenstein, this is made explicit in the overview, which says that it is not certain that such investments will enable the foundation to keep its tax privileges.

In the United States, mission-related investments (MRIs, also referred to as impact investments) that are designed to generate both social and financial returns are not deemed charitable activity, nor do they qualify as charitable distributions.⁴⁸

5.3.3 Programme-Related Investments

In the United States, the so-called programme-related investments (PRIs) are regarded as philanthropic spending in tax legislation. PRIs are defined as investments in which:

1. The primary purpose is to accomplish one or more of the foundation's exempt purposes

⁴⁴For a more elaborate discussion I refer to Hemels (2017b).

⁴⁵Bitterová and Surmatz (2021), p. 31.

⁴⁶Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Kosovo, Latvia, Lithuania, Luxembourg, Malta, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Switzerland, Ukraine, and the UK.

⁴⁷Austria, Cyprus, Italy, Slovenia, Spain, Russia, and Turkey.

⁴⁸Levitt (2011).

2. Production of income or appreciation of property is not a significant purpose, and
3. Influencing legislation or taking part in political campaigns on behalf of candidates is not a purpose⁴⁹

Such PRIs count toward the 5% of assets that US foundations are required, under US tax law,⁵⁰ to pay out every year. The recipients of PRIs need not be within a charitable class if they are the instruments for furthering an exempt purpose of the charity. For example, the legal structure of LLCs was intended to provide foundations with a business entity to which they could safely make PRIs without jeopardizing their charitable status.⁵¹ The IRS guidance⁵² mentions various examples of PRIs, including low-interest or interest-free loans to needy students, high-risk investments in non-profit low-income housing projects and investments in businesses in low-income areas.

In the United Kingdom, PRIs are also recognised for charitable purposes.⁵³ PRIs that further the object of the charity are considered for the UK expenditure requirement.⁵⁴

In the Netherlands, the Dutch tax administration regarded PRI in the same way as other investments. As a result, charities that engaged in PRI on a large scale could be confronted with the Dutch anti-hoarding requirement for charities and lose their charitable status. In 2020, the government announced that, in collaboration with the philanthropic sector, guidance would be published on PRI that does not breach the anti-hoarding requirement.⁵⁵ This promise has not yet been met; word is that this is due to staffing shortage at the Ministry of Finance. This indicates that such change is not deemed to have high priority for the Dutch government.

6 Value-Added Tax Concerns of Social Enterprises

Other than is the case for corporate income tax, the starting point for VAT is not the legal form of the entity but the transaction. For the VAT to apply, there must be a supply of goods or services for a consideration.⁵⁶ A social enterprise that only provides services free of charge, for example free advice or counselling, does not fall within the scope of VAT.⁵⁷

⁴⁹Internal Revenue Service (2021).

⁵⁰Section 4942 Internal Revenue Code.

⁵¹Vitello (2011).

⁵²Internal Revenue Service (2021).

⁵³Charities (Protection and Social Investment) Act 2016.

⁵⁴Charity Commission for England and Wales (2017).

⁵⁵Kamerstukken II, 2019–2020, 35 437, no. 7, p. 5.

⁵⁶Article 2 VAT Directive.

⁵⁷ECJ 1 April 1982, Case C-89/81, Hong Kong Trade Development Council, ECLI:EU:C:1982:121.

In addition, if only voluntary donations are received, there is no supply for consideration.⁵⁸ This is the case, first of all, because there is no legal agreement with the donor and, second, because there is no necessary link between the service and the payments. Such activities are, therefore, also out of the scope of VAT.

The VAT Directive defines ‘a taxable person’ as any person (which includes legal entities) that, independently, carries out in any place any economic activity, regardless of the purpose or results of that activity.⁵⁹ In this respect, ‘economic activity’ has a wide scope and is an objective term in the sense that the activity is considered per se and without regard to its purpose or results.⁶⁰ It is not relevant that activities are not for profit or pursue a social purpose. Social enterprises that supply goods or services for a consideration will, therefore, in general be considered taxable persons for the purpose of VAT.

6.1 VAT Exemptions

Being a taxable person does not necessarily mean that VAT must be charged on (all) transactions. The VAT Directive includes exemptions for certain activities in the public interest.⁶¹ These include hospital and medical care; the supply of human organs, blood and milk; the supply of services and goods closely linked to welfare and social security work and the protection of children and young persons; education; supplies by non-profit-making organizations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature to their members in their common interest in return for a subscription, provided that this exemption is not likely to cause distortion of competition; the supply of certain services closely linked to sport or physical education by non-profit-making organizations to persons taking part in sport or physical education; the supply of certain cultural services; and the supply of goods closely linked thereto.

For several exemptions, conditions may apply, such as a prohibition on systematically aiming to make a profit and to distribute any profit that nevertheless arises; management by volunteers; approved prices or prices that are lower than commercial prices; and the exemptions not being likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.⁶²

In addition, many countries apply an exemption for persons with an annual taxable (e.g. non-exempt or outside of VAT) turnover not exceeding a given

⁵⁸ECJ 3 March 1994, Case C-16/93, R.J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden, ECLI:EU:C:1994:80.

⁵⁹Article 9(1) VAT Directive.

⁶⁰ECJ, 6 Oct. 2009, C-267/08, SPÖ Landesorganization Kärnten, ECLI:EU:C:2009:619, para. 16–17.

⁶¹Chapter 2 of Title IX of the VAT Directive (articles 132–134).

⁶²Article 133 VAT Directive.

threshold, so-called small enterprises.⁶³ This threshold varies between countries. As of 1 January 2025, the threshold may not be higher than €85,000. EU Member States may exempt such small enterprises from certain administrative obligations. Social enterprises that have a turnover below the threshold can, therefore, benefit from this exemption.

6.2 *The Problem of Irrecoverable Input VAT*

Insofar as a taxable person uses goods and services for taxed transactions, he is entitled to deduct VAT in respect of supplies provided to him by another taxable person.⁶⁴ Social enterprises that are within the scope of the VAT may thus be able to recover the VAT they paid on their inputs insofar as no exemption applies on their supplies.

For social enterprises that are not taxable persons and thus out of scope, VAT is a cost that cannot be recovered. The same applies to social enterprises with exempt activities or that apply the exemption for small enterprises. This disadvantage will probably not outweigh the advantage of not having to comply with administrative VAT requirements for social enterprises with relatively little input VAT charged to them.

For social enterprises that incur large costs for supplies and services (including investments in real estate and equipment), being able to deduct input VAT may be of great relevance. In such cases, providing exempt services or supplies or making use of the exemption for small enterprises is detrimental.

The European Charities' Committee on Value-Added Tax (ECCVAT) estimated that EU charities lose about €6 billion a year in irrecoverable VAT.⁶⁵ For the UK, it was calculated that irrecoverable VAT costs charities £1.8 billion a year.⁶⁶ It was guessed that significant amounts of the output VAT are absorbed by charities rather than being charged to their 'customers' and therefore burden the charity sector.⁶⁷ The same problem arises for the broader group of social enterprises to which an exemption applies or that are out of scope.

The problem of irrecoverable input VAT might induce social enterprises to ask for a fee even if they would prefer to provide these for free. VAT thus affects the economic decisions of social enterprises negatively. In 2020, the OECD concluded that distortions from VAT concessions for philanthropic entities typically arise from VAT exemptions applicable to the output of these entities and that these may result

⁶³ Articles 281–294 VAT Directive.

⁶⁴ Article 168 VAT Directive.

⁶⁵ <https://www.eccvat.org/resources/>.

⁶⁶ London Economics (2020).

⁶⁷ London Economics (2020), pp. ii–iii.

in a competitive advantage or in a disadvantage.⁶⁸ All in all, the exemptions in certain cases have the effect of distorting economic decisions and competition, thereby creating economic inefficiencies and a deadweight loss.⁶⁹

6.3 *Reduced VAT Rates*

A reduced VAT rate does not have the drawback of an exemption as it does not restrict the deduction of input VAT. Such a reduced rate may benefit social enterprises. In Sweden, for example, a reduced VAT rate is applied on certain repairs to stimulate the reuse of goods. This was part of the Swedish government's strategy for sustainable consumption.⁷⁰ Such a reduced rate does not apply specifically to social enterprises as every taxable person that delivers such services benefit from it. An exception is Italy, where a 5% VAT rate is applied for certain social cooperatives.⁷¹

6.4 *Alternatives*

Exemptions and reduced VAT rates are not the most efficient way to stimulate certain economic activities. The OECD observed in 2020 that VAT exemptions, reduced rates and zero rates can create unfair competition, especially if the incentive only applies to philanthropic organizations and the VAT-exempt goods or services supplied by a philanthropic entity are also provided by businesses that charge VAT on their sales.⁷² Such businesses might include social enterprises that do not meet the non-profit requirement. According to the OECD, unfair competition is the reason why some countries, including Canada and Ireland, do not exempt from VAT certain goods and services provided by philanthropic entities. Belgium, Chile, Colombia, Estonia, Indonesia, Italy and the Slovak Republic do not have preferential VAT treatment for philanthropic entities and apply the standard VAT rules.

The problem of not being able to deduct input VAT is difficult to solve within the framework of VAT.⁷³ More effective solutions can be found outside the VAT system, by granting direct subsidies. Obviously, direct subsidies also have budgetary and competition implications, but these are less than solutions within the VAT system. Governments can better target direct subsidies than VAT incentives, leading

⁶⁸ OECD (2020), p. 32.

⁶⁹ Cnossen (2003) and De la Feria (2009).

⁷⁰ Regeringskansliet/Finansdepartementet (2016), article 7(1)(2)(6) Mervärdesskattelagen.

⁷¹ European Commission (2020), p. 94.

⁷² OECD (2020), pp. 32, 65.

⁷³ See more in-depth: Hemels (forthcoming).

to less spillover effects. Strict, qualitative criteria can be established to decide whether an entity qualifies for a direct subsidy or not.

In 2011, the European Commission specifically mentioned that Member States can introduce targeted compensation mechanisms, outside of the VAT system, to alleviate the cost of VAT on the acquisitions of non-profit-making organizations. The Commission called on Member States to make use of the existing options to alleviate the burden of VAT on non-profit-making organizations.⁷⁴

Several countries already apply this solution. For example, when public museums and galleries in the UK could no longer charge an entrance fee for their permanent collections, they could no longer (fully) recover VAT. To compensate museums for this disadvantage, the UK introduced a special VAT refund scheme⁷⁵ for museums and galleries that meet strict criteria and are listed in the VAT (Refund of Tax to Museums and Galleries) Order 2001 (SI 2001/2879).⁷⁶ Eligible museums can reclaim VAT incurred in relation to free rights of admission. The scheme does not form part of the general VAT system, but certain rules in UK VAT legislation apply to it.

7 Conclusion

As social enterprises vary widely in activities and scope, it is understandable that governments are hesitant in granting all social enterprises a corporate income tax exemption. Some social enterprises may benefit from such an exemption, for example, if they meet the requirements for being a charity. In jurisdictions that have a specific legal form for social enterprises, that legal form is often precluded from having charitable status. The reasoning behind this is probably keeping a level playing field between social enterprises and regular for-profit entities with similar activities and ensuring fair competition.

Especially in relation to the funding of social enterprises, tax legislation might have an inhibitory effect. Rules for donations and charitable expenses often do not fit in the context of social enterprises. Some governments recognize this, whereas others are still struggling with these hybrid and modern forms of philanthropy. I agree with Durand et al. (2021, p. 564) that the idea that the preponderance of profitable economic activities within an organization should inevitably imply its

⁷⁴Communication from the Commission to the European Parliament, the Council and the European economic and social committee, On the future of VAT Towards a simpler, more robust and efficient VAT system tailored to the single market, 6 December 2011, COM(2011), p. 10. Available at https://ec.europa.eu/taxation_customs/sites/default/files/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf.

⁷⁵Article 33A VAT Act 1994 and VAT Notice 998, VAT refund scheme for museums and galleries, <https://www.gov.uk/guidance/vat-refund-scheme-for-museums-and-galleries-notice-998>.

⁷⁶Available at <https://www.gov.uk/guidance/vat-refund-scheme-for-museums-and-galleries-notice-998#annex>.

for-profit motives, and therefore its incompatibility with public interest is largely erroneous.

For VAT problems of social enterprises, solutions may only be found outside the VAT framework in the form of direct subsidies.

All in all, for the moment, the relation between social enterprises and taxation can still be characterized as living apart together, in some jurisdictions more apart and in others more together. The latter is more beneficial for the social enterprise sector.

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Corporate Purpose: How the Board of Directors Can Achieve an Inclusive Corporate Governance Regime



Mathieu Blanc, Jean-Luc Chenaux, and Edgar Philippin

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1 Challenging Times for Corporations and Capitalism

Since the 2000s but after the 2008 financial crisis at the latest, (large) corporations—and more broadly capitalism—which were seen as tools for progress as well as shareholders' and investors' profit centers, have been facing mistrust and criticism. In recent years, several major scandals, such as the flouted environmental tests at Volkswagen, the financial fraud at Wirecard, or the Archegos or Greensill debacle, have provided additional illustrations of strongly criticized illegal and unethical misbehaviors.¹

In that context, research and different surveys evidenced the increasing loss of confidence in business, especially in the USA² but also in Europe and more broadly in all industrial countries. In Switzerland, for example, several popular initiatives criticizing business practices obtained high vote scores, showing a part of the population's loss of trust.³

In addition to the usual criticism related to high-level executives' excessive remunerations or to short-termism in business, the numerous challenges posed by, among other causes, climate change, inequality, and new technologies raised numerous questions for the future of business and corporations.

Simultaneously, communities and people's dependence on corporations as well as their impact on our lives have never been so important. As summarized by Professor Colin Mayer from Oxford University, “[t]he corporation is the creator of wealth, the source of employment, the deliverer of new technologies, the provider of our needs, the satisfier of our desires, and the means to our ends. [. . .] It is the source of economic prosperity and the growth of nations around the world. At the same time, it is the source of inequality, deprivation, and environmental degradation, and the problems are getting worse.”⁴

Klaus Schwab, founder and executive chairman of the World Economic Forum, stated in 2019 that the defining question of our era is: “what kind of capitalism do we want?”⁵ For our purposes, this translates into the following question: What shall be corporations' role and the place of profit in our society?

Obviously, this question—and its potential answers—have both **public (public law) and private (private law) aspects**. In that respect and even if mistrust in corporations has seriously increased over the last 20 years, the difficulties faced by

¹ Aggressive tax reduction strategies and the use of tax havens may also be a reason for the public mistrust; see Tricker (2019), p. 24.

² See the poll realized already in 2014 mentioned by Gatti and Ondersma (2020), p. 4. Salter (2019), pp. 10 et seq. See also Strine Jr (2021), p. 416.

³ E.g. the Minder Initiative on abusive compensations; the initiative “1:12 - For fair wages” or more recently the Responsible Business Initiative.

⁴ Mayer (2018), p. 1. See also Strine Jr (2021), p. 415, who observes that the recent growth of the financial sector and the financialization of the economy “has been a cause of greater instability, leverage, and risk.”

⁵ www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/.

regulators and political leaders to address the abovementioned challenges and the simultaneous loss of confidence toward political entities (e.g., due to electoral calculations) led several academics, economists, and media to consider that corporations and business leaders may be better suited than public action to act and deliver solutions for the entire society.⁶ In particular, when it comes to global issues concerning large corporations, a “one-size-fits-all approach,” as implemented by regulators, is not appropriate.⁷ In addition, we consider that an improvement of the corporate governance mechanisms and a *change of the power dynamics within corporations* are appropriate means to have companies acting with consideration for its stakeholders in order to create value over the long term.⁸

Finally, this view is clearly in line with the growing expectations of all **stakeholders**,⁹ which include the shareholders, employees, managers, customers, creditors, suppliers, as well as the communities in which those corporations operate. As *The Economist* observed, “A growing cohort – perhaps a majority – of citizens want corporations to be cuddlier, invest more at home, pay higher taxes and wages and employ more people. . .”¹⁰ Hence, as former Chief Justice and Chancellor of the State of Delaware Leo E. Strine, Jr., once wrote, it may be time “for all societally important business entities – not just public companies, but large private companies and money management firms as well – to have to use their power in a socially responsible manner.”¹¹

Since 2018 at the latest, a major shift has taken place with numerous debates and research made around the *new theory of corporate purpose* and its implication for lawmakers, economists, legal practitioners, and boardrooms. The COVID-19

⁶Mayer (2013), p. 249. As noted in a McKinsey memo dated April 2020, “Business also has an opportunity, and an obligation, to engage on the urgent needs of our planet, where waiting for governments and nongovernmental organizations to act on their own through traditional means such as regulation and community engagement carries risk” (available at www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/purpose-shifting-from-why-to-how).

⁷Among other Edmans (2020), p. 258. In addition, as noted by Sjäfjell (2022, p. 106) “legislation has a tendency to follow events, rather than precede and thereby prevent, e.g., abuse of the environment.”

⁸Strine Jr (2021), p. 423.

⁹See Lipton et al. (2022): “What have changed [during the past years] are the expectations of investors and other stakeholders for (1) greater transparency, (2) deeper board engagement and oversight, (3) greater opportunity to engage with directors and (4) responsible investor stewardship to further long-term, sustainable value creation.”

¹⁰Businesses Can and Will Adapt to the Age of Populism, THE ECONOMIST (Jan. 21, 2017), <https://www.economist.com/business/2017/01/21/businesses-can-and-will-adapt-to-the-age-of-populism>.

¹¹Strine Jr (2021), p. 399. See also Winter (2020), p. 1 “[w]e can no longer afford corporations to be amoral.”

pandemic further accelerated this shift toward corporate social responsibility, notably to minimize the economic impact of the pandemic.¹²

In our view, and despite cynical views that consider that this new approach will not improve the situation of stakeholders and could even harm them, (1) the definition and implementation of a “corporate purpose” by the board of directors after the involvement of all stakeholders, notably investors, as well as (2) the question that all directors and managers of large corporations should consider regarding the way the company is doing money and the impact of the business on its various stakeholders are the right tools to restore trust and let corporations do what they know best: *innovate and create new solutions, products and services for customers and consequently generate shared value for society*.

In this contribution, we will first summarize the origins of this debate before describing the most recent developments (Sect. 2). We will then present the major criticisms addressed to both shareholder welfare and stakeholder capitalism theories (Sect. 3) in order to discuss the limits of this debate, the erroneous rejection of profit, and the new approach proposed by the corporate purpose idea (Sect. 4). Finally, we will analyze and describe what is meant by *corporate purpose* and its implementation process by the board (Sect. 5) before concluding (Sect. 6).

2 Whose Interests Shall Prevail in a Corporation? A Never-Ending Debate

In corporate law scholarship, one of the most frequent questions is certainly *whose interests shall prevail in a corporation* or *what are the corporation's ends?* To be sure, this constitutes one of the two major questions of any model of corporate governance alongside the question of control and decision-making.¹³

It is worth noting that the way this question is addressed as well as the answer (s) given have substantially evolved since the incorporation of the first, historical companies.

2.1 *Origins and Evolution*

Originally, corporations were created to develop and achieve a public purpose. Charitable, educational, or ecclesiastical companies were more common than

¹²Strine Jr et al. (2021b), p. 1886 note that “[t]he profound human and economic harm caused by the COVID-19 pandemic, and its harmful effects on ordinary workers, will only sharpen the societal focus about whether our corporate governance system is working well for the many or instead subordinating the interests of employees and society to please the stock market.”

¹³Bainbridge (2002), pp. 2 et seq.

corporations with a “business purpose” for most of corporate history.¹⁴ The Dutch East India Company, which was founded in the early 1600s, illustrates the historical public-private use of corporations. The preamble of its charter explicitly mentioned that the company shall “promote the interests and the wellbeing of the United Netherlands as well as the interests of all the inhabitants of the countries involved,” and one of its principal goals was to weaken the Spanish and Portuguese’s position overseas.¹⁵

Then for-profit corporations have developed, notably in the USA. In 1837, Connecticut enacted one of the earliest *incorporation acts* and required a description in the charter of a corporate object which was allowed “for the purpose of engaging in and carrying on any kind of manufacturing or mechanical or mining or quarrying or any other lawful business.”¹⁶ In 1874, Pennsylvania adopted a new act that distinguished three categories of corporations: religious corporations (*exempted from property taxes*), for-profit corporations (*subject to taxes*), and nonprofit corporations (*tax exempted*).

At that time, business corporations were usually under the influence and control of management. According to legal scholars, the “management corporation” caused American economic success in the late nineteenth century. This model focused on the managers’ duties, including the search for investors.¹⁷ “Underlying this arrangement was a ‘tacit societal consensus’ that corporate growth took priority over corporate profits”¹⁸ even if shareholders were obviously expecting dividends.¹⁹ As a consequence, there was clear managerial authority over the company with very little powers granted to shareholders.²⁰

In the 1930s, a quarrel opposed Professors Adolph Berle and Merrick Dodd, two prominent corporate law scholars.²¹ In short, Berle argues that “all powers granted to a corporation or to the management of a corporation, or to any group within the corporation [. . .] [are] at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.” Conversely, Dodd supports “a view of the business corporation as an economic institution which has a social service as well as a profit-making function.” In his opinion, the purpose of the corporation shall include, in addition to profitability in favor of shareholders, the creation of secure jobs for employees, the production of better quality products for clients, and, as far as

¹⁴Pollman (2021), p. 1426; Blair (2013), pp. 788 et seq.

¹⁵See de Jongh (2010), p. 8.

¹⁶Pollman (2021), p. 1437.

¹⁷Strine Jr (2010), p. 3.

¹⁸See Cremers and Sepe (2016), p. 69.

¹⁹US courts issued famous decisions in favor of shareholder wealth maximization such as *Dodge v. Ford Motor Co.* in 1919: “A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”

²⁰Cremers and Sepe (2016), p. 69: “American shareholders have historically been relegated to the role of spectators.”

²¹Berle (1932), pp. 1366 et seq; Dodd (1932), pp. 1162 et seq.

possible, greater contributions to society as a whole.²² It would, however, be too reductive to consider Adolph Berle as a “blind advocate of shareholder primacy.” He was in fact skeptical that corporate managers could be good at protecting other corporate constituencies than shareholders.²³

Thereafter, and with a significant increase since the 1970s, the disaggregated ownership of shares by individual investors, which gave a lot of freedom to corporate directors and managers, was progressively replaced by concentrated ownership in the hands of large institutional investors.²⁴ This shift “created a class of shareholders singularly focused on shareholder value.”²⁵

As a consequence of this phenomenon coupled with the globalization of capital markets, which increases pressure on corporations to deliver short-term profits,²⁶ the shareholder primacy and wealth maximization model developed. The core principles of the shareholder primacy doctrine are generally awarded to Nobel laureate Milton Friedman, who wrote that “a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society [. . .] Insofar as his actions in accord with his ‘social responsibility’ reduce return to stockholders, he is spending their money.”²⁷ It is worth noting that a similar concept was already expressed in 1776 by Adam Smith, who stated that “[t]he directors of such companies, however, being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.”²⁸

In 1976, Michael Jensen and William Meckling coauthored the article “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,” which lays out a theory of the firm based on the **agency theory**. This theory justifies shareholder value maximization as the most effective tool for managing the agency relationship between shareholders and managers, notably in companies with dispersed ownership.

²²Stout (2002), p. 1189.

²³See Bratton and Wachter (2008), pp. 134 et seq. regarding the frequent misreading of the debate between Adolph Berle and Merrick Dodd.

²⁴See notably Strine Jr (2008), p. 262 who noted that “[a]s the twentieth century ended, institutional investors controlled well over half of the stock in American corporations, and the percentage is continuing to rise”; he further added that “[t]his separation of ‘ownership from ownership’ made the triumph of Milton Friedman’s vision even more complete”.

²⁵Gordon (2007), pp. 1521 et seq.

²⁶Regarding the consequences of globalizing markets and the related pressure on corporations to deliver short-term profit, see Strine Jr (2012), p. 167.

²⁷Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, New York Times, 13 September 1970, quoted by Bainbridge (2002), p. 22.

²⁸Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (ed. 1801).

In that respect, it is worth mentioning that, conversely to the situation existing in the USA or the United Kingdom, an important number of listed companies in Europe (notably in France, Germany, or Switzerland) are under the control of one shareholder or of blockholders. Nevertheless, the analysis of the dynamics of corporate governance using the agency theory was (and still is) frequent among academics, even if it is not best adapted to the effective ownership structure.²⁹

In a famous article published in 2000, Professors Henry Hansmann and Reinier Kraakman declared the victory of shareholder primacy over other corporate theories, such as the stakeholder governance approach.³⁰ For them, a “consensus” was existing among the academic, business, and governmental elites in leading jurisdictions to consider that “ultimate control over the corporation should be in the hands of the shareholder class; that the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; that other corporate constituencies, such as creditors, employees, suppliers, and customers should have their interests protected by contractual and regulatory means [. . .].” To the extent that such a consensus really existed at that time, this analysis was soon to be challenged, as we will observe in the next section.

2.2 *Recent Developments*

A clear shift toward stakeholder governance started in 2008 with the advent of the subprime crisis. For many legal and economic scholars, the economic activity in which corporations partake is a part of social activity and, as such, cannot be analyzed independently of its impact on the community and environment.³¹

As a consequence, several institutions, economic actors, and lawmakers have promoted and embedded stakeholder governance in the USA and Europe:

- Since 2012, Larry Fink, chairman of BlackRock (the world’s largest asset management company), has sent a yearly letter to important chief executive officers (CEOs). The content of the letters has evolved over the years but has had a systematic focus on sustainable returns over the longer term. In 2018, in a letter entitled *A Sense of Purpose*, he wrote that “Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance but also show how it makes a positive contribution to society.” In his 2022 letter to CEOs, Larry Fink emphasizes again the importance of corporate purpose, stating that “Putting

²⁹See for instance Philippe (2020).

³⁰Hansmann and Kraakman (2001), pp. 439 and 468.

³¹See in particular Mayer (2013, 2018). We can also mention here the work of the Aspen Business and Society program which since 2009 has analyzed the question of how corporations affect society and how corporations could produce more shared value; see Strine Jr (2021), p. 414, fn 51.

your company's purpose at the foundation of your relationships with your stakeholders is critical to long-term success."

- While the first version of the Swiss Code of Best Practice for Corporate Governance (SCBP) published in 2002 mentioned shareholder wealth maximization as a guiding principle, the revised version of 2014 emphasizes "the concept of sustainable corporate success as the lodestar of sensible corporate social responsibility." The revised SCBP further specifies that "corporate governance encompasses all of the principles aimed at safeguarding sustainable company interests." In this respect, while determining the strategic goals as well as the general ways and means to achieve them, the board of directors "should be guided by the goal of sustainable corporate development."
- In 2016, the International Business Council of the World Economic Forum invited Martin Lipton, one of the established opponents of shareholder primacy, to prepare guidelines to promote a partnership between corporations and investors and to achieve sustainable long-term investment and growth. This document, called *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*,³² was unanimously approved and then submitted for adhesion by corporations, institutional investors, and asset managers starting January 2017. This analysis explicitly rejects regulation and proposes "private ordering through corporations and investors who best know their respective concerns."
- In 2018, the revised version of the UK Corporate Governance Code emphasized the fact that companies *do not exist in isolation* and that successful and sustainable businesses need to "build and maintain successful relationships with a wide range of stakeholders" and be "*responsive to the views of shareholders and wider stakeholders*." Within that frame, the UK Code provides that the board of directors should "establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned."
- In early 2019, the French National Assembly and Senate adopted the *Plan d'Action pour la Croissance et la Transformation des Entreprises* (PACTE). Pursuant to this Plan, legislation was modified to consider social and environmental issues in companies' strategies and activities.³³ In particular, Article 1833 of the Civil Code has been amended to set forth that *the company shall be managed in its social interest, taking into consideration the social and environmental stakes of its activity*.
- In August 2019, the Business Roundtable (BRT), an association formed by influent CEOs of leading US corporations, issued a collective statement promoting corporate purposes that support "an economy that serves all Americans" and

³²Document available at www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf.

³³Speaking before the National Assembly, French Minister Bruno Le Maire stated that "le capitalisme que nous avons connu au XXe siècle est dans une impasse. Il a conduit à la destruction des ressources naturelles, à la croissance des inégalités et à la montée des régimes autoritaires."

stressing that any corporation has a “fundamental commitment to all their stakeholders.”³⁴

- The 2020 statement of corporate purpose by the World Economic Forum (Davos Manifesto 2020) explains that “the purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large.” Within that frame, “[a] company is more than an economic unit generating wealth. [. . .]. Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.”

Hence, at least since 2018, the stakeholder governance trend has appeared clear, strong, and growing.³⁵ As Leo E. Strine, Jr., observed, “[w]hen representatives of the very business elites who have been the winners of the redistribution signal their recognition [. . .] that our corporate governance system is broken, that is not the start of something; it is the signal that the simmer is threatening to boil over. Before an establishment gets burned, its wiser and more enlightened leaders often speak up to push for a rebalancing that largely preserves the existing order and ameliorates the conditions that have given rise to widespread discontent.”³⁶

Finally, many commentators consider that with the economic difficulties and the new perspectives arising out of the COVID-19 pandemic, corporations should use this momentum to recognize that environmental, social, and governance (ESG) concerns and stakeholder governance are necessary elements of sustainable business.

3 Criticism of Shareholder Wealth Maximization and Stakeholder Governance

As we mentioned before, an intense debate has been existing for years between scholars who champion shareholder wealth maximization and those who promote stakeholder governance.

The core arguments that are usually presented to support shareholder value are now severely criticized by many legal and economic scholars. Nevertheless, several influential academics consider that the stakeholder approach is either a chimera or a

³⁴See the statement available at <https://www.businessroundtable.org/business-roundtable-rede-fines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>. It is worth mentioning that since 1997 BRT had supported *shareholder value*. For a critique of this statement, see Bechuk and Tallarita (2020).

³⁵Lipton et al. (2019), p. 1 stated that “2019 may come to be viewed as a watershed year in the evolution of corporate governance” due to “the advent of stakeholder governance.”

³⁶Strine Jr (2021), p. 412.

risk for stakeholders.³⁷ Therefore, they request public/political actions through policy making or still promote the benefits of the classical model. For instance, in Switzerland, a majority of legal scholars still follow the principles of enlightened shareholder value, according to which the board of directors and management should take into consideration stakeholder interests and pay close attention to the effects of the company's operations on stakeholders since this will maximize long-term value for shareholders. Hence, under this theory, any positive outcome for stakeholders would then eventually be a derivative consequence of the maximization of value for shareholders.³⁸

3.1 Shareholder Wealth Maximization Model

In short, under the shareholder wealth maximization doctrine, shareholders are described as “owners” of the corporation or at least the “residual claimants of the corporation” while the directors are viewed as “mere agents of the shareholders,” who have a duty to “maximize the profits for shareholders.”³⁹ We will briefly discuss these arguments.

Although the analogy with ownership rights is frequently used to illustrate the shareholders' position, this view creates, in our opinion, a false premise for any analyses.

Indeed, shareholders do not have any ownership rights either on the corporation directly or on its assets but own shares representing their contribution to the company.⁴⁰ This analysis is coherent with the most widespread economic and legal theory of the firm, which defines the corporation as a *nexus of contracts*. Under this model, “someone owns each of those factors, but no one owns the nexus itself.”⁴¹ Indeed, similarly to shareholders, all other stakeholders contribute to the company: employees and managers devote time, customers purchase products, and the community offers framework conditions for the economy.

³⁷ See in particular, Bebchuk and Tallarita (2020) and Gatti and Ondersma (2020).

³⁸ Among others Forstmoser (2006), pp. 81 ss; Fischer (2021), 10 ss. See on that debate, Blanc (2020), pp. 230 et seq. An example of this enlightened approach can be also found in Section 172 of the 2006 UK Companies Act (“A director of a company must act in the way he considers [...] would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard [...] to [...] the interests of the company's employees, [...] the need to foster the company's business relationships with suppliers, customers and others [...] the impact of the company's operations on the community and the environment [...]”).

³⁹ See Stout (2012).

⁴⁰ Stout (2002), pp. 1190 et seq. As Stout (2012), p. 36 explains in a pragmatic way “[o]wning shares in Apple doesn't entitle you to help yourself to the wares in the Apple store.”

⁴¹ Bainbridge (2002), p. 23. The *Team Production Model* developed by Blair and Stout (1999), pp. 247 et seq that we embrace has similar consequences and aims at encouraging firm-specific investments of all members of the corporation.

Another often-cited argument to promote the shareholder wealth maximization model is that shareholders are the corporation's sole "residual claimants" or "residual risk bearers." According to this opinion, all stakeholders would have fixed contracts conferring some protection, which would not be the shareholders' case as they bear the business risk. This assertion is questionable.

First, shareholders can only be considered "residual-claimants" when the company is in bankruptcy. As stressed by *Stout*, "[w]hen the firm is not in bankruptcy, it is grossly misleading to suggest that the firm's shareholders are somehow entitled to—much less actually expect to receive—everything left over after the firm's explicit contractual obligations have been met."⁴² Indeed, a company that makes profits can distribute dividends, regardless of the other stakeholders' situation. Moreover, other constituencies, such as debtholders or even employees, can also qualify as residual claimants in view of their vulnerability to the firm's overall performance;⁴³ hence, there is no ground to consider that shareholders are *the sole* claimants who would not be adequately protected by contracts.⁴⁴

The **agency theory** (and associated costs) is certainly the most cited economic theory to justify corporate governance regulations and the increase of shareholders' rights over management. In essence, under this model, shareholders are considered principals who hire directors who act as agents.

If this theory has important theoretical merits, notably in the model of closely held corporations, its premises do not apply to large or listed companies. First, the shareholders' meeting and the board of directors are two independent bodies of the corporation whose obligations and duties are derived from law. Moreover, the directors are not hired by the principals but have a contractual relationship with the corporation itself. Even if shareholders have the legal power to remove directors, this is practically very difficult to achieve for listed companies with dispersed ownership. Furthermore, the appointment of management and its chief executive officer remains a duty of the directors.

As a consequence, it does not make sense to consider the members of the board of directors as mere agents of the shareholders.

Finally, it is worth mentioning that the shareholder wealth maximization doctrine can be eventually detrimental to investors themselves. In other words, the myopic focus on shareholder value "can hurt shareholders both individually and immediately, and collectively and over time."⁴⁵ For example, the pressure imposed by the publication of quarterly results led the board of directors of many companies to limit the investments in research and development. This policy has proven to be largely

⁴²Stout (2002), p. 1193.

⁴³See Strine Jr (2021), p. 409, who notes that "[d]iversified stockholders in fact bear less firm-specific risk than most other stakeholders, particularly corporate workers, small creditors, pensioners, and corporate communities who cannot diversify away the risk of getting shafted."

⁴⁴Blair and Stout (2001), pp. 414 et seq. See also Mayer (2013), pp. 33 et seq who notes that employees and customers are often not correctly protected by contracts.

⁴⁵Stout (2012), p. 69.

counterproductive and detrimental to shareholders. One of the latest examples is Boeing, which adopted a shareholder-centric doctrine ahead of engineering-driven decisions and long-term strategy, which is at least one of the reasons for the Boeing 737 Max crisis.⁴⁶

3.2 *Stakeholder Governance Model*

The recent shift from shareholder value and the numerous statements of business leaders in favor of the so-called stakeholder capitalism (notably the 2019 statement of the Business Roundtable) have given rise to criticisms of different kinds.⁴⁷

These criticisms were notably the object of several publications prepared by shareholders' primacy advocates as well as by other scholars considering that these calls of business leaders would divert from effective solutions to protect stakeholders, notably from an efficient action by policy makers.

One of the most recurring criticisms is related to the **confusion of interests** created by this theory and the "Herculean task" that stakeholderism assigns to corporate leaders.⁴⁸ Indeed, the stakeholder governance doctrine requests the board of directors to weigh and balance a plurality of autonomous interests of independent constituencies. But having "several masters" or principals to serve will confuse directors and undercut managerial accountability to shareholders. As this was stated by the US Council of Institutional Investors, which represents public and private pension funds as a reaction to the Business Roundtable Statement of 2019, "accountability to everyone means accountability to no one."

In relation to this critique, several scholars consider that stakeholder governance gives **excessive discretion** to the board of directors, notably with respect to the category of stakeholders that the board wishes to support. Moreover, Lucian Bebchuk and Roberto Tallarita consider that stakeholder capitalism and the statements made by business leaders in favor of stakeholders are aiming to give more power to the management and insulate them from the shareholders' influence.⁴⁹

In that respect, some scholars argue that since stakeholders are as a rule not entitled to file claims to enforce ESG duties, the directors' accountability and the effective enforcement of stakeholders' interests are at least questionable.⁵⁰

⁴⁶Researches evidenced that over the past 6 years, Boeing spent US\$ 43.4 billion on stock buybacks, compared with US\$ 15.7 billion on research and development for commercial airplanes.

⁴⁷See notably Bebchuk and Tallarita (2020). It is also worth noting that Larry Fink in his annual letter to corporate leaders in 2022 responded to some criticisms that "[s]takeholder capitalism is not about politics. It is not a social or ideological agenda. It is not 'woke.'"

⁴⁸Bebchuk and Tallarita (2020), p. 20. See also Fischer (2021), pp. 10 et seq.

⁴⁹Bebchuk and Tallarita (2020), p. 20.

⁵⁰Gatti and Ondersma (2020), p. 20 and authors quoted.

Finally, several authors point out that the management and board of directors have *no incentive* to promote effectively stakeholders' interests. Indeed, the members of the board are appointed only by shareholders (except in the legal regimes that apply codetermination, such as Germany), and they would put their "re-election in danger" if they prefer employees or suppliers to shareholders.⁵¹

4 Profit and Shareholders vs. Stakeholders: A False Debate?

As mentioned, corporations face a public loss of confidence. Obviously, the disenchantment of public opinion toward capitalism stems from various causes. However, "it is becoming increasingly clear that a persistent belief in shareholder value maximization [...] as the only legitimate basis for guiding corporate strategy and measuring corporate performance has contributed directly to this ethical drift."⁵²

Similar analyses led the legislators (incl. through popular initiatives in Switzerland) to adopt several measures to limit management compensation mechanisms (say on pay, the prohibition of golden parachutes, etc.). More broadly, several criticisms were made of *profit-driven companies*.

In our opinion, multiple reasons make the rejection of "profit" as a constitutive part of the corporation system flawed.⁵³

First, it is generally accepted, at least under all western legal regimes, that corporations shall realize incomes and try to **obtain a profit**.⁵⁴ Profit, as generated by a successful business activity, allows companies to hire and compensate employees, develop new ideas and products, as well as pay taxes.⁵⁵ In addition, profit is also essential to reward investors' confidence and to finance through dividend distribution pension funds or educational endeavors.

Second, and more importantly, the traditional debate between shareholders and stakeholders relies on competing and irreconcilable interests: the shareholders' financial interests on the one hand and the stakeholders' welfare on the other hand. This traditional approach may be viewed as "pie-splitting": a fixed-size pie represents a company's value (i.e., both financial and social value), and the only way to

⁵¹ Gatti and Ondersma (2020), p. 22; Bebchuk and Tallarita (2020), p. 49.

⁵² Malcolm (2019), p. 9. See also Lipton et al. (2020a, b), "The Covid-19 pandemic has brought into sharp focus the inequality in our society that, in considerable measure, is attributable to maximizing shareholder value at the expense of employees and communities." See Winter (2020), p. 15.

⁵³ See Edmans (2021).

⁵⁴ E.g. in Switzerland see Article 660 of the Swiss Code of obligations.

⁵⁵ Edmans (2021), quotes Merck CEO Kenneth Frazier who stated that "the price of [a] successful drug is paying for the 90%-plus projects that fail. We can't have winners if we can't pay for losers."

increase one member's share is to split it differently, consequently reducing others' share.⁵⁶

As pointed out by the British Academy in its final report of the Future of the Corporation program, that is a sterile debate. "The issue is not whether to promote the interests of shareholders or stakeholders but how to do both by profitably solving problems of people and planet."⁵⁷

Indeed, the concept of corporate purpose should lead to avoiding a debate between profit-driven **or** socially responsible corporations to rather promote profit-driven **and** socially responsible corporations.

Professor Alex Edmans, in his book "Grow the Pie. How Great Companies Deliver Both Purpose and Profit," considers the pie as **expandable** and encourages developing a "pie-growing mentality," as opposed to a "pie-splitting mentality." That means that investors do not have to take from stakeholders, and stakeholders have no need to defend themselves from investors. A responsible business approach is not about splitting the pie differently (e.g., sacrificing profits to increase wages or reduce the impact of climate change) but about growing the pie through innovation and excellence in its own business. The concept—which includes profitability as an essential part—is "to create value for society . . . Profits, then, are no longer the end goal, but instead arise as a by-product of creating value."⁵⁸

Is that a naïve theory when considered under practical terms? It is not. Various analyses persuasively conclude that in companies with management committed to the company's success *in the long run*, it causes a degree of trust among employees, communities, and creditors sufficient to encourage them to devote time and make important investments in the company.⁵⁹ Put differently, a more inclusive corporate governance regime is key to attracting and retaining important investments and both internal and external contributions to the firm's success. Additionally, several surveys recently demonstrated that ESG funds seemed to be highly competitive and more resilient in the face of COVID-19 pandemic-related financial impacts than other "standard funds."⁶⁰ It is also worth noting that Bank of America Merrill Lynch

⁵⁶Edmans (2020), pp. 20 et seq.

⁵⁷Final Report of the Future of the Corporation program, British Academy, 2021, p. 21 (available at www.thebritishacademy.ac.uk/documents/3462/Policy-and-Practice-for-Purposeful-Business-The-British-Academy.pdf). See also Lipshaw (2020), p. 1 who wrote that "the zero-sum positions of the contending positions are a false dichotomy, failing to capture the complexity of the corporate management game as it is actually played."

⁵⁸Edmans (2020), p. 26. Winter (2020), p. 6 notes that "[p]rofit is not the objective of the corporation as such but is one outcome of this process in which the corporation seeks to be valuable to society."

⁵⁹See for instance Forstmoser (2005), p. 217.

⁶⁰Survey available on <https://www.morningstar.com/articles/970108/us-sustainable-funds-weathering-coronavirus-correction-better-than-most-funds>.

stated in a recent note that attention to ESG matters “could have helped avoid 90% of bankruptcies” but also that “[g]ood’ companies enjoy a lower cost of capital.”⁶¹

Research does not conclusively show that ESG strategies would *systematically* outperform traditional strategies.⁶² In addition, the difficulty to efficiently and validly measure ESG performance (contrarily to shareholder value, which can be clearly measured) and determine the applicable criteria is a challenge for rating agencies.⁶³ That being said, research showed that investors behave more patiently toward high-ESG firms and are hence less likely to sell their shares in a company that has communicated weak earnings if its ESG performance (based on several ESG criteria which significance can—once again—be discussed⁶⁴) is strong.⁶⁵ In addition, it seems that several investors are ready to give a significant premium on companies that are first in line to address climate change and related sustainability issues. Rivian Automotive Inc.’s initial public offering, which took place in November 2021, recently evidenced that phenomenon. The shares of this electric pickup truck manufacturer increased by 29% on the day following the offering, resulting in an enterprise valuation of more than US\$ 86 billion.⁶⁶

In addition, research also revealed higher effectiveness and profitability when companies elect and implement some specific ESG aspects on which they have a greater influence (rather than addressing all stakeholders’ issues or working on all ESG aspects simultaneously).⁶⁷ As an example, an article published in 2019 concluded, based on approximately 500,000 survey responses on workers’ perceptions of their employer, that “firms exhibiting both high purpose and clarity have systematically higher future accounting and stock market performance, even after controlling for current performance, and that this relation is driven by the perceptions of middle management and professional staff rather than senior executives, hourly or commissioned workers.”⁶⁸

⁶¹ https://www.bofaml.com/content/dam/boamlimages/documents/articles/ID19_1119/esg_matters.pdf.

⁶² See research mentioned by Edmans (2020), pp. 91 et seq.

⁶³ See the critiques raised by Edmans (2020), p. 92 s regarding a box-ticking approach. However, the efforts to establish global climate-related and other ESG disclosure standards (notably by IFRS) shall be taken into account.

⁶⁴ See, for instance, the recent criticism over ESG ratings: <https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/>.

⁶⁵ Starks et al. (2017).

⁶⁶ Acuner et al. (2021) point out that “the fact that Rivian has only produced 156 vehicles to date and has never demonstrated the ability to mass produce electric vehicles apparently did not faze investors.”

⁶⁷ See for instance Edmans (2020), pp. 64 et seq. and 202 et seq.

⁶⁸ Gartenberg et al. (2018), pp. 1 et seq.

5 The “New” Corporate Purpose Theory

5.1 *Notion*

In this section, we will define the core criteria of the new theory of corporate purpose.

For the clarity of this article, it is initially necessary to distinguish the notion of “corporate purpose” from other related concepts, such as the (legal) “corporate objects” or the “corporate missions and values” (Sect. 5.1.1). We will then list several definitions proposed by academics, practitioners, and special interest groups (Sect. 5.1.2) before citing some examples of purpose statements set by large and well-known companies (Sect. 5.1.3). Finally, we will outline the criteria that we selected as a tool to understand the scope and interest of corporate purpose for good corporate governance (Sect. 5.1.4).

As we will see, this concept has also business and moral significance rather than a purely legal scope (unlike the purpose clause in the articles of association). However, as we will discuss below, as a result of the continuous increase of the importance of ESG aspects for all companies and the associated risks, the board has the duty to analyze how the company achieves its missions and to lead the materialization of a purposeful activity.

5.1.1 Distinctions from Other Notions and Concepts

Within the context of this article, the “corporate purpose” shall be understood as the “raison d’être” of a corporation and concerns the *role* of corporations in society.⁶⁹

First, it is worth mentioning that the question of the *economic purpose* or “Endzweck” of the company is not discussed in this article, which concerns exclusively business and for-profit corporations.

Then the notion of corporate purpose shall be distinguished from the “purpose” or “objects” (e.g., the production and distribution of ice cream, the manufacturing of cars, etc.) of the company, which are set *by the shareholders* at the incorporation of the company or—as amended later—in the company’s articles of association. These kinds of clauses lost a lot of importance, in particular in the USA, where they are usually drafted as permissive boilerplate provisions⁷⁰ and where the *ultra vires* doctrine has eclipsed. In other countries, such as Switzerland or Germany, the purpose clause shall still define the activity of the company and may limit the

⁶⁹Pollman (2021), p. 1424.

⁷⁰Under § 101(b) of the Delaware Code Annotated a corporation may be incorporated or organized to conduct or promote any lawful business or purposes. Under § 3.01(a) of the Model Business Corporation Act, “every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.”

possibility for the management to enter into any new business line.⁷¹ In addition to this description of business activity, it is worth noting that a large for-profit corporation such as Nestlé SA inserted in the purpose clause of its articles of association a sentence setting forth that “Nestlé shall, in pursuing its business purpose, aim for long-term, sustainable value creation.”

The vagueness or imprecise character of the purpose clause in the articles of association and/or its limited public character in several countries may have led companies to develop corporate brands and communicate about values to market products. As stated by professor Elizabeth Pollman, “[t]he intangible aspects of branded goods and the associations and expectations they create for a corporation are, of course, different than a formal legal statement of purpose in a charter. They do not restrict a corporation’s activities or create legally binding governance commitments. Their value depends on the ongoing actions and contributions of corporate managers and employees.”⁷²

Finally, corporate purpose and “mission statements” are often conflated even if they are clearly correlated. The mission statement will describe *what a company does and for whom* when the corporate purpose provides *the reason why the company exists*. In any case, we consider that the definition of missions and the way such missions will be achieved are required to set a clear purposeful activity. Indeed, as outlined by the famous “management guru” Peter Drucker in 1973, “A business is not defined by its name, statutes or articles of incorporation. It is defined by the business mission. Only a clear definition of the mission and purpose of the organization makes possible clear and realistic business objectives.”⁷³

5.1.2 Definition(s)

Corporate purpose is currently the “hottest topic in corporate governance.”⁷⁴ Its definition is, however, not settled in economic or legal literature. In addition, economic scholars, legal practitioners, or other special interest groups do not put equal importance on the same criteria.

Among all the numerous publications, memos, and reports on this topic, we will mention here several complementary definitions:

⁷¹For example, under Swiss law, Article 626 ch.2 of the Swiss Code of Obligations provides that the articles of association must contain provisions concerning the objects of the company and, in Germany, § 23 of the Aktiengesetz sets forth that these articles of incorporation shall specify “den Gegenstand des Unternehmens; namentlich ist bei Industrie- und Handelsunternehmen die Art der Erzeugnisse und Waren, die hergestellt und gehandelt werden sollen, näher anzugeben.”

⁷²Pollman (2021), p. 1442.

⁷³Fred (1989), quoting Peter Drucker.

⁷⁴Fish and Solomon (2020), p. 3.

- Professor **Alex Edmans** argues that purpose is “why an enterprise exists – who it serves, its reason for being and the role it plays in the world.”⁷⁵
- Professor **Colin Mayer** considers that the fulfillment of purpose is “the reason why companies exist.” Purpose is then established as “an ultimate goal, not an intermediary objective in the attainment of something else.” On that basis, he argues that “doing well by doing good” is “a dangerous concept because it suggests that philanthropy is only valuable where it is profitable.”⁷⁶
- Professor **Beate Sjøfjell** argues that the purpose of the company can be summarized in a normative perspective “as the fulfilment of its function as an all-important component of our economies in a way that, as far as possible, contributes to the general goals of society (and at least does not, on aggregate, work against them).”⁷⁷
- In 2015, Harvard professors **Rebecca Henderson** and **Eric Van den Steen** defined purpose as “a concrete goal or objective for the firm that reaches beyond profit maximization.”⁷⁸ In a recent book aiming at reimagining capitalism, **Rebecca Henderson** supplemented that companies with a purpose (in the sense we consider here), “embrac[e] a pro-social purpose beyond profit maximization and tak[e] responsibility for the health of the natural and social systems.”
- In a Wachtell Lipton Rosen Katz memorandum dated 2020, **Martin Lipton**, **William Savitt**, and **Karessa Cain** broadly formulated corporate purpose as follows: “The purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to create value over the long-term, which requires consideration of the stakeholders that are critical to its success (shareholders, employees, customers, suppliers, creditors and communities), as determined by the corporation and the board of directors using its business judgment and with regular engagement with shareholders, who are essential partners in supporting the corporation’s pursuit of this mission.”⁷⁹
- According to the audit company **Deloitte**, corporate purpose refers to “a company’s stated role in society, connected to long-term value, and how the company fulfills that role in the communities in which it operates. It is a concept that involves proactive engagement in society on a broad range of social, and in some cases political initiatives and answers the question ‘why is the company in business, and how will it stay in business and remain relevant.’” Pursuant to **PricewaterhouseCoopers**, “a company’s purpose is often expressed as the reason it’s in business. But it’s more than that. A company’s purpose, as well as messaging and activities, need to be aligned to the overall business strategy – how the company will achieve long-term sustainable returns.”

⁷⁵Edmans (2020), p. 192.

⁷⁶Mayer (2018), p. 6.

⁷⁷Sjøfjell (2022), p. 105.

⁷⁸Henderson and Van den Steen (2015), pp. 326 et seq.

⁷⁹Lipton et al. (2020a, b).

- The **British Academy Future of the Corporation program** defines the purpose of business as follows: “to produce profitable solutions for the problems of people and planet, not profiting from producing problems for either.”
- In several articles related to purpose, **McKinsey** writes the following on purpose: “it’s so much more than just a mission statement. It’s purpose. Purpose answers the question, ‘What would the world lose if your company disappeared?’ It defines a company’s core reason for being and its resulting positive impact on the world. Winning companies are driven by purpose, reach higher for it, and achieve more because of it.”

5.1.3 Examples of Purpose Statements

Most of the large corporations adopted a statement of purpose explaining in one or two sentences the objective or position that the company aims at. While several of these statements can be considered “catchwords” rather than an effective business guideline, it is important to stress that the statement is not the only defining element of a company’s purpose since the statement is usually developed and detailed in a document called “purpose and values” or “mission and purpose statement,” which lists the company’s missions, values, and culture.

The common feature observed in all purpose statements that we could review is that they state or describe *what the company does or plans to undertake for **third parties***, its “raison d’être”:

- In the 2021 version of the document “Nestlé Purpose and Values,” the Swiss corporation Nestlé states as purpose the following: “Unlocking the power of food to enhance quality of life for everyone, today and for generations to come.”⁸⁰
- The manufacturer of play materials LEGO wishes to “Inspire and develop the builders of tomorrow.”
- Airbnb defines its purpose as “We help people to belong anywhere.”
- Microsoft adopted the following purpose: “To empower every person and every organization on the planet to achieve more.”
- Purpose can change or evolve with the development of the company. For instance, Tesla had as original statement the following: “We exist to accelerate the planet’s transition to sustainable transport.” The current version is “We exist to accelerate the planet’s transition to sustainable energy.” The term “energy” instead of “transport” indicates that Tesla wants to be active not only in the transportation (car) business but also in power sources.

⁸⁰<https://www.nestle.com/sites/default/files/2021-06/nestle-purpose-values-en.pdf>.

5.1.4 Selected Criteria

The discussion about corporate purpose aims to explain the **companies' reason to exist**. In short, any corporation's reason for existence is to conduct a prosperous business, but not at any stakeholder's expense.

In our opinion, the key elements that a company shall analyze and define while setting and materializing the corporate purpose statement and missions are the following:

1. A corporation aims to provide solutions or offer services (notably through research, development, and invention) to its customers; this aspect is obviously correlated with the (legal) objects and “branding” of the company.
2. A corporation conducts a lawful and successful business over the long term to realize income and create profits. Even if the obligation to conduct business lawfully seems to be mundane, compliance obligations and risk management which derive from this basic duty require taking into consideration ESG concerns, as we will elaborate below.⁸¹
3. A corporation positively impacts society and shall not create problems or negatively impact stakeholders.
4. The commitment of the board of directors and management, as well as of all constituencies, including the shareholders, is essential to define a purpose statement, its missions, and its core values. Such commitment is also required to deliver credible actions that fully comply with the communicated purpose statement and to avoid greenwashing or fairwashing abuses.

Based on the above, we consider that every company should express and develop its corporate purpose through the following four elements: (1) definition of the missions to be completed within the framework of the corporate objects (if defined in the articles of association), (2) the culture and means by which the company wants to achieve its missions, (3) the way it considers and deals with all the stakeholders, and, finally, (4) the implementation mechanism of its purpose and missions.

5.2 *Identification, Expression, and Implementation of the Corporate Purpose by the Board of Directors*

5.2.1 Identification and Expression

In our opinion, the identification and expression of the purpose and missions of the company, which may in most cases be—at best—only implied from the perspective of the shareholders, are **business judgment issues** for the board of directors to

⁸¹ See below Sect. 5.2.3.

resolve.⁸² But the board may not adopt a broad statement of purpose for reputational reasons without conducting first a detailed analysis and then just “do as it pleases” anyway.

On the contrary, the expression of the purpose requires a specific and thorough analysis of the company’s identity, should include a list of its core values, and should express how it may have a positive impact on society. As a consequence, the **corporate culture** as defined by the board of directors “is a reflection of, and a foundation for, the corporation’s purpose.”⁸³

The board’s work should be about two different aspects: **why** the company exists and **who** the company exists for.⁸⁴

If the “why” refers in particular to the business activity (products, services, missions to achieve), the “who” has been under less scrutiny. Usually and as noted above, most statements of purpose focus on customers. But some companies’ statement explicitly refers to employees or to environmental concerns.⁸⁵ Again, research evidenced that a company’s success might depend not on its ability to act on all stakeholders’ issues but on some (or even one) of them, especially those issues on which it might have a greater influence. Hence, to have an impact, a company shall prioritize some interests and accept the resulting trade-offs, meaning that some stakeholders may not benefit from the company’s purpose-oriented activities as others. Therefore, to be meaningful, a purpose should be selective with a clear orientation.

That analysis also implies an assessment of the company’s social and environmental impact (What does it produce, and what are the required resources [notably energy] for the product’s development, making, use, and end-of-life treatment?)⁸⁶ Obviously, it also involves the *corporation’s risk profile* (including climate-related risks), which every board should know and understand. More broadly, these aspects can be addressed through one of “the most important foundational question corporate directors and managers need to be able to answer to be an effective fiduciary [...] : ‘How does the company make money.’”⁸⁷ Indeed, this question will force directors “to examine closely what the company does that results in the ultimate profitable sale of a product or service.”⁸⁸

On the basis of this analysis and after a review of the business processes by which the company conducts its activity, the board of directors and management of such

⁸²See Lipton et al. (2022).

⁸³Lipton et al. (2022). As expressed by Edmans (2020), p. 211 “while purpose concerns why an enterprise exists and who it serves, culture captures how it operates.”

⁸⁴Edmans (2020), p. 195.

⁸⁵The clothing company Patagonia expresses in its statement that it is “in business to save our home planet.”

⁸⁶In its environmental baseline report for 2018, Starbucks estimated that more than 20% of its total carbon footprint was related to the production of dairy products consumed with its coffee.

⁸⁷Strine Jr et al. (2021b), pp. 1908 s.

⁸⁸Strine Jr et al. (2021b), pp. 1908 s.

company should be able to describe the “positive contribution to society the company will make, and the steps it will take to eliminate its negative impact on society.”⁸⁹

The cross-cutting issues to be reviewed imply that the final analysis is a task for which the entire board is responsible. Obviously, the internal research and assessment of the criteria or values may be conducted by a corporate governance committee or a specific committee in charge of risk management, compliance, and ESG functions.⁹⁰ However, it is in our opinion crucial that the board organizes a group discussion so that the final decision and definition becomes a core part of the corporate strategy and activity.

Moreover, the corporate purpose definition cannot be a solitary exercise of the board. The stakeholders’ involvement—as well obviously as the support and endorsement of the management—is key to expressing a “valid” purpose as well as to legitimizing its content.

As noted by McKinsey in an article published in 2020, “[c]onnecting purpose with the heart of your company means reappraising your core: the strategy you pursue, the operations driving you forward, and the organization itself. That’s hard work, and you can’t do it without deep engagement from your top team, employees, and broader stakeholders. But there’s no substitute. Your stakeholders care about the concrete consequences of your lived purpose, not the new phrase at the start of your annual report.”⁹¹

In that context, discussions, meetings, and interviews with an employee panel, key customers, or suppliers, as well as with shareholders, are necessary to draft a statement that is (1) clear enough for the management and the board when it faces trade-offs in its strategic or daily decisions, (2) in line with the values of the company, and (3) also credible and meaningful for stakeholders.

5.2.2 Concretization and Implementation of Corporate Purpose

Once the board has defined a specific purpose for the company, it shall ensure that the company will “live purpose” and “translate it into action.”⁹² As summarized in a PricewaterhouseCoopers memo, after defining the purpose, the board shall “set related goals and lead accordingly.”

⁸⁹Eccles et al. (2020).

⁹⁰Regarding the allocation to board committees of these major issues, see Strine Jr et al. (2021b), pp. 1918 ss.

⁹¹McKinsey (2020), available at www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/purpose-shifting-from-why-to-how.

⁹²Edmans (2020), pp. 195 and 208. See also principle 3 of the King IV Corporate Governance Report of South-Africa (2016), which states that in a corporation, “the governing body should ensure that the organization is and is seen to be a responsible corporate citizen.” The code is available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf.

The first step toward purpose implementation is its communication to all relevant stakeholders. The corporate governance report should provide a “statement of purpose” in which the central aspects or topics of the statement will be described. Ideally, the report should define precisely (1) the process followed to identify the topics on which the company wants to create shared value and have a positive impact, (2) the way the company plans to implement these goals, and (3) the achievements obtained.⁹³

The board members have a major function while exercising their business judgment to implement the company’s objectives. To that end, the board of directors shall act as a **mediator** (and if needed *arbitrator*) and harmonize as much as possible within the frame of the defined corporate purpose the interests of all stakeholders, including the shareholders, with a clear mandate: **developing a successful business which has a positive impact**.

As already noted, several legal scholars criticize the wide discretion that an inclusive corporate purpose would provide to the board. The stakeholders’ inclusion in the company’s purpose would make it difficult for a board of directors to assess among (too) many interests. Too much discretion for the board could lead, at best, to negligent management and, at worst, to corporate waste or malpractice.⁹⁴

In our view, this opinion fails to recognize the already existing and “standard” complexity implied by a company’s management, including in the almost constant mediation of the various constituencies’ interests.⁹⁵

Defining the corporate strategy and corporative management are inherently difficult tasks. They require “great skill, attention to detail, substantive expertise, and perseverance through difficult circumstances.”⁹⁶ Thus, assessing different interests to make the best decision in each case (including as regards its impact on the various stakeholders, as mandated by the company’s purpose) is certainly a frequent if not a daily task for managers and directors of big companies.⁹⁷ That is also why a clear purpose definition is crucial in the first place.

In that context, it is worth mentioning an article written in 2009 by Alan George Lafley (former CEO of Procter & Gamble) and published in the Harvard Business Review, which describes his tasks as a highest-ranking manager. He notably emphasized that “[a]lthough the consumer is clearly P & G’s most critical external

⁹³The final report for the Future of the Corporation program specifies that companies should “place purpose at the heart of their annual reporting and demonstrate to their stakeholders how their ownership, governance, strategy, values, cultures, engagement, measurements, incentives, financing and resource allocation deliver it.”

⁹⁴For a critic of this opinion, see Blair and Stout (2001), pp. 438 et seq.

⁹⁵See Lipshaw (2020), pp. 6 et seq. See also Hopt and Leyens (2004), p. 141, who note additional competencies for the German Supervisory Board (*Aufsichtsrat*) in addition to its standard duties: “Networking with stakeholders and business partners and the balancing of interests within the corporation have been rated as indispensably valuable, particularly for resolving desperate situations.”

⁹⁶Strine Jr (2010), p. 3.

⁹⁷See also Mayer (2020), pp. 2 et seq.

stakeholder, others are important as well: retail customers, suppliers, and, of course, investors and shareholders. Over the past decade we have dramatically changed how we work with retail customers and suppliers [. . .]. For too long these relationships were transactional – a series of win-lose negotiations. Beginning in 2000 we tried to make them win-win partnerships. We focused on common business purposes and goals, on joint business plans, and, most important, on joint value creation.”

Hence, to think that the management and the board of a company are not able to (*and do not have to*) mediate and assess the interest of several constituencies reflects a profound ignorance of business reality.

In addition, it is obvious that stakeholders have a clear interest in the **profitability** and **success** of the company, be it to be repaid (for creditors) or to keep their job (for employees). As a consequence, “governance focused on stakeholders is not an authorization for management to do what it wants, it is a mandate for management to run a profitable company in a way that respects all stakeholders and benefits, not harms, society.”⁹⁸

That being said and for the sake of clarity, **a statement of purpose should not state that the company will protect equally all stakeholders’ interests**. The board shall set priorities and “clarify the principles that would apply to trade-offs the company might make between investors and stakeholders (say, it will sacrifice profits to reduce carbon emissions) or between different stakeholders (it will decarbonize even though doing so will lead to layoffs).”⁹⁹

5.2.3 Accountability, Compliance Duties, and Disclosure

The accountability issue is closely related to the question of the board’s discretion in its management and undertaking of the daily missions, including the implementation of the company’s purpose.

First, it is important to bear in mind the board of directors’ independent capacity as a body, which is also under the legal duty to conduct the company’s business, if possible, toward success. Effectively, most legal systems provide directors with a wide discretion as to the firm’s allocation of resources.¹⁰⁰ Directors may use that leeway to increase the share value of the firm or choose to use its resources for the benefit of employees or clients.¹⁰¹ To be sure, that does not insulate directors from any accountability. But as long as they act in the company’s best interests (i.e., in

⁹⁸Strine Jr (2021), p. 430. See also Strine Jr et al. (2021a) p. 30, who argue that “[n]o constituency has a more substantial interest in the sustained profitability and viability of the company than its workers, as they cannot diversify away the risk of its failure, as stockholders do.”

⁹⁹Edmans and Gosling (2020). In that context, as already noted, the directors’ role is to act as “mediating hierarchs charged with balancing the sometimes-competing interests of a variety of groups that participate in public corporations” (Blair and Stout 2001, p. 408).

¹⁰⁰See e.g. Watter and Spillmann (2006), pp. 104 et seq.

¹⁰¹See Blair and Stout (2001), p. 406.

compliance with its carefully defined purpose) and are not conflicted, their decisions should not be second-guessed.

This is the rationale underlying **the business judgment rule**. In short, courts must exercise **restraint** in reviewing *a posteriori* business decisions made following an irreproachable **decision-making process**, based on adequate **information** and free from any **conflicts of interests**.¹⁰²

Even if the business judgment rule provides robust protection to directors, it is nevertheless difficult for directors and managers to understand how to include these new tasks, such as setting a corporate purpose or defining corporate missions and, more generally, addressing ESG responsibilities.¹⁰³

In a recent and incisive article, Leo E. Strine, Jr.; Kirby M. Smith; and Reilly S. Steel argue that the “company’s compliance and EESG plans should not be separate, but identical” and “if a corporation already maintains a thorough and thoughtful compliance policy, the corporation has a strong start towards a solid EESG policy.”¹⁰⁴ Essentially, the board has the duty to put in place an effective compliance system and to minimize any (legal or business) risk for the corporation, and by “trying to engage in EESG best practices, the corporation will have a margin of error that keeps it largely out of the legal grey and create a reputation that will serve the company well with its stakeholders and regulators when there is a situational lapse.”¹⁰⁵

If environmental risks (e.g., dangerous emissions or pollution) are already key elements of any corporate compliance program, there are also several examples, both in the USA and in Europe, of (recent) judicial actions regarding consumer protection, employee working conditions, or misbranding, which evidences that the consideration of ESG concerns (at least partially) overlaps with compliance.¹⁰⁶ As a consequence, the practical *integration* of ESG concerns into risk management and the compliance process will help directors adopt and implement an ethical corporate culture while satisfying their legal obligations.

Furthermore, it is important to emphasize that if directors enjoy a large legal discretion, they are, however, subject to various pressures from the financial markets, suppliers, customers, and employees. In addition to (limited) legal and economic constraints, requirements related to behavioral economics analysis—notably on **social norms and trust**—cause additional limiting factors. “This constraint is directors’ internalized belief that they ought to behave in a careful, loyal and

¹⁰²This corresponds at least to the Swiss criteria but the requirements are in essence similar in other countries.

¹⁰³As noted by Strine Jr et al. (2021b), p. 1904, “Managers and directors are struggling with how to implement a commitment to good EESG practices, along with all their pre-existing legal obligations and business requirements.”

¹⁰⁴Strine Jr et al. (2021b), p. 1905.

¹⁰⁵Strine Jr et al. (2021b), p. 1905.

¹⁰⁶See the numerous examples mentioned by Strine Jr et al. (2021b), pp. 1905 s.

trustworthy fashion.”¹⁰⁷ Unlike corporate governance regulations, which state that boards and management *should not be trusted but controlled*, we consider that the role and importance of trust in corporation law is overlooked.¹⁰⁸

Finally and while we do not consider that granting specific or new enforcement rights to stakeholders in connection with the statement of purpose or ESG practices would be desirable (in particular due to the practical difficulties or false hopes that the enforcement of such rights would constitute), we argue that the regulators’ and interest groups’ current efforts to establish global-climate-related and other ESG **disclosure** standards will, if need be, constrain companies reluctant to effectively conduct a purposeful business.¹⁰⁹ In that context, the option to have not only public companies but also private socially influential companies reporting on their ESG impact should be discussed, notably to avoid any “perverse incentive to go private”¹¹⁰ to avoid reporting duties imposed on listed companies.

Since the proliferation of diverse approaches to ESG reporting is “inefficient, encourages greenwashing and gamesmanship of the kind that has characterized corporate governance ratings,”¹¹¹ the convergence of private and public efforts is crucial. In this context, the trustees of the IFRS Foundation indicated in 2021 that they will create an International Sustainability Standards Board (ISSB), in coherence with other standard setters’ work. The US Securities and Exchange Commission (SEC) indicated in the same year that ESG disclosure regulation (in particular, climate change disclosure) will undergo a central reform. The SEC notably communicated that it will be “working toward a comprehensive ESG disclosure framework” as well as “offering guidance on human capital disclosure to encourage the reporting of specific metrics like workforce diversity, and considering more specific guidance or rule making on board diversity.”

¹⁰⁷ Blair and Stout (2001), p. 438. See also Savitt and Kovvali (2021), p. 1892 who note that “[d]irectors are imperfect of course, but they are - or perhaps more accurately, the overwhelming majority of them are - decent, careful women and men making important and difficult decisions with imperfect information, with limited time, and under persistent public scrutiny. Norms matter to them. Reputation matters. Doing the right thing matters. Changing the governance dial to encourage directors to consider a broader range of interests would allow them to more freely pursue corporate purpose and responsibility while still driving value. If they fail, they’ll be voted out. If they are disloyal, they’ll be sued.”

¹⁰⁸ For a detailed analysis of *trust and corporate governance*, which would exceed the scope of this publication, see Reich-Graefe (2013), p. 103 ss and the numerous references.

¹⁰⁹ See Harper Ho (2020), p. 12 who has observed that “disclosure is widely recognized as a soft form of regulation, incentivizing changes in corporate behavior where direct regulation may be difficult to achieve or enforce.”

¹¹⁰ Strine Jr (2021), p. 432.

¹¹¹ Strine Jr et al. (2021b), pp. 1911 s. See also Pollman (2019), p. 15, who observes that “corporate leaders and investors increasingly appreciate the importance of social responsibility and sustainability, however, the need for standardized, accurate, and audited information that provides transparency and allows for comparability becomes more pressing. Better information would in turn aid efforts to understand the relationship between CSR, ESG, and financial performance, as well as related topics such as compliance.”

5.3 Partnership with Shareholders

To obtain a credible definition and then a successful implementation of the corporate purpose, shareholders' support is key. The idea is to obtain, when possible, a **commitment from shareholders and investors** to prioritize and support the companies' long-term growth and sustainability.¹¹²

Investors shall engage with companies and their boards to define both missions and values as well as encourage a purposeful business. More particularly, the board of directors should identify strongly committed shareholders to discuss and gain their support to promote the long-term fulfillment of the company's purpose. These shareholders shall then also oversee the implementation of such purpose and be aligned with the firm's purpose.

In line with the proposal formulated in *The New Paradigm*, voluntary collaboration among corporations and their stakeholders, in particular their shareholders, is a fundamental condition to resist short-termism and reach sustainable long-term value. As stated by Martin Lipton in this document prepared for the International Business Council of the World Economic Forum, "the company and its shareholders need to engage on a regular basis to foster a mutual understanding and alignment as to corporate purpose and strategy."¹¹³

This partnership could be achieved through different channels, which can be combined:

- **Informal meetings** between (committed) groups of shareholders and a delegation of the board of directors and management can be useful to discuss strategic options as well as ESG concerns.
- Instead of or in addition to informal contacts with selected shareholders, the creation of more representative platforms in the form of **shareholder committees** could be preferred by companies to challenge or legitimize the analysis made by the board. Such committees are already widely present in listed companies in France.¹¹⁴ Shareholders' committees would be able to deal with issues that require in-depth analysis or a constructive exchange of views.¹¹⁵
- Some scholars have suggested giving investors a "**say on purpose**" vote, similar to the two-part "say on pay" votes that investors in Europe have. This vote would cover, on the one hand, a *statement* specifying the company's purpose issued by the board and, on another hand, its *implementation*. Alex Edmans and Tom

¹¹²Mayer (2018), pp. 102 et seq, 159 et seq insists on the importance of having *long-term* and *committed shareholders*.

¹¹³Lipton et al. (2020a, b) (Embracing the New Paradigm). See also Savitt and Kovvali (2021), p. 1894 who stress that "[t]he promise of the approach is ultimately a question for investors and managers and directors to work out together."

¹¹⁴Cécile Le Coz, Des comités consultatifs pour une meilleure écoute des actionnaires, 06.03.2010, available at www.investir.lesechos.fr/dossiers/droits-et-garanties-des-actionnaires/des-comites-consultatifs-pour-une-meilleure-ecoute-des-actionnaires-162026.php.

¹¹⁵See in particular Chenux (2011), pp. 135 et seq.

Gosling suggest, in particular, that every 3 years, investors would have a “policy vote” on the statement “to convey whether they buy into it and the trade-offs it implies. An investor would vote against it if he or she disagrees with the priorities, or if it is so vague it gives little guidance on what the company stands for.” Then every year, shareholders could have an “implementation vote” to express whether they “are satisfied with how the company is delivering on the statement. Although both votes would be advisory, meaningful opposition would show leaders that they are off course, which could precipitate investor selling or a change in management.”¹¹⁶ In that context, it is worth mentioning that several companies already organized consultative votes concerning climate policies and roadmaps. For instance, on April 15, 2021, Nestlé’s shareholders overwhelmingly approved—by more than 95%—the climate roadmap submitted by its board of directors. In the invitation to the annual general meeting sent to shareholders, the board of directors of Nestlé stated that “shareholders should be able to express their views on environmental, social and governance (ESG) issues” and that it wished to obtain, through a consultative vote, shareholder support for its climate roadmap, after noting that “climate change is one of society’s greatest challenges.”

To be sure and as we previously highlighted, all stakeholders are key to the company’s success. However, considering the specific allocation of powers to shareholders, who can elect directors, the support of long-term shareholders is critical for the board’s ability to embrace ESG principles.

6 Conclusions

Corporate purpose may be a concept that will allow moving beyond the classical debate or dichotomy between shareholder wealth maximization and stakeholder governance theories.

Even if the scope and content of corporate purpose are closely related to stakeholder governance, it brings an additional component, emphasizing the importance of a system that promotes profit-driven *and* socially responsible corporations.

Within this frame, the success of corporations is and will be largely subject to the fulfillment of two conditions: first, the success of the board of directors’ mission to create a corporate culture and strategy aligned with the corporate purpose and, second, the commitment and responsible stewardship that shareholders are ready to provide to a company, as well as the trust that investors are ready to grant to the management.

¹¹⁶Edmans and Gosling (2020).

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Social Enterprises: Conceptual Debates and Approaches



Millán Díaz-Foncea and Carmen Marcuello

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1 Introduction

Social enterprise is a term recurrently used in the fields of social economy, social entrepreneurship, social innovation, and impact economy and has generated numerous debates. In Europe, the term “social enterprise” appeared at the beginning of the 1990s, when the Italian parliament passed a specific law for social cooperatives.¹ In the US, the first reference was in 1993, when the Harvard Business School launched the Social Enterprise Initiative.²

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¹Borzaga and Santuari (2001).

²Defourny and Nyssens (2006), p. 3.

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Since then, the growth of social enterprises worldwide has been significant, as has the conceptual discussion on it. The aim of this chapter is to present and analyze the main debates and approaches to the concept of social enterprise, as well as to address the main recent trends. To this end, we carried out a review of the most relevant academic literature and institutional reports on the subject to present the concept of social enterprise from the different schools that have contributed to its characterization. We then describe and compare different social enterprise models based on their main characteristics. We also discuss the evolution and trends of the roles, characteristics, and activities of social enterprises.

2 Concept of Social Enterprises: Debates and Approaches

Since the 1990s, social enterprises have become an increasingly widespread and recognized business model. However, the definition of the concept of “social enterprise” remains ambiguous, with blurred boundaries, for which no consensus has been reached, both in academic research and in legal-regulatory spheres.^{3, 4} Similarly, the concepts of “social entrepreneur” and “social entrepreneurship,” which are commonly used in the literature, are poorly defined.⁵

From a research perspective, several authors have put forth definitions of social enterprise that attempt to explain the phenomenon.^{6, 7} These definitions are, in many cases, controversial,^{8, 9} given the lack of a unifying understanding or paradigm.¹⁰ The current literature offers a fragmented, eclectic picture that approximates the multidimensional nature of this concept. Aliaga-Isla and Huybrechts (2018) reviewed up to 45 articles published between 2000 and 2015 with definitions of social entrepreneurship that incorporate some relevant novel feature and have not been used by other authors before. These definitions addressed different dimensions, such as the specific profile and role of individual social entrepreneurs, place of innovation, pursuit of market revenues in nonprofit organizations, allocation of profits for the fulfillment of social missions, and governance for a sustainable balance between economic and social goals.^{11, 12, 13}

³Galera and Borzaga (2009).

⁴Defourny and Nyssens (2017).

⁵Aliaga-Isla and Huybrechts (2018).

⁶Austin et al. (2006).

⁷Harding (2004).

⁸Dacin et al. (2010).

⁹Roper and Cheney (2005).

¹⁰Bacq and Janssen (2011).

¹¹Borgaza and Defourny (2001).

¹²Díaz-Foncea and Marcuello (2012).

¹³Defourny and Nyssens (2017).

Teasdale (2012, p. 99) highlighted that “social enterprise” is a fluid and contested concept affected by three variables: (1) it is constructed by diverse actors promoting different discourses, (2) it is connected to different organizational forms, and (3) it is based on different academic theories.

Regarding the first variable, actors and discourses, the literature has pointed to the shaping of definitions of competing discourses and interests, as well as divergent languages and narratives from a wide range of actors.^{14, 15} The ultimate relevance of each proposal to the criteria defining the concept of social enterprise has been linked, to a large extent, to the framework in which the different approaches and organizational models they include emerge and are applied.¹⁶

In relation to organizational forms, the social enterprise is one of the organizational models that incorporate a hybrid nature combining features from social and commercial entrepreneurship.^{17, 18} Furthermore, the concept of social enterprise itself has been linked to a wide variety of legal structures and organizational forms, contingent on the national context in which it is observed.¹⁹

Finally, the efforts of various authors to reach a broad conceptual agreement on social enterprises that serve as a basis and reference for the agents involved have come up against the existence of a traditional dichotomy between the Anglo-Saxon and continental European vision. These two perspectives propose different approaches to social enterprises and have led to the establishment of four general models.^{20, 21}

The two perspectives have important differences. The continental European perspective identifies social enterprises as a means of solving substantive problems of vulnerable social groups through the development of economic activity. Therefore, both in the academic world and in continental European institutions, the concept of social enterprise is seen as an integral part of the social economy. The continental European perspective thus gives more importance to the external or operational features of the social enterprise than to the social objectives or mechanisms for achieving them, on which the Anglo-Saxon perspective is based.²² For its part, the Anglo-Saxon perspective understands social enterprises from a one-dimensional approach (see Fig. 1), which tends to place social enterprises along a continuum from purely social to purely commercial and which assumes

¹⁴Teasdale (2012).

¹⁵Defourny et al. (2021).

¹⁶Chaves and Monzón (2018).

¹⁷Austin et al. (2006).

¹⁸Bacq et al. (2013).

¹⁹Wilkinson (2015).

²⁰Defourny and Nyssens (2017).

²¹Chaves and Monzón (2018).

²²Vargas (2020).

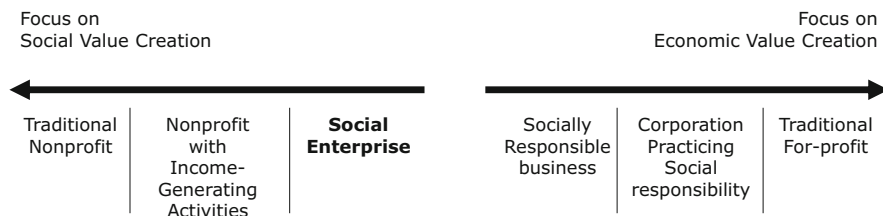


Fig 1 Social enterprise within the social–commercial continuum of the Anglo-Saxon perspective [Source: Own elaboration, based on Alter (2007, p. 15)]

that the social and commercial dimensions are independent and involve a zero-sum relation—“more of one implies less of the other.”²³

Thus, the Anglo-Saxon perspective considers the social enterprise as a hybrid between traditional nonprofit organizations and conventional capital companies, understanding them either as financing tools, via the market, for nonprofit organizations or traditional companies (“income generation” approach) or as an entity with the capacity to put social innovation into practice (“social innovation” approach), which, in any case, have the achievement of benefits for their owners or shareholders as their main objective (social entrepreneurs or nonprofit organizations, among others). This social innovation is specified²⁴ as new ideas (products, services, and models) that simultaneously meet social needs more effectively and create new modes of social relations.²⁵ Such ideas are developed by individual social entrepreneurs, who thus become agents of change, following Schumpeter’s proposal (1942), by balancing the economic aspects of the project while addressing new needs and/or using new ways of responding to traditional social demands.^{26, 27}

As for the continental European perspective, the international scientific association EMES Research Network for Social Enterprises has played a key role in the development of a common approach to the study of social enterprises in Europe.^{28, 29} Indeed, many authors speak of an “EMES approach” to social enterprises.^{30, 31} As outlined by Galera and Borzaga (2009), the conceptual framework proposed by EMES seeks to combine the two existing and widely used concepts for defining organizations that are neither public (state) nor for-profit (market) enterprises: the nonprofit sector and the social economy. However, the EMES concept of social

²³ Pestoff and Hulgard (2016), p. 1752.

²⁴ Bureau of European Policy Advisers (2010), p. 33.

²⁵ Chaves and Monzón (2018).

²⁶ Dees (1998).

²⁷ Young et al. (2016).

²⁸ Borgaza and Defourny (2001).

²⁹ Galera and Borzaga (2009).

³⁰ Defourny and Nyssens (2014).

³¹ Pestoff and Hulgard (2016).

Table 1 Dimensions of and distinctive criteria for a social enterprise

Economic dimension	Social dimension	Political dimension (participatory governance)
Continuous activity of production of goods and/or sale of services	Explicit aim to benefit the community	High level of autonomy
Significant level of economic risk	Initiative launched by a group of citizens or civil society organizations	Decision-making power not based on capital ownership
Minimum amount of paid work	Limited profit sharing	Participatory nature, involving different interest groups affected by the activity

Source: Adapted from Defourny and Nyssens (2014)

enterprise seeks not to replace other existing concepts but rather to “enhance the concepts of the third sector by shedding light on the entrepreneurial dynamics focused on social objectives within the sector, while capturing the evolving trends affecting the social services sector” in Europe.³² Thus, EMES defines social enterprises as private nonprofit organizations that provide goods and services directly related to their explicit objective of benefiting the community. Social enterprises are based on a collective dynamic in a way that involves the different stakeholders in their governing bodies, are autonomous entities, and bear the risks related to their economic activity.³³ An essential contribution of EMES is its proposal of nine indicators for defining entities that could be qualified as social enterprises, grouped into three blocks: the economic and business, social, and participatory dimensions (see Table 1).

Vargas (2020, p. 66) pointed out that these indicators describe the ideal type of social enterprise, but they do not represent the conditions that an organization must necessarily meet, nor are they intended to provide a structured concept of social enterprises. Nevertheless, the EMES approach has had consequences for the legal system of both the European Union and many European countries.³⁴ Following the evolution of the recognition and reality of the term “solidarity economy,” the continental European perspective could be complemented by incorporating this approach into the conceptual map of social enterprise, which is identified as a means for economic democratization.

The solidarity economy emerged in a context of crisis around the 1980s, as a reaction to the institutionalization of the social economy and its tendency toward market isomorphism, offering an alleged political capacity for social transformation. As Laville (1994) pointed out, the solidarity economy is based on a return to the principles of associationism, a reflection on the dynamics of participation, and a theorization of exchange. The first two are linked to the participatory governance dimension proposed by the EMES approach, whereas the third calls for questioning the economic order. This is based on Polanyi’s (1983) denunciation of the

³²Galera and Borzaga (2009), p. 213.

³³Díaz-Foncea and Marcuello (2012), p. 146.

³⁴European Commission (2020).

“economistic fallacy,” which equates the economy with the market, and on the approach taken by Polanyi, for whom all economic activities can be conceived as a combination of several economic principles (redistribution, reciprocity, and the market), rather than referring solely to the market principle.

Although the term “social and solidarity economy” has been used in academic, political, and professional circles since the 2000s, solidarity economy organizations are considered to belong to the public sphere, in the sense that they are conceived not as private organizations (as conceptually established for social economy organizations) but as citizens’ initiatives that call for public action. Thus, the solidarity economy brings together all activities that contribute to the democratization of the economy through citizen participation, considering these activities not only in terms of the legal form under which they are carried out (association, cooperative, mutuality, etc.) but also through their double dimension of economic and political.³⁵

3 Social Enterprise Models: Main Characteristics

Beyond the search for a general concept of social enterprise that is accepted by the different actors involved in this field, many authors^{36, 37} have proposed following an alternative research strategy that seeks to accept the existence of different types and models of social enterprise that emerge from the specific socioeconomic reality of each environment. However, as Gordon (2015) pointed out, few authors have provided a list of definitive criteria and characteristics that allow their respective typologies to be used to classify a given set of social enterprises.

Young and Lecy (2014) proposed the metaphor of the “social enterprise zoo” based on the Anglo-Saxon perspective. The grouping of animals by species (groups of animals that maintain common characteristics) could be assimilated to the different models of organizations identified with social enterprise (a category of entities with common objectives, organizational behavior models, and those with competitive or cooperative interactions with other categories). Young and Lecy (2014) identified six social enterprise models in this “zoo”:

1. For-profit business enterprises that develop corporate social responsibility programs in which social objectives play a strategic role
2. Social businesses that seek an explicit balance between social impact and commercial success
3. Social cooperatives that maximize the welfare of their members while including a public benefit dimension

³⁵ Eme and Laville (2006).

³⁶ Alter (2007).

³⁷ Spear et al. (2009).

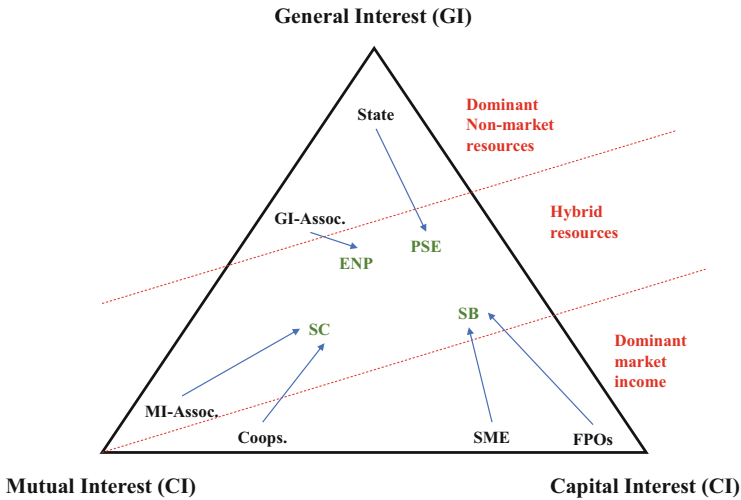


Fig. 2 Institutional trajectories and resulting social enterprise models [Source: Defourny and Nyssens (2017, p. 2479)]

4. Nonprofit organizations that engage in commercial activity in the marketplace for the instrumental purpose of raising resources to further their social mission
5. Public–private partnerships that combine the commercial and social objectives of their partners (which may include a for-profit, a nonprofit, and/or a governmental entity) in an effort to achieve the social mission set out in the signed contractual agreement
6. Hybrid models that internalize the characteristics of other forms of social enterprise by explicitly combining the organizational components of both models (commercial enterprises promoted by nongovernmental organizations (NGOs) or NGOs that are subsidiaries of a commercial enterprise)

From this delimitation, different categories of social enterprises operate, at least in theory, with fundamental differences in their organizational rationale. They are also driven by different objectives or general success criteria, which justify the study of social enterprises by examining each “species” separately.

From a continental European perspective, Defourny and Nyssens (2017) proposed a categorization of social enterprises based on the “institutional trajectories” followed by the public, private, and social sector models (which have traditionally been based on the principles of general interest, the profit-making interest of capital, and reciprocal or mutual interest, respectively) by forming hybrids of the different types of resources on which social enterprises are based (market, nonmarket, and hybrid resources).

As shown in Fig. 2, a traditional organizational model is located at each vertex: many associations and nonprofit organizations are close to the general interest, whereas cooperatives are a classic example of the pursuit of mutual interest, and

Table 2 Perspectives on, approaches to, and models for social enterprises

Perspective	Approach	Model
Anglo-Saxon	Revenue generation	Nonprofit commercial
		Social-mission-oriented company
	Social innovation	Social entrepreneur
Continental European	EMES	Social cooperative
		Work integration social enterprise

Source: Own elaboration

capitalist enterprises are linked to the interest of capital. Social enterprises are situated at the crossroads of the three motivational principles and types of resources, representing a hybridization of traditional models of enterprises and social organizations, ultimately giving rise to four main models:

- Entrepreneurial nonprofit organizations: all nonprofit organizations that develop any kind of income activity in support of their social mission
- Public sector social enterprise: public service commercialization movement encompassing public sector spin-offs, sometimes in partnership with third-sector organizations
- Social business: social enterprises that mix this logic with a “social enterprise” drive aimed at creating “blended value” (i.e., the value is created jointly with the client and other stakeholders, not only by the firm, considering its economic, social, and environmental performance)
- Social cooperatives: organizations that combine the pursuit of the interests of their members (mutual interest) with the pursuit of the interests of the whole community or of a specific group targeted by the social mission (general interest)
- Both classifications by Young and Lecy (2014) and Defourny and Nyssens (2017) are in line with the social enterprise models that emerged from the Anglo-Saxon and continental European approaches. These approaches (income generation and social innovation, in the case of the Anglo-Saxon perspective, and the EMES approach in the continental European perspective) take the form of four traditionally established social enterprise models.

From the Anglo-Saxon perspective, the “commercial non-profit” model emerged in the 1980s, in the context of austerity and the reduction of public revenue, through the development of new market-based business strategies by nonprofit organizations in the United States for financing the social activities they had been carrying out (Table 2).

The “social-mission-oriented enterprise” model incorporates social responsibility and social issues into the objectives of the enterprise as a priority. In this way, it adds a social mission to the economic mission that has traditionally been linked to business enterprises, regardless of their legal form. A concrete example is the B-corp movement and the “companies with purpose,” which bring together companies that voluntarily agree to incorporate into their statutes the use of different standards of social and environmental performance, public transparency, and legal

responsibility, as well as take into account their workers, their customers, the suppliers, their community, and the environment in which they are located when making decisions. Their mission is not only to maximize shareholder value but also to create value and have a positive impact on people and the planet.

These organizations carry, as Chaves and Monzón (2018) pointed out, the model of “social business” promoted by 2006 Nobel Peace Prize winner Muhammad Yunus. This business assumes a more restrictive social mission by focusing on the poorest people, as a business for the bottom of the pyramid. Yunus (2011) defined social enterprise as “a non-loss, non-dividend enterprise designed to address a social purpose.” These two models, “commercial non-profit” and “social mission-oriented enterprise,” are included in the “income generation” approach, which emphasizes the balance between the commercial element and the social mission—based on the development of a commercial activity—with the aim of obtaining income to finance the social objectives (the social mission) of the enterprise.

The Anglo-Saxon perspective also includes the “social entrepreneur” model, which specifies the “social innovation” approach. The social entrepreneur model has been incorporated into several countries through the Ashoka Foundation, a nonprofit foundation founded in the United States in 1981, with a reach of more than 3600 social entrepreneurs in more than 90 countries, thus becoming the reference organization in social entrepreneurship.

The European perspective uses cooperative tradition as a starting point for the development of economic activity for achieving the objective of solving substantive problems in different social groups. Scholars^{38, 39} have acknowledged the recognition in 1990 of “social cooperatives” in Italy as the moment of the emergence of the social enterprise model in continental Europe. These organizations combine mutual and general interests to solve problems of structural unemployment and groups with employability difficulties, in addition to providing social services, such as education and health care.⁴⁰

Teasdale (2012) observed that the link between the cooperative model and the discourse of community enterprise has enabled the concept of social enterprise to position itself as a model for the third way in the UK. Young and Lecy (2014) highlighted the relevance of the social cooperative model—it has enabled the concept of social enterprise to be connected with the tradition of the social economy from the European perspective.

“Work integration social enterprises” (WISE) may be considered a separate model within this perspective. WISE follow their own development path, with roots in the associative (rather than cooperative) sector and a relatively strong dependence on public policies to support work integration.^{41, 42} Indeed, work

³⁸Fici (2016).

³⁹Defourmy and Nyssens (2017).

⁴⁰Chaves and Monzón (2018).

⁴¹Defourmy and Nyssens (2017).

⁴²Defourmy et al. (2021).

integration is a broad and heterogeneous term. For example, in Spain, two types of organizations are recognized within this model and are included within the framework of the social economy: organizations that target socially excluded groups (such as “insertion enterprises”) and organizations that target people with disabilities (such as special employment centers).

Insertion enterprises must be incorporated as commercial companies (therefore, possible legal forms also include worker-owned companies or cooperatives). To be officially recognized as insertion enterprises, they must meet specific criteria: 51% of their share capital must be held by a social organization or a nonprofit entity, more than 30% of their staff—50% from the 4th year of existence onward—must be workers in the process of integration into the labor market, and they cannot distribute more than 20% of their profits). They must also develop an economic activity, and their main objective must be the integration and training of people at risk of social exclusion.

Regarding the other submodel of WISE, special employment centers in Spain were created by Law 13/1982 with the aim of pursuing the social integration of people with disabilities into the open labor market. These centers can take any legal form, and their owners can be any natural or legal person, public or private. They perform productive work, engage in commercial operations, and aim to provide paid jobs and appropriate personal and social services to workers with disabilities (who must constitute at least 70% of their workforce). Since 2017, a legal distinction has been made between social and business initiative special employment centers, the former being those that are promoted and more than 50% owned by nonprofit entities and are obliged to reinvest their profits in full in the social initiative special employment center itself or in others.

These models can traditionally be considered social enterprises in Spain,^{43, 44} which also include associations and foundations under both social economy (focused on the promotion of disability) and nonhegemonic cooperative models (e.g., health cooperativism, responsible consumer cooperatives and nonprofit entities with economic activity).

These models fall under the European Commission’s operationalization of the concept of social enterprise (Sect. 4.2). This operationalization makes it possible to apply a shared definition in multiple national contexts in a coherent manner using the three key dimensions proposed by the continental European approach to provide concrete guidelines (Table 3).

⁴³Spear et al. (2009).

⁴⁴Díaz-Foncea and Marcuello (2012).

Table 3 Operationalization of the concept of social enterprise by the European Commission

Main dimension	General definition	Minimum requirements
Entrepreneurial/ economic dimension	Stable and continuous production of goods and services (revenues are generated mainly from both the direct sale of goods and services to private users or members and public contracts) (At least partial) use of production factors functioning in the monetary economy: paid labor, capital, assets; although relying on both volunteers—especially in the start-up phase—and noncommercial resources, to become sustainable, social enterprises normally also use production factors that typically function in the monetary economy	Social enterprises must be market oriented (incidence of trading should be ideally above 25%).
Social dimension	The aim pursued is explicitly social. The product supplied/activities run have a social/general interest connotation (the types of services offered or activities run can vary significantly, depending on unmet needs arising at the local level or, in some cases, even in a global context)	The primacy of the social aim must be clearly established by national legislation, statutes of social enterprises, or other relevant documents.
Inclusive governance, ownership dimension	Inclusive and participatory governance model (all concerned stakeholders are involved, regardless of the legal form; the profit distribution constraint, especially on assets, guarantees that the enterprise’s social purpose is safeguarded)	The governance and/or organizational structure of social enterprises must ensure that the interests of all concerned stakeholders are duly represented in decision-making.

Source: European Commission (2020)

4 Evolution and Trends

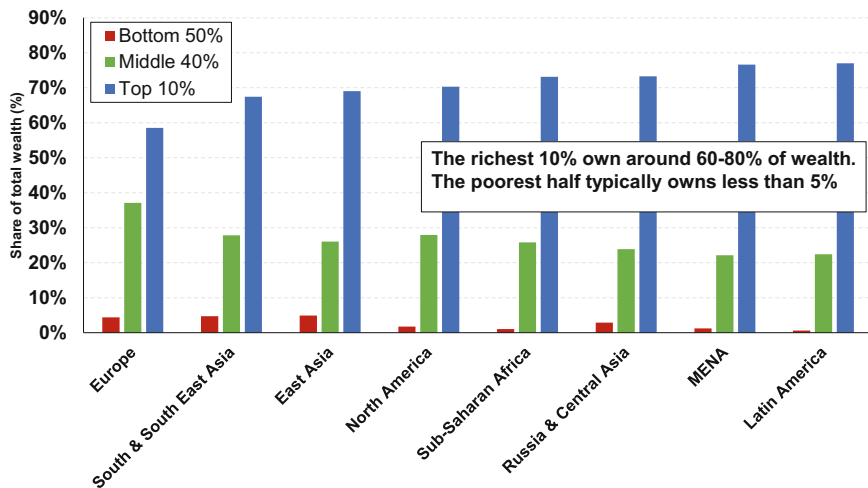
4.1 Context

As mentioned in the previous sections, the first social enterprises to be recognized were the so-called social cooperatives in Italy in 1990.^{45, 46} These “new” cooperatives mainly offered services, such as “home help (including medical) for the disabled, children, and the elderly, are professional retraining, direct occupational placement or outplacement for disadvantaged and unemployed people, production of craftwork items, labour-intensive work in agriculture and fishing, ethical and solidarity-based trade.”⁴⁷ In other words, the phenomenon already indicated by

⁴⁵Borzaga (1996).

⁴⁶Thomas (2004).

⁴⁷Thomas (2004), p. 250.



Interpretation: The Top 10% in Latin America captures 77% of total household wealth, versus 22% for the Middle 40% and 1% for the Bottom 50%. In Europe, the Top 10% owns 58% of total wealth, versus 38% for the Middle 40% and 4% for the Bottom 50%.
Sources and series: wir2022.wid.world/methodology.

Fig. 3 Extreme concentration of capital: global wealth inequality, 2021 (Source: World Inequality Report, 2022)

Demouster (1999, p. 33) “due to the exacerbation of competition, as well as the growth of inequalities and social heterogeneity, is once again taking place: they have been asked to take charge of the population, activities and territories excluded from the major economic circuits.” Economic globalization and the financialization of the economy are the main causes of the increase in social exclusion, inequality, and poverty in the world. Moreover, the market did not meet people’s actual needs, especially the care needs of the most vulnerable population. Meanwhile, economic growth was occurring in sectors that were more “interesting” from the perspective of the benefits obtained from the investments made—that is, sectors linked to technology, energy, and transport.

The scenario in 2022 has not changed. Wealth inequality continues to widen, and the demands of the most vulnerable people have increased. According to the World Inequality Report 2022⁴⁸ (p. 11), “income and wealth inequalities have increased almost everywhere in the world since the 1980s, following a series of deregulation and liberalization programmes that took different forms in different countries. The increase has not been uniform: some countries have experienced dramatic increases in inequality (including the United States, Russia and India), while others (European countries and China) have experienced relatively smaller increases. These differences among countries confirm that inequality is not inevitable, but a policy choice.” Figure 3 shows the extreme concentration of capital and global wealth inequality in 2021.

⁴⁸Published in December 2021 by World Inequality Lab. Available at <https://wir2022.wid.world/>.

Furthermore, the health crisis caused by the COVID-19 pandemic has affected the global population, and the consequences have been different across countries. Predictably, the most vulnerable population has suffered the most devastating consequences in terms of health, unemployment, and increased inequality. In some countries, the informal economy has become larger than the formal economy. The social economy has also suffered the consequences of the COVID-19 pandemic, but it has also responded to multiple situations that have occurred in all countries.

The World Inequality Report 2022 shows that economic inequality has been growing for years and that it is a consequence of the different political decisions made by countries. In addition to wealth inequality, for more than 20 years, there has been an enormous concentration of economic power in large corporations and certain economic activities. This context generates several common and global phenomena:⁴⁹ (1) greater economic instability in all territories, which generates more frequent, intense, and globally recurrent crises; (2) greater socio-labor instability of territories being provoked owing to the increase in global labor precariousness, the privatization of public services, and the consequences of climate change; (3) enormous concentration of the population in large cities, generating enormous inequality between urban and rural areas; and, finally, (4) global democratic weakening, owing to the loss of decision-making capacity in territories, an increase in the power of large corporations, and an increase in individualism. This context indicates the need to establish policy measures in different areas, such as ensuring attention to the needs of the most vulnerable population and especially in the business model being promoted. In this sense, the role of social enterprises is increasingly necessary because of their configuration, management model, principles, and values.

4.2 Evolution

An interesting example of the development of social enterprises can be seen in Europe. In 2011, the European Commission launched a program to promote social enterprises, called the Social Business Initiative.⁵⁰ This program has been evolving, both in the definition of social enterprises and in the policies for their promotion. The latest published definition of the European Commission is as follows: “A social enterprise is an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an

⁴⁹Bretos and Marcuello (2017).

⁵⁰https://ec.europa.eu/growth/sectors/proximity-and-social-economy/social-economy-eu/social-enterprises_en; Two pioneering documents that identified social enterprises are the European Economic and Social Committee EESC opinion on “Different types of enterprise” INT/447 2009 and the EESC opinion on “Social entrepreneurship and social enterprises” INT/589 of 26 October 2011.

open and responsible manner and, in particular, involves employees, consumers and stakeholders affected by its commercial activities.” Furthermore, the types of business of social enterprises, according to the European Commission, are “a) Those for whom the social or societal objective of the common good is the reason for the commercial activity, often in the form of a high level of social innovation; b) Those whose profits are mainly reinvested to achieve this social objective; c) Those where the method of organization or the ownership system reflects the enterprise’s mission, using democratic or participatory principles or focusing on social justice.” Finally, the European Commission point out that “there is no single legal form for social enterprises.” That is, we can find social cooperatives, private companies limited by guarantee, mutual corporations, nonprofit organizations, associations, and charities of foundations.⁵¹

This definition contains three important elements that configure an enterprise model, all of which will have a clear impact on the context described in the previous section. The European Commission recognizes three substantial elements of social enterprises: (1) the social or societal objective of the common good is the reason for the commercial activity; (2) profits are mainly reinvested to achieve this social objective; and (3) the method of organization or ownership system reflects the enterprise’s mission, using democratic or participatory principles or focusing on social justice. These three elements have a major impact on the above context. First, economic activity is subordinated to the fulfillment of social objectives or the common good, which will have a clear impact on the generation of economic activity with a long-term view, avoiding situations of risk and rapid growth to favor and create greater economic stability and contribute to the mitigation of climate change. Second, the reinvestment of profits will make it possible to generate more decent working conditions and avoid the incorporation of free riders, who only seek personal enrichment through economic activity without considering the rest of the stakeholders. Third, the democratic and participatory decision-making model of social enterprises will favor the democratic stability of territories and the co-responsibility of different stakeholders.

Finally, the European Commission has also been evolving in terms of what it considers to be the main areas of economic activity of social enterprises. The main sectors of economic activity are identified as work integration, personal social services, local development of disadvantaged areas, and more diverse activities, such as recycling, environmental protection, sports, arts, culture or historical preservation, science, research and innovation, consumer protection, and amateur sports.⁵² Nicolas Schmit, European Commissioner for Labor and Social Rights, stated in the report published by the European Commission (2020, p. 5), that “Social enterprises contribute to important policy objectives, such as job creation, inclusion, equal opportunities, sustainability and social engagement. They are an excellent

⁵¹<https://ec.europa.eu/growth/sectors/proximity-and-social-economy/social-economy-eu>.

⁵²European Commission, Internal Market, Industry, Entrepreneurship and SMEs, https://ec.europa.eu/growth/sectors/proximity-and-social-economy/social-economy-eu_es.

example of an ‘economy that works for people,’ which represents one of the main priorities of the European Commission (EC).”

4.3 Trends

Regarding trends in the field of social enterprises, we identified two issues to highlight: first, social enterprises are expanding their scope of economic activities; second, business models are being generated that more clearly incorporate the need to change the traditional business model based on the subordination of the company’s decisions to the remuneration of the company’s capital.

Regarding the first trend, in the 1st years in which the term social enterprise began to be used, it was mainly identified with business experiences directly linked to processes of socio-labor integration for people experiencing exclusion and people with disabilities. In Spain, WISE⁵³ and special employment centers⁵⁴ were the first legal figures recognized at the state level as social enterprises.⁵⁵ In Italy, social cooperatives⁵⁶ emerged “in response to the failure of policies for the employment of disadvantaged workers” and as an “expansion of the social economy.”⁵⁷

In 2022, amid the COVID-19 pandemic, the range of activities of social enterprises in general, as indicated by the European Commission (Table 2), has expanded, along with the territory where they are developed. Initially, the traditional spaces of generation and action of social enterprises tended to be in urban contexts, with some experiences in rural areas. Pinch and Sunley (2016, p. 1290) observed that the urban context offered “key benefits of agglomeration” to social enterprises that enable access to demand for “goods and services together with institutional support, funding and commercial contracts, as well as access to both formal and informal networks that can provide a wide range of knowledge and mutual support.” However, social enterprises have also brought about a very interesting phenomenon of recovery of economic activities and through another model of local development. In this sense, Olmedo et al. (2021, p. 1) indicated that “rural social enterprises are increasingly recognized as organizations that contribute to local development by providing goods and/or services to meet community needs and by fostering inclusive social and governance relations.”

The second trend is a paradigm shift in the concept of capitalist enterprises. This proposed change takes the form of different transformation levels in the capitalist

⁵³Law 44/2007, de 13 de diciembre, para la regulación del régimen de las empresas de inserción.

⁵⁴Royal Decree 2273/1985, of 4 December 1985, approving the regulations for special employment centers as defined in Article 42 of Law 13/1982, of 7 April 1982, on the social integration of the disabled.

⁵⁵Marcuello et al. (2008).

⁵⁶Borzaga (1996), p. 209.

⁵⁷Thomas (2004), p. 243.

model. Following the example of France in 2019, which enacted Law n° 2019-486 on May 22, the category of “Entreprise solidaire d’utilité sociale (ESUS)” was created to monitor the growth and transformation of companies. It has allowed the identification of social entrepreneurs whose activity is oriented in a dominant way toward the search for a significant social impact. ESUS approval notably favors social entrepreneurs’ access to equity financing. This law is in line with the recognition of other types of companies, such as benefit corporations, public benefit corporations, and social purpose corporations introduced in the United States. Henderson (2021, pp. 838, 849) indicated that “solving the great problems of our time will require reimagining capitalism by balancing the power of the free market with capable, democratically accountable government and strong civil society” and insisted on “firms to be committed to more than simple profit maximization.” In Spain, following the growth of the B-corp and “impact ecosystem,” campaigners have called for legislation on companies with a purpose and the creation of a new legal figure (“Sociedades de Beneficio e Interés Común”) following the French model.⁵⁸

However, a number of important issues need to be taken into account in this necessary transformation of the capitalist enterprise to bring about a paradigm shift. For one, company boards of directors should include workers and even representatives of civil society. Other issues are concerned about ensuring that the distribution of profits clearly leads to an improvement in working conditions and in the territories where the company operates, as well as penalizing undesirable behaviors, such as abuse of power, job insecurity, and economic activities that negatively impact the environment.

5 Conclusions

The concept of social enterprises has received wide attention from practitioners, policy makers, and academic researchers. Different ways of understanding enterprise models have emerged since the beginning of the 1990s, but two perspectives have dominated the discourse: the Anglo-Saxon and continental European models. Each highlights different structural features of social enterprises, which can be categorized into four general models.^{59, 60} The first is the “commercial non-profit” model that emerged in the 1980s within a context of austerity and reduction of public revenues, formed through the development of new market-based business strategies by non-profit entities in the United States for financing the social activities they had been implementing. Second, the “social mission-oriented enterprise” model incorporates

⁵⁸<https://www.bcorpSpain.es/blog/mesa-redonda-manana> and <https://www.empresasconproposito.net/>.

⁵⁹Defourmy and Nyssens (2017).

⁶⁰Chaves and Monzón (2018).

and prioritizes social responsibility and social issues within the objectives of the company. In this way, these enterprises add the social mission to the economic mission that has traditionally been linked to commercial enterprises, whatever their legal form is. The third is the “social entrepreneur” model, which concretizes the “social innovation” approach and which has been promoted especially through the Ashoka Foundation. The last is the European model defined by EMES—private nonprofit organizations that provide goods and services directly related to their explicit objective of benefiting the community. These are based on collective dynamics in a way that involves different stakeholders in their governing bodies, are autonomous entities, and bear risks related to their economic activity.

The term social enterprise remains an evolving concept and is influenced by the economic model from which it emerges. At present, these enterprises face the urgent need to address the problems generated by globalization. These problems can be seen in the dramatic increase in inequality, more intense and global-scale economic instability, socio-labor instability of territories, and the global weakening of democracy. Faced with this situation, companies are fundamental actors in both the generation of these problems and their solutions. In this sense, society has an urgent need for a paradigm shift in the conception and function of business. Thus, social enterprises are increasingly necessary in terms of the role they can play, owing to their characteristics, democratic management model, and principles and values, as pointed out by the European Commission. Meanwhile, the role and contribution of B-corps, or companies with a purpose, remain very relevant. Nonetheless, these new business models must incorporate elements that include worker participation and a change in the profit distribution model, not only in terms of capital ownership but also with the participation of stakeholders and the penalization of undesirable behavior in the labor, social, and environmental aspects.

Finally, social enterprises, especially those under the European-continental approach, can be promoted to democratize the economy. The inclusion of the governance and ownership dimensions points to the need to give people the ability to be the protagonists of their own economic decisions. This is a key issue that should be addressed by all other models and approaches to social enterprises.

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Models and Trends of Social Enterprise Regulation in the European Union



Antonio Fici

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1 Introduction

In the European Union (EU), social enterprise (SE) legislation continues to grow,¹ owing to both the introduction of new laws specifically dedicated to SEs and the recent changes to and replacements of preexisting laws. Moreover, in countries that still lack specific SE laws, their introduction has been discussed or specific legislative proposals already exist and are waiting to be passed. For example, Malta enacted

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¹See Fici (2016, 2017), p. 12; Fici (2020).

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a new SE law in February 2022.² Furthermore, in 2017, Italy implemented SE regulations within the broader context of the great reform of the “third sector,”³ while the new Belgian Code of companies and associations in 2019⁴ brought about profound changes in SE identification and regulation. Regarding countries without dedicated SE laws, in an October 2021 study promoted by the Irish government as a follow-up to research conducted when implementing the National Social Enterprise Policy of 2019, 51% of respondents declared they would prefer that a new legal form specific to SEs be introduced.⁵

The issue of social enterprise and its legal forms continues to generate great interest at both the national and EU levels. However, at the EU level, the current perspective appears to be slightly modified compared to previously (as emerging from the Commission’s “Social Business Initiative” of 2011, the “SBI” Communication). The Commission’s “Action Plan for the Social Economy”⁶ in December 2021 shifted the discourse on social enterprise to incorporate it into the broader context of the social economy. Accordingly, at the national level, the topic of social enterprise is sometimes framed and addressed within broader contexts, such as the social economy’s third sector. For example, in Italy, SEs are considered a component of the third sector,⁷ and in France, SEs (which in this jurisdiction present the slightly different denomination of “solidarity enterprises of social utility”) are included by law among social and solidarity economy enterprises.⁸

Important nonlegal research has also directed attention toward the legal framework of SEs. The impressive ICSEM project⁹ and the extensive and relevant research on social enterprises and their ecosystems promoted by the European Commission¹⁰ have elucidated the determinants and features of existing social enterprises in Europe and globally, piquing legal scholars’ curiosity regarding how

² Act no. IX of 2022, to regulate social enterprise organizations and their administration, published in the Government Gazette of Malta on February 22, 2022.

³ Legislative decree no. 112/2017 on social enterprises replaced Legislative decree no. 155/2006 on the same subject. Legislative decree no. 112/2017 is connected to Legislative decree no. 117/2017, the Code of the third sector, since social enterprises are a particular type of third sector organization Cf. Fici (2021).

⁴ In Belgium, “cooperatives accredited as social enterprises” replaced “social purpose companies”: cf. art. 8:5 of the Code of companies and associations of 2019 and art. 6 ff. of Royal Decree June 28, 2019.

⁵ Cf. Lalor and Doyle (2021).

⁶ Cf. COM (2021) 778 final of December 9, 2021 on “Building an economy that works for people: an action plan for the social economy,” according to which “social enterprises are now generally understood as part of the social economy” (p. 3).

⁷ Cf. art. 4, para. 1, Legislative decree no. 117/2017.

⁸ Cf. art. 11 of Law no. 2014/856 of 31 July 2014, which modified art. L3332-17-1 of the Labor Code. Among other countries, something similar occurs in Slovakia due to Law no. 112/2018: cf. Polačková (2021), p. 190.

⁹ Cf. Defourny et al. (2021) and Defourny and Nyssens (2021a, b).

¹⁰ Cf. European Commission (2020).

these findings fit within the existing legal framework of SEs and vice versa.¹¹ For the jurist, empirical research on the third sector and the social economy,¹² and the consideration thereof in statistical surveys and methodologies,¹³ has brought about similar interests.

Consequently, the situation relating to social enterprise has changed significantly since the passage of the first law specifically dedicated to this phenomenon (i.e., Italian law November 8, 1991, no. 381, on social cooperatives). In the three decades since, the picture has become clearer in terms of both legislation and legal culture related to SEs, while broader organizational categories, such as the third sector and the social economy, have also emerged.

Therefore, the current general climate might allow another step forward, in the sign of both the further completion of the legal framework on SEs at the national level (six EU countries still have no ad hoc SE legislation)¹⁴ and the introduction at the EU level of specific legislation thereon, even if on the latter front EU institutions making apparent strategy changes have increased the complexity of the situation.¹⁵

2 The Essential Role of Social Enterprise Law

A considerable number of specific laws on SEs exist in various EU (and non-EU) countries, thus demonstrating the essential role of legislation in SE development. In fact, 21 out of 27 EU countries have dedicated laws on SEs, and some even have more than one.¹⁶ Furthermore, in those countries where such laws do not yet exist, their possible introduction is under discussion or precise legislative proposals have been put forward.¹⁷

Continuing to use real-world examination to support our thesis, it is worth noting that in countries where there had previously been no specific SE laws, their adoption led to notable SE growth. In Italy, although social cooperatives were established even before Law no. 381/1991 was introduced, their number has increased considerably since then. According to the National Institute of Statistics (ISTAT), there were a little over 2000 social cooperatives before 1991, almost 3500 in the

¹¹ See, for example, Adam and Douvitsa (2021) regarding Greek legislation.

¹² Cf. Enjolras et al. (2018).

¹³ Cf. United Nations (2018).

¹⁴ They are Austria, Estonia, Germany, Ireland, the Netherlands, and Sweden.

¹⁵ Cf. *infra* Sect. 4.

¹⁶ This occurs when, in a given jurisdiction, a law on social cooperatives (or another specific legal form of social enterprise) and a more general law on social enterprises coexist, as happens in France, Greece, and Italy, among other countries.

¹⁷ For example, in Ireland, see the preliminary study of Lalor and Doyle (2021); in 2020, in the Netherlands, the government planned to introduce the social private limited liability company as a specific legal form for SEs.

mid-1990s, and just over 6000 by the end of 2003.¹⁸ According to the latest available ISTAT census data on nonprofit institutions, almost 15,500 social cooperatives were active as of December 31, 2019.¹⁹ Other EU countries have also reported significant increases in the number of registered SEs after introducing such laws. In Latvia, for example, this number has increased sixfold since SE laws were introduced in 2017.²⁰ Outside the EU, UK regulations implemented in 2004 demonstrated an enormous impact on the development of “community interest companies,”²¹ the number of which had reached 23,887 as of March 31, 2021.²²

However, arguments in favor of introducing ad hoc legislation on SEs are not only based on practical examples. Precise theoretical justifications for the legal recognition and regulation of SEs have also been provided. In most jurisdictions, the existing general legal forms (e.g., association, foundation, cooperative, company) can be used to establish an organization with the concrete characteristics of an SE; however, in the absence of specific organizational law recognizing them, SEs do not have a precise, distinct, reserved, and protected legal identity. When organizations possess distinctive features related to their pursued purpose—be it negative, such as the nonprofit purpose, or, moreover, positive, such as the social purpose that characterizes SEs—organizational law has a vital role in defining each organization’s specific identity, which is primarily determined by its particular goals.

Therefore, SE law’s primary and essential role is (and should be) to establish a defined identity of SEs and preserve their essential features. This per se justifies the existence of specific SE legislation and helps identify its minimum and essential contents.²³ Having and operating under a specific identity different from that of other organizations, and under a legal designation that conveys particular objectives and actions, is what satisfies the interests of SE founders and members and, consequently, is a precondition for this particular form of business organization’s existence and development.²⁴ If “the diversity and openness of the concept [of SE] are probably some of the reasons for its success,”²⁵ however, a precise legal identity increases “a founder’s or member’s ability to signal, via her choice of form, the terms that the firm offers to other contracting parties, and to make credible [her] commitment not to change those forms.”²⁶

¹⁸Precisely, 6159: cf. ISTAT, *Le cooperative sociali in Italia. Anno 2003* (Roma, 2006).

¹⁹Cf. ISTAT, *Censimenti permanenti. Istituzioni non profit*, October 15, 2021.

²⁰Cf. Gintere and Licite-Kurbe (2021).

²¹Sections 26 ff. of the Companies (Audit, Investigations and Community Enterprise) Act of 2004, and the Community Interest Company Regulations of 2005.

²²Cf. Community Interest Companies Annual Report 2020/2021. On this subject, cf. Liptrap (2021b).

²³See Fici (2017), p. 13; more recently, along the same lines, Bohinc and Schwartz (2021), p. 4: “A primary contribution of social enterprise law is to enable companies with a true social mission to distinguish themselves.”

²⁴Cf. Bohinc and Schwartz (2021), p. 6.

²⁵In these terms, Defourny and Nyssens (2012), p. 20.

²⁶In these terms, Kraakman et al. (2009), p. 22.

Therefore, dedicated SE laws are advantageous to the extent that they allow social entrepreneurs to distinguish their initiatives for stakeholders (e.g., customers, employees, investors, volunteers, donors, public administrations). By imposing specific legal identities on SEs, legislators are not unnecessarily restricting their private autonomy but rather allowing them to display their distinctive traits and profit from them. The list of potential benefits includes, among others, these aspects:

1. SEs may be taken into specific consideration in tax, public procurement, insolvency, or competition laws, among others, and thus receive rules that are in line with their legal nature, which is a prerequisite for SEs to prosper;²⁷ SEs need a comprehensive legal framework that favors their establishment because organizational law alone (especially in the absence of a consistent tax regime) is insufficient.²⁸
2. Specific public policies may be designed in support of SEs,²⁹ and these policies may be justified under EU competition and state aid laws.³⁰
3. Clearer boundaries may be drawn between SEs and other concepts, such as corporate social responsibility, sustainable businesses, and socially responsible

²⁷Several times, EU institutions have emphasized the need for SEs to receive specific treatment under competition law and public procurement law: cf., for example, the EP resolution of September 10, 2015, on Social Entrepreneurship and Social Innovation in combating unemployment, at paragraphs 21, 22 and 33; and the EP resolution of February 19, 2009, on Social Economy, at paragraph 4. The aspect is also highlighted, with regard to social economy entities in general, in the Commission's Action Plan of December 2021: "Developing coherent frameworks for the social economy entails considering its specific nature and needs with regard to numerous horizontal and sectoral policies and provisions such as those relating to taxation, public procurement, competition, social and labour market, education, skills and training, healthcare and care services, Small and Medium-sized Enterprise (SME) support, circular economy, etc."

²⁸This is demonstrated by the failure of Italian Legislative Decree no. 155/2006. It led to the establishment of a very limited number of SEs, which resulted from the lack of consistent and adequate tax consideration for SEs. In the 2017 reform, the Italian legislature introduced specific tax rules for SEs into Legislative Decree no. 112/2017 specific tax rules; they are still not effective (because they are conditioned on the European Commission's approval, which has yet not arrived), but they are expected to re-launch this legal instrument.

²⁹This is one specific objective envisaged by EU institutions: cf., for example, the Council's conclusions on the promotion of the social economy as a key driver of economic and social development in Europe, cit., at paragraphs 28 and 29. See the Commission's Action Plan for the Social Economy of 2021.

³⁰Cf. EU Court of Justice, 8 September 2011 (C-78/08 a C-80/08), and, for commentary, Fici (2014). The Court held that the specific (and more favorable) tax treatment of Italian cooperatives is (potentially) compatible with EU law, and, in particular, with the rules prohibiting state aid to enterprises, to the extent that cooperatives are business organizations different from all others (as they are person-centered and not capital-centered, democratic, etc.). Therefore, their particular tax treatment is not an unlawful privilege but the reasonable consequence of their structural diversity from ordinary business organizations. The statement was made possible by the fact that cooperatives are also subject to EU law, having been provided for in a little-used, but highly symbolic EU statute (Regulation no. 1435/2003), as this ruling shows. Thus, an EU statute on SEs would have a similar effect with respect to SEs. In its absence, the 2011 EU Court judgement can certainly help (by way of analogy).

- enterprises;³¹ these concepts may deserve specific consideration from legislators and public institutions but on different grounds and in different terms than SEs.
4. The relationship between SEs and more general concepts, notably those of the social economy and third sector, as legal categories of entities that include but are not limited to SEs may be better understood.
 5. The interests of an SE's various stakeholders, such as customers, investors, and socially responsible suppliers, may be more effectively protected because the use of the denomination "SE" without a legal standard to guarantee a corresponding substance may have a distorting effect on the market.
 6. The establishment and operation of "pseudo-SEs" may be prevented, thereby reducing the risk of serious harm to the image of the third sector or the social economy as a whole.³²
 7. More reliable statistical data on SEs may be collected, thereby improving the visibility of the entire sector.³³

Hence, SEs should have their own organizational laws for numerous theoretical and practical reasons. In addition, on a more philosophical level, it arouses curiosity why laws on SEs, or on the third sector and the social economy overall, should require justification. In fact, there is no apparent reason why the state should provide a specific legal framework for collective actions motivated by profit but not for collective actions aimed toward the common good. Both structures of action, those for the "homo oeconomicus" and the "homo donator" or "reciprocans," should be recognized and carefully regulated by law. Organizations with a higher degree of constitutional salience, such as SEs, which perform important social and economic functions by helping the state to provide general interest services and the community to self-organize to satisfy needs unmet by the state (the first sector) and traditional for-profit producers (the second sector), in principle, deserve more attention than organizations in other categories.

Thus, in countries where SEs and third-sector (or social economy) organizations in general are not regulated, the question should not be whether to legally recognize these subjects but should be why this has not already occurred.

³¹Cf. recently Bohinc and Schwartz (2021), p. 5: "A company that strives to be a good citizen is not the same as one that is committed to a certain social goal. Social enterprises are good corporate citizens, but good corporate citizens are not necessarily social enterprises."

³²Cf. Yunus (2007), p. 178; Yunus (2010), pp. XXV and 117.

³³Improving statistics on SEs to increase their visibility is another objective EU institutions often highlight: cf., for example, the opinion of the EESC on "Social entrepreneurship and social enterprise" of October 26, 2011, at paragraphs 1.11 and 3.6.3. On data and statistics for the sector, the Commission's Action Plan for the Social Economy of December 2021 has a dedicated section.

3 Models and Trends of National Social Enterprise Legislation in the EU

Beginning with Italian Law no. 381/1991 on social cooperatives,³⁴ social enterprise legislation has spread throughout Europe; today, 21 out of 27 EU Member States have at least one law on this subject. The current national legislation on SEs is certainly more varied and complex than at the time of its emergence. Laws on social cooperatives are still in force and continue to be adopted; however, the legal landscape is now more articulated, and different forms of legislation also exist.

More precisely, two general models of SE legislation can be identified, which can also coexist within the same national jurisdiction.³⁵ In the first model of legislation to emerge, SEs are a particular legal type (or subtype) of entity: either a (social purpose) cooperative or company. In the second model, which has been increasingly used, “SE” is a legal qualification (the terms “certification” and “accreditation” are also used for the same purpose) that may be acquired by private organizations that, regardless of the legal form of incorporation (a company, a cooperative, or, even in certain cases, an association or a foundation), satisfy the requirements assumed by the law as indicators (or “criteria”) of their “sociality.”

Another possible classification of SE laws is as follows:

- Laws that recognize only work integration social enterprises (WISEs) as SEs, and
- Laws according to which an SE is identified by the performance of one or more social utility or general interest activities, including work integration of disadvantaged persons or workers

This distinction regards the scope of an SE’s activity and may apply to both law typologies previously described. Therefore, depending on the characteristics of national legislation, laws may provide only for the establishment of work integration social cooperatives (e.g., Poland),³⁶ or there may be laws under which work integration is the only activity that an organization can perform to qualify as an SE (e.g., Lithuania).³⁷

³⁴The fact that Italian Law no. 381/1991 is the cornerstone of this type of legislation corresponds to an opinion commonly shared by the most prominent scholars in this field, such as Galera and Borzaga (2009) and Defourmy and Nyssens (2012). However, although it is undeniable that this Italian Law initiated a process that involved several EU Member States, and therefore had a strong cultural impact even outside the borders of its application, it must be acknowledged that the UK’s Industrial and Provident Societies Act (IPSA) of 1965 already provided for the establishment of a Community Benefit Society, that is, a company whose economic activity “is being, or is intended to be, conducted for the benefit of the community” (see sect. 1(2)(b) IPSA 1965, and now sect. 2(2)(a) (ii) of the Co-operative and Community Benefit Societies Act of 2014).

³⁵The two models in this chapter do not coincide with the two models identified by Vargas Vasserot (2021), p. 70.

³⁶Cf. Law 27 April 2006 on social cooperatives.

³⁷Cf. Law no. IX-2251 of June 1, 2004, on social enterprise. See also Lithuanian Law no. XIII-2427 of September 19, 2019, on the same subject.

Work integration of disadvantaged persons and workers is only one possible social utility (or general interest) activity that SEs may, in principle, conduct; thus, no apparent reason exists to reduce by law the scope of SEs to work integration. Accordingly, the legislative trend toward enlarging the scope of institutionalized social enterprises beyond work integration must be appreciated. One example of this is Slovakia, where a new law passed in 2018 on social economy and social enterprises freed the concept of SE from work integration and overcame the limits of the preceding legislation, which, by supporting only WISEs, was unable to capture *de facto* SEs not focused on work integration.³⁸

3.1 Social Enterprise as a Legal Form of Incorporation

Following the first model of legislation described above, in some EU countries, the law provides a specific legal form for SE incorporation, which is distinct from the ordinary legal forms and usually constitutes a special subtype (or modified type) of either a cooperative or shareholder company. The most common legal form for an SE is social cooperative, which in some countries has different names, such as collective interest cooperative in France, social solidarity cooperative in Portugal, or social initiative cooperative in Spain. It is present in many EU national jurisdictions, namely, Croatia,³⁹ the Czech Republic,⁴⁰ France,⁴¹ Greece,⁴² Hungary,⁴³ Italy,⁴⁴ Poland,⁴⁵ Portugal,⁴⁶ and Spain⁴⁷ (as well as Belgium after reforms in 2019, although in a partially different manner, which is described later in this chapter).

In the EU28, the UK community interest company was the most prominent example of a social purpose company. After Brexit and changes to the Belgian legal framework on SEs (in which the provisions on the social purpose company were repealed), Latvia is now the only EU Member State that adopts this model of legislation (although in a partially different manner, as highlighted later in this

³⁸Cf. Law no. 112/2018 of March 13, 2018 on social economy and social enterprises and art. 50b of Law no. 5/2004 on employment services, as amended in 2008. See also European Commission (2020), p. 29.

³⁹Cf. art. 66 of Law no. 764 of March 11, 2011, on cooperatives.

⁴⁰Cf. art. 758 ff. of Law no. 90/2012 on commercial companies and cooperatives.

⁴¹Cf. art. 19-*quinquies* ff. of Law no. 47-1775 of September 10, 1947, on cooperatives, as introduced by Law no. 2001/624 of July 17, 2001, and amended by Law no. 2014/856 of July 13, 2014, on the social and solidarity economy.

⁴²Cf. Laws no. 2716/1999 and 4019/2001.

⁴³Cf. articles 8, 10(4), 51(4), 59(3), 60(1), and 68(2)(e) of Law no. X-2006 on cooperatives.

⁴⁴Cf. Law of November 8, 1991, no. 381.

⁴⁵Cf. Law of April 27, 2006.

⁴⁶Cf. Law-Decree no. 7/98 of January 15, 1998, on social solidarity cooperatives.

⁴⁷Cf. art. 106 of Law no. 27/1999 on cooperatives.

chapter).⁴⁸ However, in both Germany and the Netherlands, the national government has put forth proposals regarding the introduction of social purpose limited liability companies.

3.1.1 Social Enterprise in the Cooperative Form

The existing framework demonstrates that national legislators appreciate social cooperatives, thus raising questions as to why. A possible explanation is that, notwithstanding its particular aims, the social cooperative remains, at its core, a cooperative, of which it shares the general structure of internal governance and other particular qualities national legislators deem to be consistent with an SE's nature and objectives.

The social cooperative is, in fact, a cooperative with a nonmutual purpose,⁴⁹ given that—as for example Italian Law no. 381/91 states—its “aim [is] to pursue the general interest of the community in the human promotion and social integration of citizens,” either through the management of socio-health or educational services (social cooperatives of type A) or any entrepreneurial activity in which disadvantaged people are employed (“social cooperatives of type B,” which belong to the WISE category).⁵⁰ Of great interest in this regard is the recent Belgian legal provision, according to which cooperatives may be accredited as social enterprises if their “main objective is not to provide their shareholders with an economic or social advantage, in order to satisfy their professional or private needs,” but “to generate a positive societal impact for the human being, the environment or the society” (art. 8, para. 5, Code of Companies and Associations of 2019).⁵¹

However, if a social cooperative's “soul” (i.e., main purpose) is that typical of an SE (and not of an “ordinary” cooperative pursuing a mutual purpose), then its “body” (i.e., organizational structure) remains that of a cooperative. Consequently, in addition to the distinctive traits all SEs share (including, in particular, the total or partial profit nondistribution constraint and disinterested devolution of residual assets in case of dissolution), the SE in the cooperative form is as follows:

⁴⁸Cf. Law of October 12, 2017, on social enterprise.

⁴⁹The mutual purpose that, in general, characterizes ordinary cooperatives is to act in the interest of their members as users, consumers, or workers of the cooperative enterprise. Therefore, “non-mutual” here refers to cooperatives not acting exclusively in the interest of their members but primarily in the general interest. This does not imply, of course, denying the societal role or social function of ordinary cooperatives, which is even recognized at the constitutional level in many countries (as highlighted in the main text and footnotes). Cf. also Meira (2020).

⁵⁰A social cooperative's members, therefore, cooperate not to serve themselves (as in ordinary mutual cooperatives), but to serve others: cf. Fici (2013b).

⁵¹Translation by Author. The original French text is as follows: their “*but principal ne consiste pas à procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels ou privés,*” but “*de générer un impact sociétal positif pour l'homme, l'environnement ou la société.*”

- A democratic SE (cooperatives are, in principle, managed according to the “one member, one vote” rule, regardless of the share capital held by each member; therefore, they are person-centered rather than capital-centered organizations)
- Open to new members, whose admission is favored by the variability of capital (the “open door” principle in cooperatives is a manifestation of present members’ concern for the future generations of members)
- Jointly owned and controlled by its members (in cooperatives, usually, all, or at least most, of the directors must be members, and the external or nonmember control of a cooperative is not permitted by law); and
- By its very nature, supportive of other cooperatives, its employees, and the community at large⁵²

Therefore, the cooperative legal form is considered in specific constitutional provisions that recognize its social function and provide for state support.⁵³

The social function of cooperatives is even more intense when a cooperative aims to pursue the general interest of the community rather than its members’ economic interests. Essentially, the combination of cooperative structure and social objectives may determine an organization’s increased social relevance, given that the sociality of the cooperative structure is added to the sociality of the entity’s objectives.

Undoubtedly, SEs in the cooperative form are entities that have a very strong identity as SEs because their governance has the participatory (and human) dimension that characterizes the SE “ideal-model,” as adopted, for example, by the European Commission in the SBI Communication of 2011, which was based on previous work by the EMES research network. In the SBI Communication, an SE is described as follows: “It is managed in an open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities.” In addition, the democratic nature of SE in the cooperative form makes it perfectly compatible with the notion of a social economy entity that is increasingly common in Europe and the laws on the social economy approved there thus far. In these laws, democratic governance is indeed a key identifier of social economy entities.⁵⁴

If the above holds true, two examples in the most recent legislation may be appreciated for the prominence given to the cooperative form in SE regulation. The first, and most relevant, is the case of Belgium, which completely modified its legislative approach to SEs in 2019 by repealing its law on the “social purpose company” (SFS) and replacing it with legislation on the “cooperative accredited as social enterprise.” The second is the case of Italy, where the “social cooperative,” as

⁵²It is impossible to discuss here these general characteristics of the cooperative legal form of business organizations: cf. Fici (2013a) and Fajardo et al. (2017).

⁵³The list of countries whose constitutions deal with cooperatives is very long and includes, among many others, Italy, Spain, and Portugal. For further reference, see Fici (2015) and Douvitsa (2018).

⁵⁴Cf., for example, art. 4, lit. a), of Spanish Law no. 5/2011; art. 5, lit. c), of Portuguese Law no. 30/2013; art. 1, para. 1, no. 2, of French Law no. 2014-856; art. 4, lit. d), of Romanian Law no. 219/2015.

provided for by Law no. 381/1991, is now recognized as an *ope legis* social enterprise in Legislative Decree no. 112/2017 and receives more favorable treatment (not only under tax law) than SEs established in another legal form.

These recent legislative changes are in line with the idea that the cooperative form is the “most natural” for a social enterprise.

3.1.2 Social Enterprise in the Company Form

Under the first model of legislation, cases in which national legislators provide for SEs in the company form are, as previously noted, exceptional.⁵⁵ An SE in the company form is a particular type of company intended not to distribute profits to shareholders or maximize shareholder value but to pursue a social purpose, the general interest, or the interest of the community or maximize “social value.”⁵⁶ The company form does not, in itself, raise particular concerns regarding the pursuit of an SE’s typical purpose if and to what extent the law clearly assigns a social objective to these companies and restricts profit distribution⁵⁷ (and, of course, if enforcement is reliable and effective).⁵⁸ Furthermore, SEs in the company form might be more effective in fulfilling their objectives, given their greater financial capacity compared with SEs established in other legal forms. Being their structure based on the capital individually held (one share, one vote), these companies should potentially attract more investors than other types of organizations, such as cooperatives, in which capital held is irrelevant to governance (one member, one vote).

However, these strengths of the company form are also risky aspects for a social enterprise’s identity. Being a capital-driven organization, an SE incorporated as a company could potentially be controlled by a single shareholder, thereby losing its democratic or participatory character.⁵⁹ An SE in the company form could also become a manager-run enterprise since members’ control and active participation are not required the way that they are in the cooperative form. This arrangement can even be risky for a social enterprise’s identity, considering certain findings in the fields of behavioral law and economics. These findings indicate that, under certain

⁵⁵ Of course, as is clarified in the main text, an SE in the company form may also be found in those jurisdictions that adopt the second model of legislation, in which SE is a legal qualification, open to entities incorporated in various legal forms, including that of a company.

⁵⁶ Liptrap (2020), p. 15.

⁵⁷ The fact that the company SE has a share capital per se does not imply, of course, that shareholders are entitled to receive profits. In addition, it must be noted that SE legislation, rather than prohibiting the distribution of profits, usually more opportunely mandates a certain use of the profits, thereby impeding their full distribution to shareholders: cf. Fici (2017); Fici (2020); Liptrap (2020), pp. 19 f.

⁵⁸ On the importance of enforcement in SE regulation, see Brakman Reiser (2013); Brakman Reiser and Dean (2014).

⁵⁹ Cf. Lloyd (2010), which explains that the CIC—as compared to a charity—finds its justification in that it offers its founders the possibility of controlling the organization.

conditions, managers are less inclined to transfer resources to third-party beneficiaries compared to not only their shareholders but also themselves, were they not acting as agents. A likely reason for this is that managers tend to adopt principles to curry favor with company ownership and satisfy shareholders' interests to retain their positions.⁶⁰

Therefore, compared to SEs in the cooperative form, SEs in the company form need rules imposing specific restrictions to avoid potential deviations from their social mission. In fact, an SE in the company form has, in principle, a weaker identity as an SE, which is at risk if, among other things, legislators do not set limits on the control of certain shareholders or precise rules on the ownership and control of the company.⁶¹ For example, Italian Legislative Decree no. 112/2017 stipulates that a single individual or for-profit entity may participate in, but not control or direct, an SE.⁶² This approach resolves the issue almost entirely, making the company SE a useful structure, notably for second-degree aggregation among primary SEs or operating as a subsidiary of other SEs, third-sector entities, or nonprofit organizations.

Another interesting provision to this effect is found in art. 9, paragraph 1, of Slovenian Law no. 20/2011, which limits for-profit companies' potential to establish SEs by providing that they may do so only to create new jobs for redundant workers (and explicitly providing that they may not do so to transfer the enterprise or its assets to the SE).⁶³ Notable as well is a rule set by the (no longer existing) Belgian *société à finalité sociale* (SFS), according to which no shareholder could have more than one-tenth of the votes in the shareholders' general meeting.⁶⁴

⁶⁰Cf. Fischer et al. (2015). It is generally agreed that agents tend to behave less generously than their principals in both the ultimatum and dictator games: cf. Hamman et al. (2010).

In our opinion, to be consistent with its institutional objectives, an SE in the company form should have a governance structure that either (a) directly involves the shareholders in the management of the enterprise, if they are actually motivated by a sense of altruism; (b) completely frees the managers from the competitive pressures of shareholders, so that they do not have any incentive to align themselves with the latter's interests; or © awards rights and powers (also) to an SE's beneficiaries who are not shareholders (or to their representatives), so that they might push managers to efficiently and effectively achieve the organization's social mission.

⁶¹ See the preceding footnote about our recommendations on how this might be accomplished.

In addition to the risk of abuse of the SE legal form for profit purposes, the risk also exists that, if the use of the company form of SE is not carefully regulated through limits relative to who may hold its capital and/or control the company, the SE might be used purely for purposes of corporate social responsibility. If this is the case, the autonomy of the social economy sector from the for-profit capitalistic sector could be seriously compromised.

⁶²Cf. art. 4, para. 3, Legislative Decree no. 112/2017, as well as art. 7, para. 2, of the same act. Even stricter is the solution found in Spanish Law no. 44/2007, given that only not-for-profit entities, associations, and foundations may promote the establishment of integration enterprises (see articles 5, lit. a) and 6).

⁶³In addition, it is worth mentioning that the second paragraph of the same article of this Law suggests that an entity may not acquire the SE qualification if it is subject to the dominant influence of one or more for-profit companies.

⁶⁴Cf. repealed art. 661, para. 1, no. 4, of the Belgian Company Code. This maximum percentage was even lower (i.e., equal to one-twentieth), if the holder of equity (i.e., the shareholder) was a

3.2 *Social Enterprise as a Legal Qualification*

The laws ascribed to the second model of legislation aim to establish a particular legal category of entities—that of social enterprises—that have some common characteristics relative to their pursued purpose (a social purpose), the activity conducted to pursue that purpose (an activity of general or collective interest), profit use, and some aspects of governance. These laws assume these characteristics to be requirements for the qualification or accreditation of an organization as a social enterprise. In contrast, the legal form of an entity’s incorporation is not relevant for its qualification or accreditation as an SE; thus, under this legislation, SEs may, in principle, have different legal forms. There may be cooperative or company SEs and, in some jurisdictions, even association or foundation SEs.

The plurality of the available legal forms for SEs is the element that most differentiates these laws from those in the group previously examined in this chapter. The other major distinction is that, applying this model of legislation, an organization receives the qualification to be an SE rather than incorporates as an SE, unlike what occurs when an SE is a legal form. In contrast, an SE’s identity is not subject to variation, depending on the model of legislation adopted. Comparative analysis shows that in both models, SEs have substantially the same legal identity (apart from the profile of the legal form, as already noted).⁶⁵ This type of legislation is found in most national jurisdictions in the EU (and in two-thirds of those with specific SE laws), namely, Bulgaria,⁶⁶ Cyprus,⁶⁷ Denmark,⁶⁸ Finland,⁶⁹ France,⁷⁰ Greece,⁷¹ Italy,⁷² Lithuania,⁷³ Luxembourg,⁷⁴ Malta,⁷⁵ Romania,⁷⁶ Slovakia,⁷⁷

“*membre du personnel engagé par la société*” (staff member employed by the company). Cf. also art. 23 of Slovenian Law no. 20/2011, which imposes on SEs the obligation to treat members equally in decision-making processes and, in particular, prescribes a single vote for all members, regardless of the particular law of the entity’s incorporation.

⁶⁵Cf. Fici (2016, 2017, 2020).

⁶⁶Law no. 240/2018 on social and solidarity enterprises.

⁶⁷Law on social enterprise of 2020.

⁶⁸Law no. 711 of June 25, 2014, on registered social enterprises.

⁶⁹Law no. 1351/2003 of December 30, 2013, on social enterprises.

⁷⁰Art. L3332-17-1 of the Labor Code on the solidarity enterprise of social utility.

⁷¹Law no. 4430/2016 on the social and solidarity economy. However, on the questions posed by this legislation, cf. Adam (2019).

⁷²Legislative decree no. 112/2017 of July 3, 2017.

⁷³Law no. IX-2251 of June 1, 2004.

⁷⁴Law of December 12, 2016, on social impact societies, as amended by Law of August 31, 2018.

⁷⁵Social Enterprise Act no. IX of 2022.

⁷⁶Art. 8 ff. on social enterprise of Law no. 219/2015 of July 23, 2015, on the social economy.

⁷⁷Law no. 112/2018 of March 13, 2018, on social economy and social enterprises.

Slovenia,⁷⁸ and Spain.⁷⁹ More precisely, in some countries, such as Bulgaria, Finland, Italy, Slovakia, and Slovenia, the law permits entities incorporated in any legal form (company, cooperative, association, or foundation) to qualify as SEs.⁸⁰ In other countries, such as Luxembourg, the law restricts SE qualification to entities incorporated as companies (or only certain types of companies) or cooperatives.⁸¹ In the Maltese SE law passed in 2022, one qualification requirement is that the entity be established in the legal form of a company, partnership, or cooperative;⁸² however, the same law foresees the potential expansion of the admissible legal forms to include foundations.⁸³

Two recent laws adopted yet another approach. In Belgium, after the 2019 reforms, SE became a legal accreditation; however, it can only be obtained by cooperatives (upon the concession of the Minister of the Economy). In the Latvian Law of 2017, SE is a legal qualification but may be acquired only by limited liability companies. This suggests a new trend emerging in which jurisdictions combine both general models of legislation, so that SE is a legal qualification, but only entities with a specific legal form (either a cooperative or company) may qualify. This results in the convergence of the two models of legislation identified and described in this chapter.

SE as a legal qualification is a model of legislation increasingly praised by legal scholars⁸⁴ and increasingly diffused across the EU. Thus far, it has also been a reference model for EU Institutions. In the European Commission's "SBI" Communication of 2011, which provoked a new wave of laws on SEs in the EU,⁸⁵ no reference is made to a specific legal form of incorporation defining an SE. Similarly, "EaSI" Regulation no. 1296/2013 specifies that legal form is irrelevant for the

⁷⁸Law no. 20 of 2011 on social entrepreneurship.

⁷⁹With particular regard to integration enterprises and special employment centers: cf., respectively, Law no. 44/2007 of December 13, 2007, and art. 43 ff. of Royal Legislative decree no. 1/2013 of November 29, 2013. Cf. Vargas Vasserot (2021), pp. 80 f.

⁸⁰According to art. 1, para. 1, of Italian Legislative Decree 112/2017, "All private entities, including those established in the forms of the fifth Book of the Civil Code, may acquire the qualification of social enterprise." The legal forms of the fifth Book are companies and cooperatives.

⁸¹More precisely, according to Luxembourgian Law of 1December12, 2016, only the *société anonyme*, *société à responsabilité limitée*, and *société coopérative* may qualify as social impact societies (SISs). Along the same lines, qualification as an *integration enterprise* under Spanish Law no. 44/2007 is limited to those enterprises with the legal form of a *sociedad mercantil* or *sociedad cooperativa* (art. 4, para. 1). In contrast, the possibility exists that legislators permit even an individual entrepreneur to qualify as an SE, as happens in Finland, where Law no. 1351/2003 allows the registration as SEs of all traders, including individuals, registered under sect. 3 of Law no. 129/1979, and in Slovakia, where art. 50b, para. 1, of Law no. 5/2004, refers, in defining an SE, to both legal and physical persons (the same occurs in Slovakian Law no. 112/2018, with regard to the definition of the subjects of the social economy, among which are social enterprises).

⁸²See sect. 3(1)(a), Act no. IX of 2022.

⁸³See sect. 3(3), Act no. IX of 2022.

⁸⁴Cf., in particular, Sørensen and Neville (2014); more recently Lavišius et al. (2020).

⁸⁵Cf. Fici (2020).

definition of an SE, which is “an undertaking, regardless of its legal form . . .”⁸⁶ Furthermore, in its Resolution of July 5, 2018, the European Parliament proposed the adoption of a “European Social Enterprise Label” to be awarded to enterprises complying with certain criteria but “established in whichever form available in Member States and under EU law.”⁸⁷

National-level legislators also seem to appreciate the opportunities this model of SE legislation brings. The most recent national SE laws, such as those passed in Malta in 2022 and Cyprus in 2020, provide for SE as a legal qualification. In some countries that already had a specific law on social cooperatives, such as France, Italy, and Slovakia, laws of this type have been subsequently approved.⁸⁸

In effect, there are certain advantages that may be attributed to this model of legislation in comparison to the preceding one. It permits an existing organization to become an SE without having to reincorporate and an existing SE to lose its qualification without having to dissolve or convert into or reincorporate as another legal form, thereby reducing costs and facilitating access to (and exit from) the SE legal qualification.⁸⁹ This holds particularly true for organizations already established in a legal form different from that usually chosen by legislatures (e.g., associations or foundations), following the first model of legislation, to accommodate an SE (i.e., company or cooperative). Imposing sanctions may be simpler for the public authority in charge of enforcing SE qualification laws (and less onerous for the organization) because it may suffice to revoke the qualification (or threaten to revoke it if problems are not resolved) rather than dissolve or convert a legal entity.⁹⁰

However, the most considerable advantage of this model is that it allows an SE to choose the legal form under which it prefers to conduct business, without imposing either the cooperative or company form (or another specific legal form), which differs from what occurs when a jurisdiction adopts the first model. The plurality of the available legal forms permits an SE to shape its structure in the most suitable manner, according to its circumstances (e.g., the nature of the founders or members: workers, investors, first-degree SEs, etc.), the tradition (e.g., cultural, historical) where it has its roots (e.g., of associations or cooperatives), or the nature of the business it conducts (e.g., labor- or capital-intensive).

Furthermore, to the extent that the law imposes certain requirements on all SEs (or, rather, on all organizations that wish to qualify as SEs and maintain this qualification over time), independent from their legal form of incorporation, this

⁸⁶This regulation was replaced by Reg. no. 1057/2021 establishing the European Social Fund Plus (ESF+). In this regulation, the definition of social enterprise is found in art. 2(1) n. 13: see *infra* in the main text.

⁸⁷See Vargas Vasserot (2021), pp. 68 f.; Liptrap (2021a) for comments on this proposal, which followed the final recommendations provided by the Author of this chapter in Fici (2017).

⁸⁸None of these countries has repealed its existing laws on social cooperatives.

⁸⁹Cf. Sørensen and Neville (2014), p. 284.

⁹⁰Cf. Sørensen and Neville (2014), pp. 284 f.

model ensures that, in any event, all SEs have a common identity as SEs.⁹¹ Therefore, there is no evidence that the laws in this second group are, in general, less strict than those in the first group. Of equal importance is the fact that this model allows legislators to organize and combine the legal qualification requirements in different ways, depending on the legal form of SE incorporation, thereby making the qualifications more flexible.⁹² In addition, this model resolves the dilemma between the company and cooperative forms, which the previous model of SE legislation inevitably poses.⁹³

Nevertheless, the benefits of the cooperative form—already highlighted in this chapter—might and should be recognized even within this model of legislation. For example, in Italy, although SEs may assume any possible legal form, social cooperatives are *ope legis* social enterprises and receive more favorable tax benefits than SEs incorporated in other legal forms. This preferential regime (as compared to other SEs) finds its rationale in the underlined virtues of the cooperative form, so that it also appears reasonable and justifiable under competition and state-aid laws.

4 Concluding Remarks

Social enterprise legislation is widespread in the EU, as three-quarters of Member States have specific laws on social enterprises. In this chapter, these laws have been classified according to two different models. In the first model, the law provides for an ad hoc legal form for social enterprises, which is usually that of the social cooperative. In the second model, the laws identify some legal requirements (usually regarding the purpose pursued, profit uses, activity conducted, and some aspects of governance), which allow an entity to obtain the qualification of a social enterprise (or the accreditation as a social enterprise), regardless of whether it is established as a cooperative or company or even as an association or a foundation. The second model is increasingly used by national legislators. Its main benefit lies in the fact that it recognizes social enterprises in various legal forms. Therefore, in this second model, social cooperatives are not the only social enterprises.⁹⁴ This model also presents

⁹¹ Moreover, nothing prevents legislators from providing different treatment to SEs established in different forms; for example, to favor, under tax law or policy measures, an SE in the cooperative form, in consideration of its democratic nature, as compared to an SE in the company form.

⁹² For example, the democratic and participatory character of an SE in the cooperative form permits the relaxation of the profit nondistribution requirement, while the nondemocratic character of an SE in the company form imposes rigidity with regard to profit distribution, as well as specific measures to ensure stakeholders' involvement.

⁹³ This does not mean, however, that SEs in the company form do not also require specific rules under this model of legislation to make it (more) consistent with an SE's identity, as clarified *supra* in the main text.

⁹⁴ Several reasons however remain as to why social cooperatives should deserve, even within this second model of legislation, special consideration relative to social enterprises in other legal forms,

certain practical advantages, for both private entities that aspire to qualify as SEs and public administrations that enforce the law.

The second model is inspired by the concept of social enterprise adopted by the European institutions, particularly the “SBI” Communication of 2011, which gave rise to a new wave of social enterprise laws.⁹⁵ In a 2018 resolution, the European Parliament referred to this model of legislation when calling on the Commission to introduce a European statute establishing the status or label of the “European social enterprise.”

However, European institutions appear to be currently focusing their attention on other concepts. In the December 2021 “Action Plan for the Social Economy,” the European Commission showed a preference for addressing the broader category of social economy entities, which includes not only social enterprises but also other subjects identified solely based on their legal form (e.g., associations, foundations, mutuals, cooperatives).⁹⁶ In addition, the European Parliament has recently proposed regulations introducing the European association and a directive of minimum harmonization on nonprofit organizations.

In this changed climate, where new strategies have been employed,⁹⁷ the hope is that forces will not be dispersed in attempts that are too ambitious and certainly more complex than the one to create a harmonious legislative framework for social enterprises in Europe, which, based on the existing national-level legislation, would be more feasible.

by reasons of their intrinsic benefits derived from their cooperative structure, as explained in the main text. However, of great significance in this regard is the shift from the company form to the cooperative form that took place in Belgian law, where in 2019, the social purpose company was replaced by the cooperative accredited as social enterprise.

⁹⁵If we are not mistaken, after the SBI Communication of 2011, 14 Member States either adopted new SE laws or changed the existing ones, while legislative proposals were put forward in the other Member States.

⁹⁶In addressing social economy organization law, it may be useful to read Hiez (2021).

⁹⁷As already testified, at the legislative level, by Regulation no. 1057/2021, replacing Regulation no. 1296/2013, which provided a new definition of social enterprise that includes social economy organizations. Cf. art. 2(1), n. 13, Reg. no. 1057/2021, which reads: “‘social enterprise’ means an undertaking, regardless of its legal form, including social economy enterprises, or a natural person which: ‘(a) in accordance with its articles of association, statutes or with any other legal document that may result in liability under the rules of the Member State where a social enterprise is located, has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes, and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives; (b) uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective; (c) is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact.’”

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Social Enterprises in the Social Cooperative Form



Daniel Hernández Cáceres

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1 Introduction

In Europe, most social enterprises have their origins in the tradition of the cooperative movement in the fields of labor, agriculture, health, retail, credit, and education.¹ The first works that studied social enterprises in Europe were developed in Italy in 1990. These works elaborated a conception of the social enterprise with many similarities to the traditional model of cooperatives, adapted to provide answers to more social needs.² In 1991, the Italian Parliament passed a specific law for social cooperatives, which led to an extraordinary boom of these entities

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¹EMES (2020, p. 42).

²Vargas Vasserot (2021, p. 317).

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throughout Europe.³ After this pioneering experience, European legislators found the cooperative model to be the most appropriate, or the most natural, for framing the phenomenon of social enterprises,⁴ to the point of being considered by some as a modified form of the cooperative.⁵

As such, some of the characteristics that define the European concept of social enterprise are currently related to the cooperative principles that guide the actions of this type of entity. Thus, the social dimension of social enterprises in Europe is identified with the cooperative principle of concern for the community, which has been present in the cooperative movement since its inception, and which currently requires cooperatives to contribute to the sustainable development of their communities in the ecological, social, and economic spheres.⁶ This social dimension is also influenced by the principle of voluntary and open membership.⁷

Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

This principle enables the rest of the community to join the cooperative and to benefit from the same advantages enjoyed by members, thereby demonstrating the altruism of the cooperative members toward potential future members. Finally, the social function of cooperatives has been recognized by legislators in the constitutions of some European countries, such as Spain, Italy, and Portugal.⁸

The political or participatory governance dimension of social enterprises finds its equivalence with the cooperative principle of democratic member control, which establishes that decision making within the cooperative is not linked to paid-up capital but governed, in principle, by the rule of “one member, one vote.” They are also entities with a high degree of autonomy, as defined by the cooperative principle of autonomy and independence. Social enterprises are autonomous organizations and managed by their own members.

Despite the similarities, cooperatives cannot be directly considered as social enterprises, because they do not meet all the requirements. However, a type of cooperative has emerged that adapts some of the attributes of social enterprises while respecting the essential cooperative principles and elements. These new entities, known as social cooperatives, have been considered to be a type of social enterprise.⁹ Social cooperatives combine the mutualistic purpose typical of cooperatives with the general interest of the whole community or of a specific target group, serving broader interests than those of their social base.

³Defourmy and Nyssens (2010, p. 33).

⁴Fici (2020, p. 17).

⁵Fici (2017, p. 47).

⁶Hernández Cáceres (2021, p. 23).

⁷ACI (1995, p. 17).

⁸Fici (2015, p. 2).

⁹Defourmy and Nyssens (2013, p. 13).

In defining or identifying common characteristics, authors have pointed out that the social cooperative is an entity that operates according to a democratic procedure through member participation and its purpose is to pursue the public interest of the community.¹⁰ The International Organization of Industrial and Service Cooperatives (CICOPA), which is a sector of the International Cooperative Alliance, agrees in part with this definition, although it expands on it by identifying five main characteristics of social cooperatives: 1. explicit general interest mission, 2. non-state character, 3. multi-stakeholder membership structure, 4. substantial representation of worker members at every possible level of the governance structure, and 5. non- or limited distribution of surplus.¹¹ This interpretation is also adopted by other authors, such as Defourmy and Nyssens, who even add a sixth characteristic, “*One member, one vote,*” or “*limitation to the rights of shareholders.*”¹²

Among all these characteristics proposed to identify a social cooperative, some can be ruled out because they are not exclusive to social cooperatives but rather inherent to the social form of cooperative and will be present in all cooperatives, social or not. The first of these is the “non-state character.” As CICOPA itself recognizes, this characteristic is linked to the fourth cooperative principle of autonomy and independence. The same principle applies to the “one member, one vote” rule, which is part of the second cooperative principle of democratic control of members and which specifically specifies, “members have equal voting rights (one member, one vote).”¹³

Thus, based on these definitions, social cooperatives have only three characteristics that distinguish them from other cooperatives: an explicit social mission, a specific economic framework that mainly affects the distribution of surpluses and liquidation, and the participation of multiple stakeholders in the cooperative.

2 Regulatory Models in Comparative Law

The regulation of social cooperatives has been carried out very unevenly, using different names to refer to them, and without a clear consensus as to where and how they are to be regulated. Thus, one can find cases in which social cooperatives are included in the general law on cooperatives, as if they were another type of cooperative or a type of qualification that can be obtained by any type of cooperative that meets certain requirements imposed by the legislator. Other countries have decided to regulate them through their own exclusive law, to give these cooperatives greater importance, although these countries also include several references to the general law on cooperatives, which regulates a large part of their social framework.

¹⁰Du et al. (2020, p. 37).

¹¹CICOPA (2004).

¹²Defourmy and Nyssens (2013, p. 16).

¹³ACI (1995, p. 17).

Table 1 Regulation of the analyzed social cooperatives

Country	Legislation	Name of social cooperative
Belgium	Companies and Associations Code 2019 Royal Decree of 28 June 2019	Cooperative as a social enterprise
Brazil	Law no. 9.867 of November 10	Social Cooperatives
France	Law n° 47-1775 of September 10, 1947, on the status of cooperation	Cooperative society of collective interest
Greece	Law 2716/1999 on Development and modernization of mental health services and other provisions	Limited liability social cooperatives
	Law 4430 on Social and Solidarity Economy and Development of its Institutions and other provisions	Social cooperative enterprises
Italy	Law 8 November 1991 n. 381	Social cooperative
Portugal	Decree-Law no. 7/98	Social solidarity cooperatives
South Korea	Framework Act on Cooperatives Enforcement Decree	Social cooperatives
Spain	Law 27/1999 of July 16, 1999, on Cooperatives	State social initiative cooperative
	Law 11/2019 of December 20, 2009, on Cooperatives in the Basque Country	Basque social initiative cooperative Basque social integration cooperative
	Law 12/2015 of July 9, 2015, on cooperatives	Catalan social initiative cooperative

Finally, some countries have regulated them within other laws of broader content, such as corporate codes, laws regulating the social economy, or within laws related to the activities that cooperatives can carry out.

Legislators have opted for different formulas, which may seem contrary to the logic that a social cooperative regulated through its own law would be regulated in greater detail than a social cooperative regulated within a general law on cooperatives. As such, social cooperatives do not demonstrate a clear correlation between the form of regulation and their greater or lesser degree of development. Depending on this degree of development, three models of regulation¹⁴ can be found (Table 1):

¹⁴In addition to the legislations cited here, other countries have also regulated social cooperatives; for brevity, these have not been included in this paper. Examples are the Czech Republic, which regulates the *social cooperative* in Articles 758 et seq. of Law no. 90/2012 on commercial companies and cooperatives; Croatia, which develops the social cooperative in Article 66 of the Law of 11 March 2011, no. 764, on cooperatives; Hungary's *work integration social cooperative*, regulated in Articles 8, 10(4), 51(4), 59(3), 60(1), 68(2)(e), of Law no. X-2006 on cooperatives; Poland, which recognizes the *work integration social cooperative* in the Law of 27 April 2006 on social cooperatives; and South Africa, which regulates the *social cooperative* within Part 5 of The Cooperatives Act 14, of 2005.

- Legislation with little regulation: These are laws that only contain the definition of a social cooperative and a list of the activities to which it may be dedicated. In some cases, these laws also generalize the characteristics of the people to whom they are addressed and the presence of volunteers. Examples are legislations in Brazil and Spain; the former regulates social cooperatives (*cooperativas sociais*) through Law no. 9.867, of November 10, 1999, and the latter includes social cooperatives in different legislations.¹⁵ Thus, we find the state social initiative cooperative (*cooperativa de iniciativa social estatal*), which is regulated in Article 106 of Law 27/1999 of 16 July on Cooperatives; the Catalan social initiative cooperative (*cooperativa de iniciativa social catalana*), regulated in Article 143 of Law 12/2015 of 9 July on Cooperatives; and the Basque social integration cooperative (*cooperativa de integración social vasca*) and Basque social initiative cooperative (*cooperativa de iniciativa social vasca*) in Articles 133 and 156 of Law 11/2019 of 20 December on Cooperatives of Euskadi (Basque Country).
- Legislation with an intermediate regulation: These legislations, in addition to the contents of the previous category, specifically regulate other aspects of social cooperatives, such as membership criteria, member types, voting rights of members, destination of surpluses and allocation of assets in the event of liquidation, activity of the cooperative with non-member third parties, registration of this type of entity, possibility for these entities to enter into agreements with different administrations, and applicable tax benefits. Examples are the Italian legislation that regulates social cooperatives (*cooperative sociali*) through Law 8 novembre 1991, n. 381; Portuguese legislation, which develops the regime of social solidarity cooperatives (*cooperativas de solidariedade social*) in Decree-Law no. 7/98; the French legislation with the regulation of the cooperative society of collective interest (*société coopérative d'intérêt collectif*) within *Title II Ier* Law n° 47-1775 of September 10, 1947 on the status of cooperation; and the Belgian legislation, which regulates the cooperative qualification as a social enterprise in Title 3, Book 8 within the Companies and Associations Code of 2019 and Royal Decree of June 28, 2019 that sets out to establish the conditions for authorization as an agricultural enterprise and as a social enterprise. Regarding the latter legislation, only cooperative entities may qualify as social enterprises.
- Legislation with detailed regulation: In this last group are those legislations that, in addition to containing what is regulated by the previous categories, develop in a more extensive and detailed manner other matters, such as the constitution of the cooperative, minimum capital to be contributed by each member, regime for holding assemblies, composition and decision making of the administrative body, dissolution and liquidation of the cooperative, and modification and supervision by the authorities. This group would include the Greek legislation, which

¹⁵For the Spanish legislative analysis, in addition to the state law, the laws of the autonomous communities of Catalonia and Basque Country have been chosen, since these are the regions with the largest number of this type of cooperatives. Bretos et al. (2004, p. 9).

regulates *limited liability social cooperatives* in Article 12 of Law 2716/1999: Development and modernization of mental health services and other provisions and *social cooperative enterprises* in Chapter Δ of Law 4430 on Social and Solidarity Economy and development of its institutions and other provisions; and the South Korean legislation, which regulates *social cooperatives* in Chapter IV of the Framework Act on Cooperatives and in its Enforcement Decree.

3 General Interest Mission

The main characteristic of social cooperatives is that they mainly develop activities of general interest, in such a way that they substitute the mutualistic purpose of the cooperatives for broader purposes that affect the society or community in which they are inserted. This activity is the *raison d'être* of the cooperative; the cooperative is created mainly to meet these needs of general interest and satisfy them. In this sense, CICOPA states:¹⁶

The most distinctive characteristic of social cooperatives is that they *explicitly* define a general interest mission as their *primary* purpose and carry out this mission *directly* in the production of goods and services of general interest.

A summary of the activities that each of the cooperatives analyzed can carry out is found in Table 2. Depending on the goods and services they produce and the way in which they provide them, three types of social cooperatives can be distinguished:

- **Social integration cooperatives:** These are cooperatives formed by a certain percentage of people affected by physical, mental, and/or sensory disabilities, as well as by people in a situation of social exclusion, and which seek to facilitate their social and professional integration either through their associated work or the provision of general or specific consumer goods and services. In the first case, the persons concerned would set up a worker cooperative to organize, channel, and market the products and services of the members' work. This type of worker cooperative finds its equivalence in work integration social enterprises. In the second case, the members involved constitute a consumer cooperative that can develop any type of economic activity, either producing goods or providing services to the members themselves and that is aimed at contributing as far as possible to the treatment of the members or facilitating their economic self-sufficiency.

The analyzed legislations include several cooperatives that, as they are regulated, fall within this type of cooperative. These are the cases of the Basque integration cooperative and Greek limited liability social cooperative. In addition to these are three others that are also considered integration cooperatives, both those created for the integration of vulnerable groups and for special groups, but

¹⁶CICOPA (2004, p. 2).

Table 2 Activities carried out by the analyzed social cooperatives

Country	Name of social cooperative	Integration		Social purposes	Activity with non-members
		% members disadvantaged	No % of disadvantaged members		
BE	Cooperative as a social enterprise	X	X	X	X ^a
BR	Social Cooperatives	X			
FR	Cooperative society of collective interest	X	X	X	X
GR	Limited liability social cooperatives	35%			
	Social cooperative enterprises for social insertion	30%/50%			
	Social cooperative enterprises of collective and social benefit		X	X	X
IT	Social Cooperative Type A		X	X	X ^a
	Social Cooperative Type B	30%			X ^a
PT	Social solidarity cooperatives	X	X	X	X
SK	Social cooperatives	X	X	X	X
SP	State social initiative cooperative	X	X	X	X ^a
	Basque social initiative cooperative		X	X	X ^a
	Basque social integration cooperative	51%			X
	Catalan social initiative cooperative	X	X	X	X ^a

^aBy application of the general cooperative regime

can only be configured as worker cooperatives: the Italian type B social cooperative, Brazilian social cooperative, and Greek social insertion cooperative enterprises.

Aspects affecting people with difficulties vary among the legislations analyzed. One is the percentage of members with difficulties who must form these cooperatives, which ranges from 30% to 51%.¹⁷ The only legislation that does not contain a minimum percentage is that of Brazil, which initially set it at 50% but decided to veto the article that regulated it, on the grounds that admitting this percentage would contradict cooperative principles by creating an organization in

¹⁷These percentages coincide with those established by CICOPA (2004, p. 3).

which half of the workers are not members while also opening the door to the proliferation of fraudulent worker cooperatives.¹⁸

The second aspect that varies from one legislation to another is the group of people for whom these types of cooperatives are intended. Some cooperatives are created for a very specific target group, such as the social responsibility cooperatives in Greece that only admit as ordinary members older people or people under 15 years old who need rehabilitation owing to mental disorders.¹⁹ Meanwhile, other cooperatives of this type admit heterogeneous groups of people, either because they use generic formulas, such as “people with disabilities” or “in a situation of social exclusion” that include a broad group of people, as do the Basque social integration cooperatives; or because they make a detailed list identifying the specific group of people for whom these cooperatives are intended, such as persons with disabilities, ex-drug addicts, former prisoners, victims of domestic violence, victims of illegal human trafficking, unhoused people, refugees and asylum seekers, single-parent families, and long-term unemployed people.

- **Small social cooperatives:** These are cooperatives with a much broader field of activities than the previous group, and can provide health, educational, cultural, and social services or facilitate the social and professional integration of disadvantaged people, but which, unlike the previous ones, do not have to be made up of a percentage of people with difficulties. Thus, when constituted as a workers’ cooperative, the members will often be health professionals, teachers, or social workers,²⁰ rather than people in distress. The Italian type A social cooperative, Basque social initiative cooperative, and Greek social cooperative enterprises of collective and social benefit fall under this group.

The reason they cannot be formed by a certain percentage of disadvantaged members is because the legislations that include this type of cooperative are the same legislations that regulated the previous type. A cooperative with a high percentage of members with difficulties will be classified as a social integration cooperative, instead of a small social cooperative.

Although the three cooperative types mentioned above can, in principle, carry out the activities indicated above, some differences can be observed. The Basque social initiative cooperative, in addition to the aforementioned activities, can also carry out any economic activity whose purpose is “the satisfaction of social needs not met by the market” (Article 156.3), thus considerably broadening its scope of action. Greek social cooperative enterprises of collective and social benefit can engage in sustainable development activities that “promote environmental sustainability, social and economic equality, as well as gender equality, protect and develop common goods and promote reconciliation between generations and cultures” (Article 2.6). The Italian social cooperative type A, which could

¹⁸Damiano (2007, p. 205).

¹⁹Nasioulas (2012, p. 153) and Fajardo García and Frantzeskaki (2017, p. 60).

²⁰Fajardo García (2013, p. 270).

develop an expanded number of activities per the legislative decree of 3 July 2017, n. 112, operates a narrower scope in reality: certain socio-health and educational services and integration or reintegration into the labor market of people with disadvantages or disabilities. The decree makes no mention of other relevant aspects, such as the environment and equality.

- **Broad-spectrum social cooperatives:** This group includes cooperatives whose corporate purpose encompasses that of the two preceding types of cooperatives. The legislation does not differentiate between cooperative types to provide these services but regulates a single type of social cooperative that admits members among people with difficulties (without requiring the presence of a certain percentage as a minimum) and without difficulties. The regulated cooperative type can carry out activities aimed at the social and professional integration of such people and provide health, educational, and cultural services or social needs not met by the market. This group includes the Spanish social initiative cooperative, Catalan social initiative cooperative, South Korean social cooperative, French collective interest cooperative, Portuguese social solidarity cooperative, and Belgian cooperative classified as a social enterprise.

The case of the Korean social cooperative should be highlighted owing to its uniqueness. First, Korean legislation allows the cooperative to carry out any other activity as long as the social activity is the main activity, understood as such when it “accounts for more than 40% of the total amount of the cooperative’s activity as a whole” (Article 93.2). In other words, Korean legislators views as the main activity an activity that in reality is not the main activity—the cooperative can engage in a non-social activity that accounts for up to 60% of the cooperative’s activities. Second, the granting of small loans and mutual aid programs to members is included among the possible activities to be developed. These grants are intended to improve members’ mutual welfare, so long as they are within the limit of the total amount of the cooperative’s paid-up capital (Article 94).²¹

In addition to these activities of general interest, most of the legislations analyzed allow this type of cooperatives to let non-member third parties participate in the cooperative activity, either as workers or as recipients of the services provided by the cooperative. This possibility of action results in the improved welfare and improvement of the community, since not only the members will benefit from these services but also the entire community will participate in the benefits provided by these activities. In most cases, this participation in the cooperative activity with third parties has limitations, as in the case of Greek social cooperative enterprises, where the number of non-member employees cannot exceed 40% of the total number of employees (Article 18). The case of the South Korean social cooperative is striking. For one, it is the only type of cooperative in Korea that the law allows to carry out business activities with non-members.²² For another, the law identifies

²¹ Jang (2013, p. 658).

²² Jang (2013, p. 658).

some activities in which it is allowed to provide services to non-member third parties without any limit, and other activities in which it is not allowed or is very limited to do so, as is the case of medical and health services, where the law delimits both the target public to whom it can be provided, drawing up an exhaustive list of recipients, and the amount thereof, establishing a maximum of 50% of the total amount of services provided (Article 95.1 and 24 and 25 Decree). The case of the French collective interest cooperative is likewise extraordinary. French law authorizes non-member third parties to benefit from the products and services without any limitation, unlike the other types of French cooperatives.²³

4 Economic Regime

The next identifying characteristic of the social cooperative is the presence of some common limitations or indications that are repeated in most of the legislations analyzed and that affect their economic regime. Thus, for a social cooperative to be considered as such, it will need to not only comply only with the development of an activity of general interest but also to consider economic aspects, as can be seen in Table 3. Practically all legislators, when regulating these figures, will establish specific precepts indicating the possibility to distribute surplus and their allocation. The law determines the possibility of distribution of the reserves and allocation of the cooperative's assets during liquidation.

The first of these common issues concerns the distribution of surplus among members. In this regard, CICOPA recognizes that:²⁴

Whereas cooperatives may use part of their surplus to benefit members in proportion to their transactions with the cooperative (3rd cooperative principle), social cooperatives practice limited distribution or non-distribution of surplus.

However, this is not the case in all the legislations analyzed. Instead of only two types of cooperatives (which limit or prohibit), there is a third one, which, after the relevant allocation to reserves and possible payment to the members of the interest earned on their capital subscription, allows the distribution of the surplus among members.

This last group of cooperatives that can distribute the entire surplus among members is mainly made up of the cooperatives previously referred to as social integration cooperatives. In this type of cooperatives, whether worker or consumer cooperatives, most of the members are disadvantaged people. By not introducing any type of limitation and allowing the distribution of surpluses, the law ensures that surpluses will go directly to the disadvantaged members, which directly contributes to achieving the cooperative's purpose—to socioeconomically empower and

²³Margado (2004, p. 155).

²⁴CICOPA (2004, p. 4).

Table 3 Economic regime of the social cooperatives analyzed

Country	Name of the social cooperative	Surplus sharing	Irreparable reserve	Distribution of liquidation assets	Non-profit	Limitation on interest
BE	Cooperative as a social enterprise	Limited		General Interest		X
BR	Social Cooperatives	Allowed				
FR	Cooperative society of collective interest	Forbidden	X	Coop. and Social Econ. ^a		X
GR	Limited liability social cooperatives	Allowed				
	Social cooperative enterprises	Limited		Social Econ.		
IT	Social cooperative Types A and B	Allowed	X	General Interest	X	X
PT	Social solidarity cooperatives	Forbidden	X ^a	Coop.	X	
SK	Social cooperatives	Forbidden	X	General interest and Coop.		
SP	State social initiative cooperative	Forbidden	X ^a	Coop. ^a	X	X
	Basque social initiative cooperative	Forbidden	X ^a	Coop. ^a		
	Basque social integration cooperative	Allowed	X ^a	Coop. ^a	X	
	Catalan social initiative cooperative	Forbidden	X	Coop. ^a	X	X

^aBy application of the general cooperative regime

professionally and socially insert these people. Moreover, the distribution of surplus will be carried out in proportion to the cooperative activity developed by each of the members, as indicated in the third cooperative principle of economic participation of the members.²⁵

This is the case of the Greek limited liability cooperative, which can distribute 95% of the surplus among members (Article 12.12). In the cases of the Basque integration cooperative, Italian social cooperative,²⁶ and Brazilian social cooperative, the law offers no specific rules for the destination of surpluses and the general

²⁵ACI (1995, p. 18).

²⁶The economic regime of the Italian social cooperative is the same for types A and B. In the type A cooperative, which is not made up of members in difficulty, the profits are also shared among all members.

regime applies to them. That is, in the case of these three cooperatives, the distribution of surpluses is no more limited than for the rest of the cooperatives.

Among the cooperatives whose distribution of profits is partially limited is the Belgian social cooperative, in which surplus distribution will take place “after having fixed an amount which the society reserves for projects or allocations necessary or useful for the realization of its object” (Article 6 § 1.6° of the Decree). According to this wording, the distribution of profits is conditional on the availability of profit after the amount that the cooperative reserves for projects is set. In the end, the cooperative itself decides whether to distribute surpluses. This depends on whether it allocates a greater or lesser amount to projects, exhausting the available profits. Moreover, the purposes to which these reserved amounts are destined contribute directly to the achievement of the cooperative’s social purpose—“-generating a positive social impact for people, the environment or society” (Article 8.5.§ 1st. 1°). In those cases in which the cooperative is not made up of members who are disadvantaged people, then the cooperative can be expected to allocate all the profits to projects.

The Greek social cooperative enterprise also belongs to this group, which in principle prohibits the distribution of profits among members, unless they are workers, in which case 5% must be allocated to the legal reserve, 35% to the workers (whether they are members or not), and the rest to the creation of new jobs and expansion of productive activities. However, the distribution of this 35% can also be eliminated, since, even if there are worker-members within the cooperative, it can be allocated to the creation of new jobs and expansion of productive activities if the assembly so decides with the vote of at least two-thirds of its members (Article 21.2).

The group of cooperatives that prohibit the distribution of surpluses among members is more numerous compared with the previous ones, although it is not possible to identify a single trend in terms of the allocation of surpluses. A few legislations impose, after the endowment to reserves, the prohibition of distributing the rest of the profits, without giving any precise indication as to what is to be done with these surpluses, as is the case of the Spanish social initiative cooperative. Other legislations require the remainder of the profits to be allocated to a reserve that cannot be divided among members, as is the case with the Portuguese social cooperative, South Korean social cooperative, and Catalan social initiative cooperative, although the latter must use the reserve for activities that fall within the cooperative’s corporate purpose. Finally, a few legislations give a wide range of possibilities on the allocation of surpluses that cannot be distributed among members. For the Basque social initiative cooperative, the surplus must be used for the realization of its purposes (Article 52.a of the Provincial Tax Law). For the French collective interest cooperative, the surplus must be allocated either to a reserve or assigned “in the form of subsidies to other cooperatives or unions of cooperatives or to works of general or professional interest” (Article 16).

Another characteristic of this last group is the prohibition established by all legislations on the distribution of reserves among members. Some laws establish such a condition expressly for this type of cooperative, while others are affected by the referral to the general regime in which all cooperatives experience such a

prohibition. This is a logical requirement, given that the law cannot prohibit the distribution of profits among members while obliging the cooperative to allocate them to reserves that are distributable. An outcome of such legal loophole is that members can obtain those profits that in principle are irreparable.

Among the issues affecting the economic regime of cooperatives, the CICOPA only refers to the distribution of surplus. The present legislative analysis showed that during the liquidation procedure, the social cooperative prohibits the distribution of the remaining assets among members once all debts have been satisfied and the members reimbursed for their contributions to the capital. Instead, most of the legislation analyzed allocates it to different purposes, albeit ones that have in common the promotion of the general interest, cooperative movement, or social economy. Among those that are obliged to allocate them to general interest purposes are the Italian social cooperative, which has to allocate these assets to public utility purposes; and Belgian cooperative as a social enterprise, which has to allocate them to purposes related to its corporate purpose that is of general interest. Among those that allocate the remaining assets to the cooperative movement are the Portuguese social cooperative, which must allocate them to another cooperative of general interest, preferably in the same municipality (Article 8); and Spanish, Basque, and Catalan cooperatives, to which the general regime applies. The South Korean social cooperative is in an intermediate situation, between general interest and support for the cooperative movement; it can allocate surpluses to the social cooperative federation, a social cooperative with similar purposes, a non-profit entity, a public service entity, or to the National Treasury (Article 104). Among those that use surpluses for purposes related to the social economy, the Greek social cooperative enterprise must transfer surpluses to the Social Economy Fund (Article 22.3). The French collective interest cooperative combines support for the cooperative movement and social economy by being able to use surpluses for another cooperative or other social economy entity.

In addition, this regime has some particularities that are repeated in the regulations of social cooperatives, but their consideration as an identifying characteristic of the type merits investigation, given the lack of uniform treatment. Thus, some of the legislations analyzed define this type of cooperatives as *non-profit* cooperatives.²⁷ However, this cannot be claimed to be a common characteristic of social cooperatives, since four of the legislations make no reference in this regard. The same is true of *limitations on compensation for subscribed capital*. Although some regulations include it, there is no uniformity; only five of the regulations analyzed establish the prohibition of accruing interest in excess of the legal interest, while the rest of the regulations do not make any reference. Moreover, the same limits established for

²⁷ *A contrario sensu*, an implication would be that in the rest of the types of cooperatives, this profit motive would be present. It is not the aim of this study to examine the presence of the profit motive in cooperatives, only to reflect some of the common requirements imposed on social cooperatives by the legislations analyzed. Further information on this content is available in other works that deal with the subject in greater depth, such as Aguilar Rubio and Vargas Vasserot (2012), Llobregat Hurtado (1999), and Paniagua Zurera (2005).

other cooperatives in the general regulation should be applied to the social cooperatives in these legislations.

Finally, most of the legislations analyzed typically establish, together with the legal regime of the cooperative, a series of tax benefits for this type of cooperative, such as reductions in social security contributions, tax benefits in inheritance and gift tax, access to special subsidies for financing, and favorable conditions in public contracting.

5 Multi-Stakeholder Membership Structure

The last of the representative characteristics pointed out by CICOPA among these social cooperatives is the presence of governance based on multi-stakeholder participation.²⁸ By developing a general interest activity, the cooperative has, as members, different groups of stakeholders, such as workers, users, local authorities, and different types of legal entities. As members of the cooperative, their interests would be represented within the cooperative's bodies, and they would have a direct influence on decision making through their vote. This structure enables the cooperative to take actions not from a single perspective, as might occur in a consumer or worker cooperative, in which only consumers or workers are members. Decisions within a social cooperative are much more inclusive by considering the needs and concerns of all the different groups that comprise the cooperative. This would be the case of an organic agricultural cooperative of proximity that is created jointly by producers and consumers of organic food, where the interest of the members is combined with the environmental objective through the joint structure of two types of stakeholders whose interests would be opposed.²⁹

This multi-stakeholder composition has been implemented by some legislations, which impose the obligation for the social cooperatives created to have a variety of member groups. Thus, the French collective interest cooperative must have at least three categories of members (Article 19 septies), while the South Korean social cooperative requires at least two stakeholder groups (Article 19.2 Decree). These different groups or categories of interested persons will be composed of persons benefiting from the cooperative's activities, workers, producers of goods or services, and volunteers.

Meanwhile, the rest of the legislations do not establish the obligation to be configured as a multi-stakeholder cooperative, but neither do they prevent the confluence within the cooperative of members belonging to several of the different groups mentioned above. As such, although not expressly regulated, this multi-stakeholder structure can be found in the rest of the social cooperatives, depending on how the cooperative is configured by its own members. In this sense, the

²⁸CICOPA (2004, p. 3).

²⁹Defourmy and Nyssens (2017, p. 14).

Table 4 Persons who can be members in the analyzed social cooperatives

Country	Name of social cooperative	Public sector	Volunteers
BE	Cooperative as a social enterprise		
BR	Social Cooperatives		X
FR	Cooperative society of collective interest	X	X
GR	Limited liability social cooperatives	X	X
	Social cooperative enterprises	X	
IT	Social Cooperative Types A and B	X	X
PT	Social solidarity cooperatives		X
SK	Social cooperatives		X
SP	State social initiative cooperative	X	
	Basque social initiative cooperative	X ^a	
	Basque social integration cooperative	X	
	Catalan social initiative cooperative	X ^a	X (no members)

^aBy application of the general cooperative regime

legislation has foreseen that some specific figures can also be members of this type of cooperative, which will facilitate multi-stakeholder situations within the cooperatives. These are the figures of public administrations and volunteers, as can be seen in Table 4.

Most of the legislations analyzed expressly allow public entities to participate in the social cooperative as members. Some of them establish limitations on the presence of the latter in the cooperative. For example, all public entities cannot hold more than 50% of the share capital in the French collective interest cooperative (Article 19 septies). In Greek limited liability cooperatives, all legal entities, public or private, must exceed 20% of the total number of members (Article 12.4. γ). Others limit the type of public entity that can become a member, as in the Basque social integration cooperative, which requires that a public entity must be responsible for the provision of a social service (Article 134.1), or in the Greek social cooperative enterprises, in which the participation of local authorities is not allowed and require the approval of the public body that supervises them (Article 14.5).

The participation of public law legal entities in the bodies of the cooperative will be carried out through the appointment of a representative who will exercise the rights corresponding to the public entity as a member of the cooperative. The case of the public entity partner in the Basque integration cooperative is notable. In addition to the rights corresponding to it as a partner, its representative “will provide its personal technical, professional and social assistance work together with the members of the cooperative and will attend with voice to the meetings of all the social bodies” (Article 134.1). Therefore, the public entity will always have a representative in the Board of Directors, although only with a voice and without voting rights.

A similar tendency happens with volunteers, defined as people who provide their services within the cooperative free of charge. They are provided for by most of the legislations regulating social cooperatives and, in almost all of them, are allowed to acquire the status of members. As was the case with public entity partners, some of

the legislations establish limitations to the presence of these volunteers within the cooperative. In the Italian social cooperative, their number may not exceed 50% of the total number of members (Article 2.2). The limited liability cooperative only allows them to be adult volunteers working in the field of mental health, and whose number may not exceed 45% of the total number of members (Article 4.β).

In these cases, volunteers who acquire the status of member will have the same political and information rights as the rest of the members, being able to attend and vote within the cooperative's bodies. The only exceptions are found in the Catalan social initiative cooperative, which admits the presence of volunteers but does not allow them to acquire the status of member, although they can attend general assemblies, with a voice but no vote, and designate a person to represent them at the meetings of the board of directors, with a voice but no vote (Article 143.4).

Finally, the Portuguese social cooperatives offer a singular case with respect to volunteers. Under the name of *honorary members*, these cooperatives regulate a type of member whose political rights are very restricted.³⁰ Volunteers may be admitted to the general assembly at the reasoned proposal of the board of directors and may attend the same but without the right to vote. These members enjoy the right to information in the same terms as the rest of the full members, but they cannot elect or be elected to the corporate bodies (Article 5). In view of this limitation of political rights, the law, to encourage the participation of these members within the cooperative, allows the bylaws to provide for the creation of a general council, a consultative body where these honorary members will meet with the members of the corporate bodies and may make suggestions or recommendations (Article 6).

Despite the linking of the figures of volunteers and public entities to social cooperatives, as mentioned above, not all legislations consider their presence indispensable, nor the requirement of having a multi-stakeholder structure, for a cooperative to be considered a social cooperative. In this sense, social cooperatives can also be single-stakeholder entities when they have only one type of members that carries out its work with a social interest, such as Latin American worker cooperatives, created within the "popular economy" movement by poor people seeking to create their own jobs.³¹

6 Conclusions

The first social enterprises in Europe were developed based on cooperatives. Consequently, some of the characteristics that define the European concept of social enterprise are related to the principles that guide the actions of cooperatives. The subsequent emergence of social cooperatives has demonstrated the combination of

³⁰For more information on the restriction of these rights for honorary members and the possible breach of the cooperative principle of democratic management, see Meira (2020, p. 235).

³¹Defourny and Nyssens (2017, p. 14).

mutualistic purpose with general interest of the community or of a specific target group, serving broader interests than those of its social base.

Accordingly, countries have sought to regulate social cooperatives. The existing regulations have been uneven, even using different names to refer to social cooperatives. This review found countries with little regulation, such as Brazil and Spain, others with detailed regulation, such as Greece and South Korea, and still others in between, such as Italy, Portugal, Belgium, and France. Despite the differences, some common aspects can be observed in all these regulations that allow the identification of the legal features of cooperative types.

The first of these features is the development of activities of general interest. Social cooperatives can be categorized into three types, depending on the activities that the legislation allows them to develop: social integration cooperatives, made up of a certain percentage of people with difficulties and which seek to facilitate their social and professional integration; small social cooperatives, also aimed at the integration of people with difficulties but which are not required to have a certain percentage of members with disabilities; and broad-spectrum social cooperatives, which can develop integration activities and other social services of general interest. In addition, these cooperatives allow non-member third parties to participate in cooperative activities.

The second characteristic is the presence of a specific economic regime that affects both the profits and, during liquidation, the assets of the cooperative. Thus, cooperatives that are not formed by people with difficulties will have the distribution of profits among the members limited, or even prohibited in some cases. The distribution of assets among members in the event of liquidation of the cooperative is also prohibited in most legislations; the assets must be used to promote the general interest, cooperative movement, or social economy.

Finally, regarding the multi-stakeholder structure mentioned by some experts, it cannot be concluded as one of the features of social cooperatives. Most legislations have express references to the possibility that both public entities and volunteers may participate as partners in the social cooperative. However, only French and South Korean legislation require the presence of members belonging to different groups of people. In the other legislations, social cooperatives can be configured as single-stakeholder entities.

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How Social Entrepreneurs Create Systemic Change



A Comparative Analysis of for-Profit and Nonprofit Models

Federica Massa Saluzzo, Davide Luzzini, and Rosa Ricucci

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1 Introduction

Over the past 20 years, there has been a growing global trend in the promotion of social businesses as key leverage to advance sustainable development. Here, we refer to social business as a particular type of social enterprise: a hybrid organization, typically set up as a for-profit organization, which pursues a social mission and runs

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a business simultaneously to support such a mission.¹ An example of this global trend is the exponential growth of the B Corp movement, revealing that, every year, an increasing number of entrepreneurs from all over the world decide to give a social imprint to their ventures. In 2020, there were 560 certified B Corps in Europe, almost double that of the previous year. Another example is the rise of Impact Investment, which is becoming mainstream globally. According to the Global Impact Investing Network, the global impact investing market will reach \$715 billion in 2021 and continue to grow rapidly. Key players such as financial institutions, universities, and public administrations are giving increasing recognition and legitimacy to social business: the ESG movement has pushed corporations to partner with social businesses and learn from their philosophy, the United Nations Development Goals is motivating businesses to simultaneously pursue profits and the world's most pressing problems, and universities and business schools around the globe are offering training programs with a focus on social and environmental challenges.

The fact that social business is going mainstream globally also means a migration of symbolic value from the entrepreneur to the investor and from the idea to the capital. While social businesses are gaining relevance and legitimacy at different levels and in different sectors, organizations in the social impact arena that do not have a clear source of revenue—such as pure nonprofit organizations—are not given the same importance and recognition. This difference is not supported by evidence that nonprofit organizations are less effective at addressing large-scale social problems and generating impact at a systemic level. If public and private key decision-makers, such as governments and investors, fail to recognize nonprofits as relevant and legitimate, just as they are doing with social businesses, the most compelling problems of our society may never be solved.

The literature states that social enterprises, including social businesses and nonprofit organizations, typically step in when public and private actors fail to provide long-term solutions to a social problem.² In doing so, social enterprises often break conventions, span sectoral boundaries, and conduct experiments using different ways of organizing and managing. The ultimate goal is triggering catalytic or systemic change.³

EADA Business School and Ashoka Spain decided to collaborate in order to investigate systemic change empirically and gain a better understanding of how the two organizational forms—*for-profit* (FP) and *nonprofit* (NP)—deploy their resources and capabilities to achieve systemic change. The current debate allows for the isolation of the potential elements of such change—including the capability

¹Battilana and Lee (2014), pp. 397–441.

²Battilana and Dorado (2010), pp. 1419–1440.

³Mair et al. (2012), pp. 353–373.

to generate a cognitive shift, its embeddedness, and the replicability of solutions—and explores how the elements develop in different ways in FPs and NPs.^{4, 5}

Hence, the specific research questions of this study are as follows: How do FP and NP social enterprises generate large-scale, long-term social impacts? Is there any difference between the two models in terms of their capacities and mechanisms employed to generate systemic change?

We conducted ten preliminary interviews with academic and sector experts to fine-tune the research method and viability of the study. Next, we selected five matched couples of social enterprises in the education, healthcare, and environmental sectors in two countries (India and Brazil) and compared them in terms of FP and NP models, as well as other characteristics that emerged related to systemic change. As an example, a couple of Indian social enterprises in the environmental sector include Flashgarden⁶ (which adopts an FP model to create forests in cities) and Develop Rural (an NP social enterprise promoting organic farming and rural development). Data were collected through interviews and archival documents. Such empirical evidence is the basis for the conclusions presented in this chapter.

First, the core of the study tackles the current debate in research and practice regarding the primacy of FP vs. NP models. We intend to clarify this distinction and, most importantly, empirically assess the association between these two alternative models and the achievement of systemic change.

Second, we intend to isolate the mechanisms through which FP and NP SEs create systemic changes. We will compile and explore a list of attributes, including the individual characteristics of the entrepreneur, stakeholder management, source and application of technical know-how, embeddedness in local communities, and community empowerment. Social enterprises alone cannot generate and sustain systemic change, but they fulfill their mission by connecting with a variety of actors. Therefore, we adopted an ecosystem perspective and explored the connections between social enterprises and their key stakeholders.

2 Meaning and Scope of Systemic Change

Systemic change is related to other concepts that have become popular and, hence, are familiar both in the academic field and across practitioners; however, these concepts need to be further explored to gain a more fine-grained understanding and bring upon an organized research agenda. In particular, three concepts related to

⁴WEF (2017) Beyond Organizational Scale: How Social Entrepreneurs Create Systems Change. <https://www.weforum.org/reports/beyond-organizational-scale-how-social-entrepreneurs-create-systems-change>. Accessed on 05 March 2022.

⁵Seelos and Mair (2018), pp. 35–41.

⁶All names of organizations and persons have been anonymized.

systemic change appeared to be relevant in our interviews and need to be explained further: *cognitive shift*, *embeddedness*, and *replicability*.

2.1 Cognitive Shift

Systemic changes are typically associated with cognitive shifts. However, it is unclear when and how this shift occurred. From our interviews, it became apparent that cognitive shift occurred in the initial phases of the implementation of the social entrepreneur's project. Specifically, the people that the social entrepreneur involved in the project begin to shape the entrepreneurial idea, as conceptualized by the entrepreneur. The shift occurs when people involved in the enterprise solve a specific problem by changing the interpersonal dynamics that are typically put in place to solve that problem. By realizing that a problem traditionally solved in one way can also be solved differently with the dynamics that they are producing, a cognitive shift can be produced. Unlike previous definitions, our findings suggest that cognitive shift refers not to a change in a stereotype or a new way to perceive a problem but rather to a change in *how* the problem is solved, that is, the configuration of the actors and the actions that the actors put in place to solve a problem. This new perspective leads to a change in the stereotype (if present) or how the problem is perceived.

One example is provided by Michael Kurtz, founder of Community Mind, a charitable trust based in Kerala that provides "good quality, comprehensive, mental care to the poorest sections of the population with severe mental disorders. It is entirely based on the community with no provision for hospital admission, and people are selected based on the process of economic screening. All community services are provided in collaboration with like-minded local partners, which makes it possible to offer services free at the point of delivery of care." When Michael Kurtz involved the community of volunteers in Kozhikode in his project, he asked them to help address severe mental disorders *not* by hospitalizing people, having them treated by psychiatrists in a formally recognized health institution or giving them drugs (the traditional way to solve the problem of severe mental disorder), but by training community members to rehabilitate the person with the disorder, to support their family, and ultimately to provide the person with peer support.

While Michael could not anticipate the cognitive shift his enterprise would have produced, the enactment of his idea (rehabilitating, supporting families, and peer support from the community) by the members of the community convinced them and Michael himself that severe mental disorders could be solved by reorganizing the actors involved in the treatment. The cognitive shift occurs with implementation: the vision of the entrepreneur became effective when the community members, the people treated, and their families understood that there was another way of treating a mental condition. Hence, the cognitive shift referred not to a direct change in how mental disorders are perceived but rather to how a specific set of actors—in this case, a community of volunteers—can reorganize themselves to provide a complete and effective solution to mental disorders. While the implication is a change in how

mental disorders are perceived, the difference is important because the effort of social entrepreneurs does not lie in persuading others that the definition of a problem must change (i.e., people with mental disorders are not patients to be treated with medicines but elements of a community) but rather in helping the community find the appropriate configuration to solve the problem. This requires the community to “accept” the social enterprise by experiencing that it can work.

The Ana Bella Foundation, based in Spain, is a clear example of this cognitive shift: the foundation empowers women who suffered from abusive relationships to become “super-vivors” and not just survivors. The assumption, and the basis for the cognitive shift, is that a woman who overcomes such an experience is not a victim but rather a hero who has developed rare and extremely valuable skills. This is why the foundation helps these women find leadership positions in their workplace.

The difference between FPs and NPs when it comes to cognitive shift pertains to its boundaries: in an FP social enterprise, the scope of the change is predefined; the entrepreneurs know clearly the change they want to put forward and present it (in the form of a business model). Instead, for an NP social enterprise, the change is emergent and cannot be *ex ante* presented in a business model because the type of relations that it requires will emerge *after* the community members undertake the process of experimenting with the value proposition of social entrepreneurs. Necessarily, in an NP, the shift will be much more engrained than in an FP because it will be the result of the cognitive and practical effort of the community members involved in the entrepreneurial action.

In sum:

- The idea of cognitive shift was already present, but it referred to a change in a stereotype rather than in *how* actors are configured to solve a problem.
- We understand that cognitive shift emerges once the idea of the entrepreneur is enacted by community members because it is the actual making and acting that persuades stakeholders that the idea can work. This was a cognitive shift.

2.2 *Embeddedness*

The second concept associated with systemic change is embeddedness, which refers to the extent to which the solution proposed by the social entrepreneur becomes part of the sociocultural fabric (social norms, goals, and values) of the community where it is established. It became evident in our research that embeddedness is also a precondition for systemic change to occur in the case of NP social enterprises, and we observed that the actual cognitive shift mentioned in the previous section is produced if there is an existing set of rules shared by a community. In other words, because social problems are always contextual, solutions proposed by social entrepreneurs should also be contextual. The geography, culture, and people of an area are the ones that will be involved in the solution of the problem and in producing systemic change. For the cognitive shift to occur, the members of the community

where the project is implemented must share social norms, goals, and values. In the absence of shared norms and values, it is difficult for social entrepreneurs to activate the process that triggers systemic change.

One example is provided by Marc Blum, founder of Develop Rural in northeast India, which facilitates the transformation of agricultural practices from chemical to organic production by training “small and marginalized farmers to develop their homestead gardens into organic nutrition gardens with local nutraceutical plants, herbs, fruits, and vegetables, ensuring nutrition security and sustainable livelihood development.” Instead of hiring graduates in organic farming from diverse locations, Marc chose to train small and marginalized farmers. The fact that they are small and marginalized characterizes the type of social norms, goals, and values they shared. For example, their small size renders them powerless to negotiate with retailers, and their marginalized position limits their ability to be influential in offering a specific type of product, different from the mass market type of production. Hence, these small and marginalized farmers share the same problems, experiences, values, and acrimony to some extent. Marc built on these problems, experiences, values, and acrimonies to create a community that fosters organic farming. Had the farmers not experienced the same problems, they would have not been sensitive to the project proposed by Marc. Their common understanding of the contextual situation in the northeast Indian agricultural sector was the basis for the creation of Marc’s project.

As previously stated, an important assumption in this view of systemic change is that problems are always contextual. Hence, the solutions should also be contextual (i.e., embedded). If the problem is embedded, the solution proposed by the social entrepreneur is more likely to become embedded too because it is produced by the same actors using the same norms, goals, and values considered relevant before the solution had been proposed.

In FP social enterprises, embeddedness is present (more than in traditional businesses), but it is somehow “imposed” by the entrepreneur: the existence of a market is a precondition, and the choice to adopt the solution is made by a customer and not integrated into a community. In NPs, embeddedness is the key as the solution is the result of the conceptualization of stakeholders present at a specific moment and in a specific sociocultural context.

In sum:

- While it is known that solutions must become embedded, our study revealed that problems must also be embedded in a community, and such embeddedness creates an opportunity for systemic change.

2.3 *Replicability*

The third and last concept associated with systemic change is replicability, which is the ability of a social enterprise to grow in impact. Replicability is different from scalability in that it does not require the same organization to grow larger but focuses

instead on the positive social and environmental impacts that the organization can produce. A social enterprise has replicability if it can be replicated in other areas and situations. However, according to our study, the relationships among stakeholders are replicated to produce a specific change. Organizations involved in replication do not scale a product but knit relationships to produce a change.

In the case of Community Mind in India, Michael Kurtz offers many insights into how replicability works. He started with a staff of two in Kerala, and then after understanding the local social norms by studying the community movements of the area (refer to the previous section on embeddedness), he decided to find local partners and establish a highly decentralized model. The Community Mind currently has a staff of 40 and seven independent clinics created across India.

If we look at how Michael has changed relationships to produce systemic change, we can see two major efforts. The first one is a very evident, direct effort; he chose to train the community members and did not leave each community until the task-sharing model proposed by Community Mind became embedded. He had to ensure that his legacy would have continued even in his absence.

The basic idea for Michael in terms of replicability is to empower communities to become independent in helping others; by providing all the technical and relational support that Community Mind had been developing, Michael could ensure that the clinics he helped create would no longer require his presence.

The second way Michael changed the relationships among stakeholders to produce systemic change through replicability is indirect but very powerful. By showing that the clinics successfully employed the task-sharing model (i.e., nonprofessionals were employed in treating people with mental health disorders), he cast light on a deficiency in private and public health sectors. He has shown that his clinics could deliver superior quality service because “the isolation of a sick person is surpassed by the community.” He has shown that community treatment (already validated in other countries, such as Italy and Belgium) could be a very effective alternative to traditional treatments that focus on the isolation of a patient and the administration of drugs. Since Michael’s efforts, both the government and the private sector have become more involved in community therapy and support.

In terms of the organizational model, our study shows that the replicability of NPs is lower than that of FPs. It is slower because it sets the basis for systemic change to occur by ensuring that the solution is embedded within the community. In NPs, scaling takes longer because there is no ready-to-make business model, but rather the organization lets the local context (typically, the community members) adapt to the idea of how the relationships should be designed. Instead, in FP social enterprises, scaling is faster, owing to the presence of a business model. The depth of the relationship is reduced to the benefit of speed.

While the replicability discussed with Michael’s example refers to direct replicability—that is, another community replicates the model adopted by one—there is also “mediated replicability.” It requires the intervention of a public entity or some kind of authority. This type of replicability is facilitated in the case of an NP model, as witnessed by the Energy for All cases: Luke Light managed to bring energy to underserved areas of Brazil only when he successfully bypassed national

energy companies and interacted with the *Banco Federal de Desenvolvimento*. He explained that only by being an NP organization could he undertake such action; FP organizations are “bound” by market mechanisms, while NPs have the freedom to design and develop relationships with public and private organizations, transcending the regular transactional approach.

In sum:

- The successful replication of a social enterprise requires a change in the relationships among the stakeholders involved.
- For NPs, replication is slower than for FPs because an NP organization requires community members to adapt the solution to their context, internalize the routines, and embed them into their own system of norms and values. By doing so, it is more likely that systemic change will be brought about.

3 Mechanisms to Achieve Systemic Change

In this section, we illustrate the main mechanisms employed by social entrepreneurs to bring about systemic change.

3.1 *Illegitimacy*

The first mechanism to produce systemic change is one that is employed to gain legitimacy: social entrepreneurs need it to leverage their stakeholders and produce a change. If a solution presented by a social entrepreneur is not legitimate among stakeholders, it cannot become embedded and, hence, cannot produce systemic change.

FPs achieve legitimacy by showing that their product or service is scalable; that is, there is a demand for it. They use a typical transactional approach to achieve legitimacy. NPs cannot follow the same approach because they do not have a business model. Our study shows that NPs leverage illegitimacy as a reaction toward the market and the public sector to build legitimacy within a community. This community grows its own identity the more it realizes that neither the public nor the private sector endorses the model of the social entrepreneur. This identity creation is the basis for embeddedness.

Michael Kurtz realized early on how the dynamics described above could lead to systemic changes. When he proposed the task-sharing model to treat mental disorders, he received harsh criticism from his colleagues in the field of psychiatry. They shunned him for adopting an illegitimate practice that enabled people with no medical training to administer medication and treat patients, threatening the status and validity of the traditional treatment employed on people with mental disorders. At the same time, Michael received criticism from public organizations that also felt

threatened by a type of treatment that was very different from the one proposed in the Indian public system. This rejection from the private and public systems had a very powerful consequence on the communities where Community Mind was present: the community members who had been trained by Michael to support the people with mental disorders, the treated people, and all the actors involved in the creation of Community Mind grew stronger in their belief that task sharing is a superior (more legitimate) solution than those offered by the public and private sectors. The label “illegitimate” that the private and public sectors were imposing on Community Mind provoked the response of making the organization even more legitimate among its stakeholders. The resistance posed by traditional powers created an army of disobedient people who believed that what they were practicing in their communities was good and necessary. Entrepreneurs who successfully manage illegitimate mechanisms use their NP status to force established rules.

In terms of the organizational model, the ability to challenge the private and public sectors is not present in FP social enterprises. FPs need to find legitimacy among their customers. There are cases of traditional FP entrepreneurs that have challenged the *status quo* (such as Tesla in the automotive industry), but the typical rhetoric employed is consistent with innovation rather than illegitimacy, and this is how financial viability can be obtained. Conversely, NP enterprises build their legitimacy from the bottom by empowering the communities to experience the validity of entrepreneurial initiatives. By doing so, they have an incredibly strong basis, and—using Michael Kurtz’s words—“People trust them even when things go wrong” because they are part of the solution and have internalized what it means to change a system from within.

In sum:

- NPs take advantage of their “illegitimacy” to force the *status quo*.
- Only if the solution provided by the social enterprise is embedded in a community can it trigger the “illegitimate” response.
- When shunned by the public and private sectors, NP social enterprises find allies among actors that also fail to fit in with those sectors.
- FPs cannot exploit such mechanisms and instead leverage the rhetoric of innovation to gain legitimacy.

3.2 *Learning from Failure*

Case studies show that social enterprises have different approaches to strategy definition and execution. The ability to learn from failures has emerged as an important intervening mechanism for achieving systemic change. As entrepreneurial work is often associated with complex settings, social enterprises can make mistakes. The ability to learn from these mistakes and apply corrective actions entails both individual and organizational aspects. At the individual level, the entrepreneur and their team must feed virtual cycles of learning rather than spiral into vicious

cycles of negative attitudes in the face of challenges and opposition from existing institutions. Usually, the founder takes the lead and provides an interpretative lens to allow collaborators and stakeholders to perceive the opportunities hidden in apparent challenges and enforce a trial-and-error approach. Some social entrepreneurs speak about “conscious failure” as a necessary condition to learn, especially in the early stages of their endeavors.

At the organizational level, the ability to learn from failures emanates from a series of synergetic abilities, including teamwork, flat structures, empathy, and double-loop learning. Teamwork favors collaboration among employees and stakeholder, and allows knowledge and resource sharing. This is a key asset when facing challenging situations as it allows leveraging others’ abilities when the arranged solutions do not work. In connection with this, a rather flat or horizontal organizational structure that uses delegation and people’s empowerment enables the power of the crowd and is likely to open alternative paths. Social enterprises that seem to make the most of failures are those where power is not centralized in the hands of the entrepreneur but rather shared with other committed and passionate individuals. Empathy appears to be a pervasive competence in an organization. Learning from one’s mistakes can only happen when alternative views are considered valid and people pay attention to what others think. Furthermore, we found that social enterprises that learn from failures are willing to challenge their assumptions. In other words, they do not simply look for alternative solutions to a certain problem but doubt the problem itself (otherwise referred to as double-loop learning) in a seamless exercise of questioning their own goals and, as a consequence, search for the most appropriate conduct.

From this standpoint, FP and NP social enterprises are quite different. FPs need to have a viable solution, which is ideally perfect from the beginning; otherwise, their financial sustainability would be at stake. Therefore, failures that are too large are not allowed. Their solution, in the form of either a product or service, is designed to work and be valued by the market. Contrarily, NPs might consider failure to be a necessary step. Some entrepreneurs recognized that, in the early stages of their enterprise, they consciously did the wrong thing until they realized how to think outside the box. It was clear to them that they did not need the best possible strategy from the start but simply need to be good enough to set the course. Improvements and impacts can occur at a later stage once the solution is iteratively validated.

In sum:

- Social entrepreneurs learn from “conscious failures.”
- The best way to achieve systemic change is through a trial-and-error cycle.
- FP social enterprises have limited chances of failure. This enables their success in the market but might prevent the full extent of systemic change opportunities.

3.3 *Know-How*

Systemic change requires some kind of specific know-how, sometimes very technical and sometimes emanating from the connections across the community where it is spreading. In all the cases analyzed, we found that the social entrepreneur spent considerable time learning and accumulating knowledge about the social issues addressed. Ilo Green studied Dr. Miyawaki's method to grow forests, and he even refined the method in time as a result of his own experience. Fred Stones initiated Chef's Power from his chef skills. Psychohelp and Community Mind were created, thanks to a lifelong connection with mental illness and psychiatric practice, respectively. A profound understanding of the problem appears as a precondition for stirring debate and action in the right direction, mobilizing the relevant stakeholders, and bundling together the necessary resources.

Acquiring know-how might require a considerable period of training, practice in the field, personal connection with the issue, or a combination of all of these. The entrepreneur might be the source of know-how, but they can also outsource it from other actors participating in the enterprise.

However, we also found distinctive characteristics in the know-how of FP and NP social enterprises. FPs usually require proprietary knowledge that is legitimized in the market. This is because they need to sell a credible and effective solution to sustain the growth in demand. Not all FPs decide to protect their intellectual property, and this is a key factor in terms of replicability. It appears more common for FPs to retain intellectual property (IP) rights and therefore link replicability to their own capacity. Contrarily, NPs do not usually hold any proprietary know-how; they make knowledge, tools, and techniques available to anyone who is willing to adopt their solution in other locations.

In sum:

- System change is achieved by sourcing know-how from a broad range of stakeholders.
- FPs tend to protect their know-how, whereas NPs typically make their know-how open source.

3.4 *Adaptability*

Any organization should be capable of adapting to changing institutional factors. Opportunities and challenges arise from society, regulations, market trends, competition, and so on. However, the social enterprises we studied showed prominent adaptability to their changing contexts. On the one hand, their survival instincts make them more resilient to crises and disruptions than traditional businesses. On the other hand, they are particularly receptive and able to detect opportunities to maximize their impact or even new problems that call for action. For example, in the last few years, Chef's Power quickly realized the dramatic extent of the issues

caused by the coronavirus disease 2019 pandemic and soon reorganized to launch the “Solidarity Kitchen Project” to empower local communities in the provision of healthy food during an emergency.

Despite the pandemic constituting an unfortunate test bench for resiliency, we observed a similar capability in most social enterprises, looking back retrospectively at their moments of crisis and turning points. It is difficult to decode the genetic characteristics that enable adaptability, but there are a couple of interconnected aspects.

First, social entrepreneurs are often resilient and eclectic individuals who seem at peace with change. Because one of the characteristics of systemic change is the generation of a cognitive shift in people’s view, social entrepreneurs are naturally open to challenging their principles, values, and habits, constantly searching for the most effective solution to a problem. In this sense, the entrepreneur (and by extension the coworkers) understands that they need to embody the change before making it happen.

Second, social entrepreneurs are more eager to learn. Learning is a pervasive element of the analyzed cases. Social enterprises need to be constantly updated with the latest solutions to the targeted issue. They also need to be efficient in the use of resources and connect to a wide array of stakeholders across different industries, including business, public administration, the social sector, and society at large. Learning enables the enterprise to orchestrate knowledge and resources and bundle them together in response to changing environments in a constant equilibrium between problems and solutions. Therefore, social entrepreneurs firmly believe in the need to nurture people and develop their commitment to learning.

As for the comparison between FP and NP social enterprises, we can report a difference in the degree of adaptability. For FPs, adaptability is a qualifier factor that is helpful in topical moments, such as the founding or moments of crisis. Once the enterprise is running, FPs look for stability. Once they find a viable business model, they try to exploit their skills to ensure financial sustainability and maximize their impact. In this sense, they do not necessarily perceive the necessity for change. Adaptability is a core ability of NPs. They seem to acknowledge that change is the only constant, and they do not expect stability.

In sum:

- Adaptability is a key mechanism for pursuing systemic change, and it requires challenging assumptions and learning capabilities.
- Adaptability is a core ability of NPs, whereas in FPs, it must be balanced with stability.

4 Conclusions

The main objective of this study was to explore the characteristics of systemic change and the mechanisms used by social enterprises to achieve it.

Table 1 Facets of systemic change in for-profits and nonprofits

Systemic change	For-profits	Nonprofits
Cognitive shift	Predefined (part of the business model)	Emergent and deep (part of the community)
Embeddedness	Not required (market demand)	Required (social norms)
Replicability	Replication Transaction Faster	Propagation Experience Slower

Table 2 Mechanisms that drive systemic change in for-profits and nonprofits

Mechanisms	For-profits	Nonprofits
Legitimacy vs. illegitimacy	Legitimacy	Illegitimacy
Learning from failure	Need to succeed	Conscious failure
Know-how	Proprietary	Cocreated
Adaptability	Noncore	Core

We discovered three interrelated facets of systemic change.

As summarized in Table 1, this requires a cognitive shift, which sprouts and grows in a community. The community often offers preconditions that enable the development of new thinking about a problem and the testing of new solutions. Once the change is embedded in the values and practices of the community, it becomes replicable in other contexts.

We also discovered clear differences in how FP and NP social enterprises approach systemic change. FPs usually have a predefined change in mind, which is conceived to solve a social issue and also takes the form of a business model for selling a given product or service. In this sense, the objective of FPs is to scale up and increase income and profitability while solving social issues. In this sense, the solution offered by FPs should work by itself and does not necessarily require profound links with the local community, which makes scalability faster. Instead, the NPs’ concept of systemic change is much more embedded in social context specificities. The cognitive shift to be produced is not predefined as it is usually cocreated. The local community becomes the protagonist, and change emerges rather than being designed. On the one hand, this type of change is deeper and has more complex ramifications. On the other hand, it is slower to scale as it requires an understanding and adaptation to the target contexts of the application. NPs tended to replicate their impact by influencing other communities that came into contact with the original community where the movement started. This process is more effective and persistent but requires more time.

As for the mechanisms (see Table 2) that drive systemic change, we discuss four: illegitimacy, know-how, learning from failures, and adaptability. Similar to the characteristics of systemic change, we found striking differences between FP and NP social enterprises. FPs need legitimacy to be considered credible providers of products and services in the market. Conversely, NPs are usually positioned on the

Table 3 Strategic profiles in the evolution of for-profits and nonprofits

Evolution	For-profits	Nonprofits
Value proposition	Seizing	Sensing
Complexity	Simplify	Embrace
Institutional context	Usually stay FP	Can generate FP and back

opposite side of the spectrum and destabilize the *status quo*. NPs aim to disturb the conscience as a first step toward systemic change and simultaneously create a sense of belonging within the community whose needs are satisfied by an illegitimate idea. Therefore, it follows that FPs are not predisposed to fail; like any other firm, they intend to satisfy customers (while benefiting their target group). Instead, NPs prioritize a social mission over market success. Because they are conscious of the complexity of the problems tackled, they understand that an optimal solution is not easy to achieve (if it exists) and often adopt a trial-and-error approach. In this sense, NPs consider failure as a necessary learning phase, which brings them one step closer to a satisfactory solution.

Another important difference between FPs and NPs is the way knowledge and intellectual property are handled. The former protects the advantage-generating resources. They tend to be protagonists in the replication of the solution to other contexts and use it as an instrument of financial viability. The latter does not usually fit the traditional concepts of resource ownership and inimitability. NPs are spread from a community where solutions are cocreated; therefore, they are not necessarily owned or controlled. Moreover, their aim is to build bridges and contaminate as many communities as possible, allowing them to become independent agents of change. The NP not only spreads among communities, but its core model is tweaked to better fit the local community and hence become truly embedded.

Finally, FPs seriously consider efficiency, ideally privileging stable contexts that favor repetition and process optimization. They dedicate time and effort to designing a solution that fits a certain environment and wish to exploit their value creation potential as much as possible. NPs simply do not live in stable environments and, therefore, cultivate adaptability for survival. They are fluid organizations that constantly adapt to changing circumstances.

In conclusion, we explored the evolution patterns of FP and NP enterprises and observed different strategic profiles (see Table 3). For the reasons illustrated above, we consider FPs better at “seizing” market opportunities as they design hybrid value propositions that have the power to address societal problems and ensure financial independence at the same time. Contrarily, NPs are better at “sensing” innovative ways to address social issues. They prioritize the social welfare logic oriented toward systemic change and consider financial viability as a subobjective. In connection with this, FPs tend to address relatively simpler problems that have clear boundaries and can be solved through specific solutions. Conversely, NPs focus on the bigger picture and embrace the complexity of issues involving many stakeholders and multiple objectives.

Since NPs aim to tackle complexity, they are more likely to implement a variety of concurrent initiatives that address different facets of the problem. As part of this process, they may find themselves in a position to generate ramifications, including areas where FP models can be applied. Instead, FPs usually stay the same because their scope of action is predefined and they focus on exploitation.

If NPs have proven superior abilities in creating systemic change for their ability to be embedded in the community, they are also key in paving the way for FPs to emerge and flourish; the “conscious failure” mechanism discussed above is the natural antecedent to the generation of multiple successful models, particularly FP ones. Luke Light, one of the interviewees in this study, clearly explained this consideration: “The NP model comes in earlier than the FP one to create the conditions for the private venture to arise.” Once the model is consolidated, thanks to the trial and error activated by the NP, other social initiatives can be established with a lower risk of failure.

5 Implications and Recommendations

The preliminary interviews conducted to support this research project were instrumental in confirming that this topic is underresearched and that important novel contributions can be made.

With this research, we hope to clarify two main aspects: defining systemic change and understanding how to bring it about. This can have fundamental implications for social entrepreneurs in their journey to tackle social issues; for nongovernmental organizations (NGOs), investors, and donors that support social enterprises; and for policy makers, giving ground to benefits and regulation for the social sector. As a result, we expect this project to empower and legitimize the role played by social entrepreneurs and other relevant stakeholders that are part of their ecosystem. Ultimately, we expect that the know-how generated through this project can help foster systemic change in the medium to long term, pointing out that, now more than ever, a paradigm shift toward a model of shared responsibility in which all ecosystem players contribute to systemic change is needed (i.e., entrepreneurs, investors, donors, public administration).

The first target group that can benefit from the project is social entrepreneurs who operate at the nexus of social and economic systems to solve societal issues.⁷ Social enterprises not only contribute to public policy objectives (such as job creation, inclusiveness, equal opportunities, sustainability, and civic participation), but they are also an important part of the economy as they account for 13.6 million workers in Europe.⁸ For example, in Spain, it is estimated that the social economy’s benefits for

⁷Longoni et al. (2019), pp. 3–33.

⁸Borzaga et al. (2020).

society are worth €6229 billion annually.⁹ Our results can help social entrepreneurs choose the most effective and viable organizational model with the goal of achieving systemic change and also provide them with a further understanding of the interrelated subdimensions of systemic change and the mechanisms to get there.

Another reason for the social relevance of our project is the impact we can provide to NGOs, such as Ashoka, which support social entrepreneurs. These organizations help them spread their ideas and connect them to different allies. Our results support these NGOs in selecting social entrepreneurs with the most promising prospects. Finally, our results can help pitch social entrepreneurs to a wide array of supporters, showing which kind of value proposition would ensure financial viability and which would generate the greatest systemic change.

Finally, our study could directly help donors, investors, and policy makers decide which social enterprises they might want to fund and understand what kind of support they might need. Specifically, it is urgent to strengthen the support ecosystem of NPs, just as it is happening with social businesses, and this is an important element to consider for those donors and investors who are truly committed to supporting systemic change. Funding for systemic change initiatives requires an important mindset shift since it is like doing research and development (R&D) and undertaking the exploration phase of highly complex social challenges. This means, first, starting to work in close and deep alliances with systemic entrepreneurs, creating spaces for dialogue, and prioritizing relational over transactional. Second, it means setting the basis for long-term engagement since systemic change involves long processes that cannot be addressed in the short term. Finally, this mindset shift implies being open to failure as a mechanism that allows identifying the best possible course of action and creating spaces to share learning, successes, and failures.

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Part II
Benefit Corporations and B Corp
Certification

Benefit Corporations: Trends and Perspectives



Mario Stella Richter Jr, Maria Lucia Passador, and Cecilia Sertoli

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1 Looking Back to Move Forward

For those of us who, like Paul Valery, believe that, despite ourselves, *nous entrons dans l'avenir à reculons*, looking at the trends and prospective of a field of law (or even a simple legal phenomenon) means looking at its origins. In other words, we can only attempt to divine the future by contemplating and considering (in the etymological sense) the past and the present. This may be a short-sighted way of proceeding, but we see no alternative.

The paper is the result of the joint reflection of the three authors. More specifically, §§ 1, 4, 5 are attributable to Mario Stella Richter, § 2 is attributable to Cecilia Sertoli, and § 3 is attributable to Maria Lucia Passador. § 6 was written jointly.

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This chapter does not aim to discuss the legislative and non-legislative history of *benefit corporations*, *B-Corps*, *società benefit*, *sociedades de beneficio e interés colectivo* or *sociétés à mission*,¹ whatever their national name and shades might be,² as each section of this book analytically sets them out already, and as the history of the various forms of **benefit corporations** is, in itself, still rather short.³

On the other hand, we deem it useful to frame the recent and lively progression of the “benefit corporation phenomenon”⁴ (as we prefer to refer to it as a mere “phenomenon,” given its different shades in different legal systems) within the broader context of the generally renewed awareness on **corporate purpose** (or *purpose of the company*),⁵ *shareholder welfare*, *shareholder theory*, *enlightened shareholder value*,⁶ on *corporate* (or *business*) *social*

¹Article 176 of the loi PACTE (No 2019-468 of 22 May 2019) provides for the *société à mission*, as a result of which Article L210-106 of the Code de Commerce now reads as follows: “*Une société peut faire publiquement état de la qualité de société à mission lorsque les conditions suivantes sont respectées:*”

1. *Ses statuts précisent une raison d’être, au sens de l’article 1835 du code civil;*
2. *Ses statuts précisent un ou plusieurs objectifs sociaux et environnementaux que la société se donne pour mission de poursuivre dans le cadre de son activité;*
3. *Ses statuts précisent les modalités du suivi de l’exécution de la mission mentionnée au 2°. Ces modalités prévoient qu’un comité de mission, distinct des organes sociaux prévus par le présent livre et devant comportant au moins un salarié, est chargé exclusivement de ce suivi et présente annuellement un rapport joint au rapport de gestion, mentionné à l’article L. 232-1 du présent code, à l’assemblée chargée de l’approbation des comptes de la société. Ce comité procède à toute vérification qu’il juge opportune et se fait communiquer tout document nécessaire au suivi de l’exécution de la mission;*
4. *L’exécution des objectifs sociaux et environnementaux mentionnés au 2° fait l’objet d’une vérification par un organisme tiers indépendant, selon des modalités et une publicité définies par décret en Conseil d’Etat. Cette vérification donne lieu à un avis joint au rapport mentionné au 3°;*
5. *La société déclare sa qualité de société à mission au greffier du tribunal de commerce, qui la publie, sous réserve de la conformité de ses statuts aux conditions mentionnées aux 1° à 3°, au registre du commerce et des sociétés, dans des conditions précisées par décret en Conseil d’Etat.”*

²From now on, for the sake of simplicity, we shall refer to benefit corporations as all the companies that combine a profit-making purpose with the pursuit of any “altruistic” interest, i.e., to the benefit of certain groups of subjects other than share-/stake- holders only.

³Embid Irujo (2022), p. [•] (observing that the inclusion in some legal systems of express provisions on benefit corporations is still quite recent).

⁴The studies collected in this volume seem to also attest such an ongoing evolutionary framework well.

⁵See Stout (2013), p. 61 ff. and, by limiting the examination to the latest events, *cfr.* Lipton and Schwartz (2020) and Bebchuk and Tallarita (2020). See also Mayer (2021), p. 887 ff.

⁶It is widely held that the last four formulas constitute, together, the main responses to the *Friedman doctrine*. The *enlightened shareholder value* seems to have found acceptance in *Section 172 of the UK Companies Act 2006*. *Stakeholder theory*, and thus the inherent duty to consider all *stakeholders*, is already echoed in the various North American *constituency statutes* (see, for example, the Minnesota Constituency Statute according to which “[a] director *may*, in considering the best interests of the corporation, consider the interests of the corporation’s employees, customers,

responsibility,⁷ on the *raison d'être*, or on the *interest of the company* (or *corporate interest*), just to recall some of the most widely used slogans. Such timeless problems (related to those “watchwords” or “formulas”) have recently returned to the heart of the debate, as we can observe even at a simple glance to the international literature.⁸ Although they have never completely popped out of practitioners’, and especially corporate law theorists’, heads, previously, the debate related to them seemed somewhat dormant (or, at least, less lively).

Proceeding with a rough and reductive synthesis, we can state that, since the end of the last century the issues that used to be tackled (and to a large extent resolved) thanks to the classic instruments of law (state sovereignty; imperative norms of state law; possibly international treaties to be translated into internal norms; etc.) have turned out to be of such magnitude that they no longer seem likely to be settled alike. The global and planetary echo of both technology and economy, the affirmation of “super-capitalism,” the emergence of global entrepreneurial entities (not simply multinationals), whose turnover exceeds the gross domestic product of most states, break the assumption on which the effective sovereignty of the 19th century state was based: the co-extension of politics, economics, and law. States lost the position gained (perhaps also thanks to Hegel), and other organizations are now bursting onto the stage of the world’s destinies: corporations, whose ability to plan and dictate the rules of the game seems destined to make them become a great political player.⁹

Today, there is no longer one *corporate social responsibility* only, no longer a unique purpose to be pursued, and the *Friedman doctrine*—for which *business social responsibility* is just that of using the company’s resources and engaging in activities designed to increase its profits while *respecting the rules of the game*¹⁰—is no longer applicable. This occurs not because of its lack of intrinsic logical soundness, but for the simple reason that the (existing) rules of the game imposed on corporations and their directors cannot ensure the protection of the fundamental

suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests might be best served by the continued independence of the corporation”). While the shareholder welfare theory is mainly due to Hart and Zingales (2017), p. 247 ff.: “It is too narrow to identify shareholder welfare with market value. The ultimate shareholders of a company (in the case of institutional investors, those who invest in the institutions) are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns.”

⁷See Crane et al. (2008).

⁸See Embid Irujo (2020) and related references.

⁹Benedetti (2014), p. 31, from which the previous quotation is also taken. For a broad overview of the state sovereignty crisis and the emergence of the so-called fourth sector, please refer (for further necessary references) to: Resta [and Sertoli] (2018), p. 457 ff.

¹⁰Friedman (1962), p. 133 ff.; later included in the conclusions of the famous *The Social Responsibility of Business is to Increase its Profits*, appeared in *The New York Times Magazine*, 13 September 1970. On the occasion of the 50th anniversary of its publication, several re-readings were published, as the ones by: Enriques (2020); Zingales (2020a); Kaplan (2020); Lipton (2020).

values and interests of whole society by themselves. Hence, in this situation, it seemed natural to restore corporate responsibility to pursue general, common, collective interests and values. In other words: if God does not exist, man should nevertheless live *veluti si Deus daretur*, as if God existed.

Thus, companies—especially large ones—are not only the instruments for carrying out business activities in the exclusive interest of those who participate in them and of the company itself, but also the guardians of common, general, and even public interest. This should bring the task of identifying, selecting, and weighing up all these interests back to the companies that are free to the most suitable way to concretely pursue them. Large shareholding companies can no longer be considered only as the main characters in the economic stage, but also as the leads of the political stage (with a series of inevitable consequences in terms of the democratic deficit of the decisions that do not fall within the scope of the present study).

Hence, directors now have conspicuous (and indeed substantially disproportionate) discretionary powers; to the extent that some scholars (correctly, in our opinion) stressed how promoting the centrality of *corporate social responsibility*, reinforcing sustainability policies and making ESG (environmental, social, and governance) issues as overriding now represent a key concern for large companies' managers and directors. It is obvious that this also leads to a (not entirely unjustified) skepticism about the possibility of solving the dilemmas above by entirely relying on such figures.¹¹

2 Techniques and Possible Reasons for an Explicit Recognition of Benefit Corporations

The aforementioned context resulted in the creation of benefit corporations, i.e., companies expressly characterized by the aim of pursuing a twofold order of interests, that also need to be properly balanced: on the one hand, the traditional profit-making shareholder interests and, on the other hand, the stakeholders' interests (e.g., that of employees, clients, suppliers, members of the local community in which the firm operates, but also public administration and society as a whole). Consequently, managers and directors of benefit corporations need to, above all, strike a balance between such interests.

There are two ways of achieving a recognition of the status of benefit corporations in the regulation:

- (i) on the one hand, the identification of an ad hoc model, namely, of an **autonomous type of company**, alongside those already existing in the respective legal systems;

¹¹ See Angelici (2018a), p. 3 ff.; Id. (2020), p. 4 ff., at p. 23.

- (ii) on the other hand, the possibility of qualifying any **type of company** in that system as a benefit corporation whenever it plans to pursue the abovementioned double purpose as a necessary one. In this case, the status of benefit corporations would not represent an (autonomous) ad hoc model, but a qualification to which all companies can aspire, provided they fulfil certain legal requirements.¹²

Still, in our view, the most important question is whether amending the regulation on this topic is necessary (or appropriate) and, if so, which is the most suitable direction.

Obviously, the reasons for a regulatory intervention are almost endless. For instance, a more favorable tax treatment—although we do not think this should happen, given that the choice of adopting the benefit corporation status should be taken regardless of its possible economic convenience—or any other incentive could be granted to benefit corporations to ultimately encourage the pursuit of common interest purposes.¹³

At the same time, from a logical point of view, another question comes first: is it actually necessary to provide benefit corporations with an ad hoc model to be able to lead both managers and directors to pursue such **dual purpose** (i.e., balancing shareholders' and third parties' interest)? This is a national-specific¹⁴ matter of

¹²See, Embid Irujo (2022), p. [•].

¹³See, Stella Richter (2017b), p. 77; Marasà (2018), p. 51; Corso (2016), p. 1007, fn. 49; Prativiera (2018).

¹⁴If, to take the most straightforward case, a domestic company law provided (as, for example, *Section 172(1) of the Companies Act 2006* does in England) that “[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company’s employees,
- (c) the need to foster the company’s business relationships with suppliers, customers and others,
- (d) the impact of the company’s operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company,” well, if it were to provide all this with reference to all companies (therefore, without distinguishing between benefit and non-benefit), it would be very difficult to argue the need for an ad hoc legislative provision to allow the individual company to reconcile and pursue interests other than those of the shareholders.

Certainly, it could be argued that all the interests enumerated in the various letters [from (a) to (f)] of the cited provision are interests to be considered in determining what is the interest of the participants in the company as a whole—i.e., the *corporate purpose*—and only the pursuit of the latter would be the company’s interest. Further, such reasoning would seem to find its best demonstration in the very next provision [and thus the cited *Section 172(2)*], where it is added that “[w]here or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.” Undoubtedly, this provision admits that the company’s purpose may be something different or even something other than the “*benefit of its members as a whole*” with the consequence, then, that if it is not provided for,

law, and it is strictly connected to the notion of corporation that applies in any given system from time to time: for example, whenever this notion is causally neutral, there would obviously be no doubt of expressly providing for the category of benefit corporations; but, even where this notion is not entirely neutral from a causal (or, better, teleological) point of view, corporate case-law admits that directors enjoy sufficiently broad discretionary powers, such as to allow the consideration of a series of interests in the definition of strategic corporate objectives to be pursued in the interest of shareholders. Such ineliminable discretion is, in our opinion, linked to the fact that there is no monolithic and predetermined concept of corporate interest, and that the formulas for defining the social interest must necessarily be concretely adapted. So, the problems related to the definition of such interests lead to countless ways in which, at the discretion of directors, both order of interests can be pursued by the companies.

Therefore, even in those legal systems where the notion of company is not causally neutral and where there is no list of interests that directors have to consider when determining the company's interest, the reason traditionally put forward to justify an intervention in the field of benefit corporations seems disingenuous: to make what would otherwise have been precluded to companies possible and, therefore, to allow directors to pursue common benefit purposes in conjunction with the economic activity that constitutes their corporate purpose. In addition, we defined it as disingenuous because, even in those legal systems, directors had the power to consider "other" interests to a certain extent before the eventual introduction of benefit corporations.¹⁵

From a strictly logical point of view, the opposite is true, if anything. As the corrosion critique states explicitly providing for benefit corporations in a legal system can provide an argumentative basis for claiming that altruistic activities (which prior to the introduction of benefit corporations could be undoubtedly carried out by corporations, albeit as a tool in the pursuit of the *main corporate purpose*) are not (from that moment on) exercisable by benefit corporations.¹⁶ Providing for benefit corporations in the legal system would, then, not allow them to do what (non-benefit) corporations previously could not (and did not) do, but preclude all the companies other than the benefit corporations from continuing to do what they actually did (or could have done) in the past. In short, it might be a tool to reduce the scope of discretion of non-benefit corporations' directors.¹⁷

the company will have only one ultimate purpose: that of pursuing the interests of its members. Nevertheless, this depends on the fact that, in the Anglo-Saxon legal tradition, the company remains a causally neutral figure, thus, the problem of the expressly providing for benefit corporations in the regulation does not arise upstream.

¹⁵See Stella Richter (2017a), p. 960 ff.; Id. (2017c), p. 274 f.

¹⁶See McDonnell (2019), to whom we owe the expression, but which he himself qualifies in terms of a "mistaken impression." Instead, in the sense that the provision of the benefit corporation (in Italy) would no longer allow for common benefit activities by non-benefit corporations, see Denozza and Stabilini (2017) and Ferdinandi (2017), p. 541 ff.

¹⁷See, for instance, Denozza and Stabilini (2017).

The latter interpretation is appealing from a purely logical standpoint; however, it comes up against numerous obstacles that the law presents in those legal systems which provide for benefit corporations.¹⁸ Above all, this reading fails to overcome the fact that pursuing interests other than those of the shareholders may lead, in any case, to an inevitable “*incidental by-product of the business judgment rule.*”¹⁹

So far, discussions on the matter resulted in some major points that deserve to be recalled.

In *legal systems that do not expressly provide for benefit corporations*, nothing prevents directors from performing individual “altruistic” activities, if such activities are instrumental to the pursuit of the *corporate purpose*.²⁰ In the legal systems which, on the other hand, *provide* for benefit corporations, directors of non-benefit corporations are not precluded from carrying out altruistic activities, always provided that such activities are instrumental to the pursuit of the *corporate purpose*. In both cases, choices are backed by the *business judgment rule*.

Given such premise, we can try to delve into the real meaning of provisions requiring us to understand the difference between benefit and non-benefit corporations (precisely in those legal systems that provide benefit corporations with an ad hoc model). This is a matter that depends on the single national regulations; but, at least *de jure condendo*, it makes sense to resolve it as follows:

- in non-benefit corporations, the pursuit of altruistic purposes should be instrumental to the pursuit of the profit-making (or selfish) shareholders’ purpose;²¹
- in benefit corporations, the pursuit of altruistic purposes should be raised to the same level as the selfish aim (namely, the traditional one for profit-making corporations), with the consequence that the former would not be the aim for the pursuit of the latter, but the corporation has to be managed trying to balance both.

¹⁸In the sense that even in non-benefit companies, according to Italian law, it is possible to carry out altruistic acts or activities favoring the general benefit (when it is believed that they can contribute to the pursuit of the interests of the shareholders, i.e., when they do not irremediably contrast with the selfish aims of the latter): see, for example: Marasà (2018), p. 53 f.; Montalenti (2018), p. 303 ff., at p. 318; Angelici (2018b), p. 26 ff.; Stella Richter (2017a), p. 962; Id. (2017b), p. 82 f.; Id. (2017c), p. 277 f.; Corso (2016), p. 1012 f.

¹⁹The expression is attributable to Bainbridge (1993), p. 1423 ff., at p. 1440 (also referred to in Angelici (2010), p. 45 ff., fn. 12 at p. 51).

²⁰For the distinction between business purpose and corporate purpose, see, most recently, Rock (2020): “‘Business purpose’ should be understood to be a property of business enterprises, however they are organized. ‘Corporate objective’, by contrast, is best understood as a characteristic of a particular enterprise form (the general corporation) and not as a description of what actual businesses do on a day to day basis. Confusing these two concepts under the heading ‘corporate purpose’ limits our ability to understand what sort of organizational form is best suited to a particular enterprise, and leads to confusion in the management debates over how to build successful businesses and the political debates over the social role and obligations of large scale business enterprises.”

²¹On the role of sustainability policies and environmental and social values as part of the general corporate purpose framework, for example, Mayer et al. (2020), who underline how EESG (Employee, Environmental, Social, and Governance) factors are the subject of legal obligations for all companies. See also Strine (2019), highlighting its usefulness especially post COVID-19.

Obviously, from a practical point of view, this conceptual contrast would lose much of its clarity. However, the two points above still make sense looking at the *duty* to carry out altruistic activities: while non-benefit corporations (which could well perform such activities) would not be strictly obliged to implement such policies, benefit corporations would.²²

3 Corporations Between Doing Well and Doing Good: The State-of-the-Art of the International Debate

Given the renewed interest in the **corporate purpose** recalled at the beginning of this chapter,²³ an extensive debate developed on the usefulness of benefit corporations in the relations between *shareholders and stakeholders* at the international level. In other words, the question addressed was whether benefit corporations could be the right tool to achieve the social and environmental sustainability of business activities and, thus, follow up on the instances of *corporate social responsibility*, allow *socially responsible investing*, facilitate the creation of shared value, and strengthen the competitiveness of the company, while meeting the needs and the challenge of the communities in which it operates.²⁴

As far as the possible reasons for the success of the benefit corporation in general are concerned, Dorff's analysis is particularly accurate.²⁵ He identifies eight orders of reasons for having recourse to a **public benefit corporation**. Some of them are of a more practical order,²⁶ while others appear to be ideal;²⁷ but, in the author's

²²But even here, perhaps, provided that certain assumptions are not exceeded, which would then act as a limitation: one might wonder whether directors are bound to engage in activities of common interest when these could jeopardize the continuity of the company.

²³See above, para 1.

²⁴Ex multis, The Yale Center for Business and the Environment, Patagonia, Inc., and Caprock (2018); Winston (2018), p. 1783 ff.; McDonnell (2017), p. 717 ff.; Goldschein and Miesing (2016), p. 109 ff.; Koehn (2016), p. 17 ff.; Porter and Kramer (2011), p. 62 ff.

In the sense (extreme, to some extent) of enhancing the instrument of the benefit corporation, particularly the Public Benefit Corporation (PBC), to the point of hypothesizing that all companies exceeding one billion dollars in revenues must be Public Benefit Corporations, as per the recent proposal formulated by Mayer et al. (2020).

²⁵Dorff (2017), p. 77 ff.

²⁶It would be advisable to opt for a *public benefit company* "in hopes that it will help the business appeal to an important group such as customers, employees, for-profit investors, foundations, or donors, or to signal a dual purpose for some other reason ("Brand") [...] because of its ability to distribute profits to owners ("Earn"), something a nonprofit cannot do; because of its regulatory simplicity as compared to a nonprofit ("Simplify"); because it might serve to push managers to adopt prosocial policies that will also help improve profitability ("Manage"); or because the hybrid form may provide greater protection against hostile acquisitions ("Keep")."

²⁷In this sense, the use of a *public benefit company* would be welcome because "[f]ounders may believe that businesses have a moral obligation to aid their employees, communities, customers or

perspective, those are compatible and cumulative grounds that make benefit corporations a revolutionary tool, capable of overturning the principle of *shareholder wealth maximization*. Other scholars also recognize the coexistence, among these reasons for success, of practical reasons (particularly their ability to more effectively fight hostile operations undertaken by entities whose motivations of profit maximization threaten these companies) and of an ideal order (in terms of philanthropic endeavors).²⁸ They emphasize the need for a rigorous *mission accountability* of benefit corporations, given their intrinsic nature,²⁹ and, at times, places benefit corporations in a grey sector.³⁰

On the contrary, those who support skeptic (or, at least, puzzled) positions highlight two main issues:³¹ the degree of bindability and relevance of concepts as *shareholder primacy*, *shareholder wealth maximization* and *market value maximization*; the fear that this translates into the adoption of vacuous *corporate greenwashing* policies.

As for the former, some authors stress the need to preserve the spirit of capitalism in the pursuit of business activities,³² other authors—especially in the light of the steps being taken at European level on the subject³³—now believe that the company

other corporate constituencies [...] [and] may wish to adopt a business form that expresses these ideals and perhaps inspires others to follow their example (“Express”)[.] [...] to shield themselves from liability for adopting prosocial policies that reduce earnings, thereby encouraging such policies (“Protect”) or to ensure that the company continues to embody their values even after they lose control to their heirs or to eventual buyers (“Endure”).”

²⁸The expressions used here are borrowed from Neubauer (2016), p. 109 ff.

²⁹Cummings (2012), p. 578 ff., underlining how, among the aspects characterizing the governance of PBCs, there is a “certification from an independent third party and annual reports to the public are ill-suited to the regulation of social welfare objectives” to protect the best interests of the community, through the instruments mentioned above. The latter can reinforce the intrinsic motivations they pursue, which is the distinctive feature of this type of company. Such accountability, as well as the related *reporting* and *fiduciary duties* of the directors, would become even more crucial should the *public benefit corporation* decide to undertake a listing process (on this point, Dulac (2015), p. 171 ff.).

³⁰Andrè (2012), p. 133 ff. According to the author—although the opinion is shared—all this falls within the so-called fourth sector, to which “mission driven companies that reach across traditional sector boundaries and propose to serve multiple bottom lines, thus blurring the boundaries between the public and private sector” belong (p. 134). But her voice, offering extensive references to those who praise this “corporate genre,” capable of “*mak[ing] the economy more just*” (Adams (2010); Tozzi (2009); van den Heuvel (2010); Weber (2010)), hints at cracking.

³¹In addition, some systemic observations consider the provision of an ad hoc “company type” unnecessary: see MacLeod Heminway (2018), p. 779 ff., at p. 800 f.; Molk (2018), p. 241 ff., at p. 244 (previously: Underberg (2012)).

³²Zingales (2020a) (specifically holding that Mayer’s “mantra,” i.e., “companies should produce profitable solutions to the problems of people and planet, not profit from producing problems for people and planet,” cannot be a *policy prescription* for corporations, given its unfeasibility and its obvious risks). Although acknowledging some positive aspects, see Hiller (2013), p. 287 ff. See also, on *state laws* and *statutory differences*, Loewenstein (2013), p. 1007 ff., spec. at p. 1020 ff.

³³EU Commission-EY, *Study on directors’ duties and sustainable corporate governance. Final report*, July 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>.

should be considered in the social context in which it operates, and some other authors, while contemplating the possibility (but not the need) to look at further and broader interests, believe that benefit companies are not a decisive tool,³⁴ since the same results can be achieved by reconsidering traditional *business practices* and, specifically, by implementing policies to eventually maximize profits which are also oriented towards the creation of value and not just profits.³⁵

On the second problematic issue, certain scholars point to the lack of effective *accountability* and *oversight* systems in the current regulatory framework,³⁶ while others explicitly fear problems of *greenwashing*.³⁷ Consequently, the current provisions would not sufficiently protect shareholders, customers, or other stakeholders. Other academic exponents are more favorably disposed towards benefit corporations³⁸ and hope for the adoption of *guidelines* on the subject aimed at clarifying, on the one hand, the real meaning of *fiduciary duties* in the hands of directors and managers and, on the other hand, the stages of verification and certification, to avoid the possibility of the adoption of the benefit corporation *status* turns to a form of corporate greenwashing.

Ultimately, it is undeniable that benefit corporations had a profound impact on the general debate on *corporate purpose*, contributing to the maintenance of a *shareholder-value oriented* view of social interest by non-benefit corporations. The awareness of the importance of the “benefit issue” and the official recognition of the special institution by several parties has led some authors to believe that, at a closer inspection, a solution is already available to us.³⁹ So, if the reflection on the very general themes of the role of companies in the pursuit of common and general interests has led to the creation of a special case (that of the benefit corporation), it is now the benefit corporation itself that influences the outcome of this general debate.

³⁴Greenfield (2015), p. 15 ff. (“[t]he problem. . . is not that managers are not permitted to act with an eye toward society. The problem is that they are not required to do so. Benefits corporation statutes do not solve this problem,” p. 19) and Eldar (2020), p. 937 ff. (which underlines the need to verify the actual social impact of these business forms to avoid them focusing only on shareholder value, but not actually benefiting those individuals whom they are originally intended to protect). On the other hand, there are those who underline how “it is not fair to say that they also overcome shareholder primacy. Properly understood, benefit corporations are shareholder-centric: they exist to allow shareholders to pursue altruistic goals rather than to require them to do so” (Velasco (2020)).

³⁵Porter and Kramer (2011), p. 62.

³⁶Hacker (2016), p. 1747 ff. (“Although this legislation is a necessary and progressive evolution in corporate law, the current benefit corporation form [. . .] does little to deter bad actors from taking advantage of socially conscious consumers willing to pay a premium for ethically sourced goods and services by incorporating and operating sham benefit corporations”).

³⁷Dorff et al. (2020), p. 31 ff.; Diehl (2018); El Khatib (2015), p. 151 ff., p. 182 n.172; Pontefract (2017). While referring specifically to *charitable public benefit corporations*, see Plerhoples (2017), p. 525 ff., which also identifies the problems of so-called *market-based charity*, injecting individualistic and autocratic values into charitable activities.

³⁸For all, see Stecker (2016), p. 373.

³⁹Zingales (2020b).

4 The Problems of the Introduction of an Ad Hoc Regulation for Benefit Corporation

The previous paragraphs highlighted that the reasons for expressly recognizing the category of benefit corporations are probably not decisive. An express provision about the benefit corporations' **status** does not seem to have generated significant results in terms of legal certainty, nor does to increase corporate sustainability as a whole. Indeed, the provision of the legal status of benefit corporations inevitably poses additional problems.

On the one hand, the transition of existing companies to the benefit corporation model (i.e., achieving the relevant qualification *durante societate*) affects the functioning of the company. First, it must be approved by majority vote; second, it must protect dissenting shareholders with specific forms of withdrawal or exit.

On the other hand, as we have seen, the express provision of a benefit corporation model fails in reducing the scope of discretion of the non-benefit corporations' directors (and, generally, this is positive⁴⁰). However, there is more, as it does not seem proper to reduce that of benefit corporations' directors either. In short, an express provision for benefit corporations in the regulation does not even seem to decrease the related agency costs in such latter cases for various reasons. On the one hand, company's bylaws could express the scope of the common beneficial interest to be pursued, as well as the ways in which (and the limits within which) it should be targeted. On the other hand, nonetheless—and beyond the fact that this normally almost never happens, and, at present, there would be no merit check on this point⁴¹—two factors cannot but increase directors' discretion in the performance of their duties.

- (i) Directors are necessarily entrusted with the additional function of balancing the pursuit of this common-benefit purpose with that of traditional profit-making purpose, and this adjustment inevitably generates an additional room for choice.
- (ii) On the flipside, any provision in the company's bylaws allowing to pursue a (hypothetically well-defined) common beneficial interest entails the recognition of a (further) area of discretion for directors.⁴² In other words, the traditional

⁴⁰Denozza and Stabilini (2017) (observing that the irrelevance of the common benefit may derive not only from its generality, but also from its excessive specificity, as both the indication of a too wide common good and that of a too narrow common good might turn out to be equally irrelevant.

⁴¹According to Mayer's theory, the introduction of a *mandatory social purpose* could also lead to a *mandatory screening* with respect to the perimeter of this corporate purpose and, consequently, to an effective monitoring of the actual pursuit of these purposes (Mayer (2020)).

⁴²There still seems to be some persuasive force in the following Business Roundtable statement (dated September 1997, stating that "the principal objective of a business enterprise is to generate economic returns to its owners"): "The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders [...] it is [...] an unworkable notion because it would leave the board with no criterion for resolving conflicts between interests of stockholders and of other stakeholders or among different groups of stakeholders."

business judgment rule is accompanied, in the context of benefit corporations, by a so-called *benefit judgment rule*.⁴³ The result is that benefit corporation' directors can enjoy a wider (double) discretion; with the further consequence that they are less responsible for their choices towards shareholders than non-benefit corporation' directors are.⁴⁴

5 The Challenges of the Regulatory Framework

Going back to history, it is acknowledged that benefit corporations are the product of the so-called fourth sector and, in this sense, they represent the result of discussions concerning *corporate social responsibility*, *sustainability*, *stakeholder primacy*, etc.⁴⁵ They can be seen precisely as an attempt to overcome the most patently ambiguous aspects of the fourth sector.

Indeed, when it comes to corporate social responsibility, it has not yet been fully (and perhaps deliberately) clarified whether such responsibility is a legal responsibility or a merely ethical one.⁴⁶ Given that liability assumes a rule of conduct, one should in fact first establish what kind of rule underlies *corporate social responsibility*. If it were only an ethical rule, social responsibility would not be relevant; if, on the other hand, it were a rule of law, then we would be in the field of the legal responsibilities of directors and other corporate bodies, and it would be a matter of understanding how the social aims underlying corporate social responsibility can be reconciled with the profit-oriented aims that characterize corporations.

While there is no doubt that the pursuit of common benefit interests becomes the subject of a legal obligation in benefit corporations; it is less clear how corporate and social purposes are reconciled in practice and whether there is a real directors' liability for the failure to pursue wider interests.

Once again, there is no specific rule of law that helps us to solve the matter. Still, stakeholders do not enjoy any direct action against benefit corporations' directors, as non-managers and non-directors do not have any legitimacy to protect altruistic purposes.⁴⁷

⁴³ See [Resta and] Sertoli (2018), p. 474, and, later on, Stella Richter (2017a), p. 962; Id. (2017c), p. 278; Venteruzzo (2020), p. 50; Massa (2019), p. 111.

⁴⁴ Vice-versa, in the case of non-benefit corporations, directors will have to choose only in the light of the ordinary business judgment rule: a socially responsible management approach that also works from an economic point of view won't generate any contradiction between the company's typical purpose and that of common benefit; but a socially useful management approach that does not work may constitute just cause for the removal of directors (without giving rise to liability, when in compliance with the business judgment rule).

⁴⁵ Strine (2018) ("Benefit corporation law is a tool for establishing such a system").

⁴⁶ The search for the legal foundations of corporate social responsibility is still at an early stage, as confirmed by Embid Irujo ([•]) and Embid Irujo and Del Vale Talens (2016).

⁴⁷ Burba (2017), p. 330 ff., p. 333 and Lacovara (2011), p. 815 ff., spec. p. 851 f.

Therefore, the development of a more precise regulation of the functions, powers and responsibilities of directors is the area in which the most significant progress can be made. Innovations in the regulation, as well as in the case law and, to a not negligible extent, in the practices of drafting corporate bylaws seem to be able to contribute to this result.

From this perspective, regulating benefit corporations without concurrently fine-tuning some key aspects of their rules seems to be the major shortcoming of this vast reform effort. The weakness that is generally evident in the benefit corporation phenomenon is, indeed, a lack of rules. What deserves to be first discussed and governed today is not just the possibility of pursuing non-profit interests through organizational forms with their own legal personality and full economic self-sufficiency (a possibility which it is very unlikely to be questioned), but rather the consequences of this choice. Until now, in fact, answers given to this latter point still appear to be inadequate in various legal systems.

What seems urgent, therefore, is to start providing less vague answers to questions that do not arise at a *factual* level, but at a *regulatory* level. In short, it is a matter of understanding whether and how the liability of benefit corporations' managers and directors is affected by such purpose, who has the right to take legal action to ascertain and compensate any failures (related to the pursuit of non-profit interests) of said directors, and to what extent directors enjoy an increased discretion related to both profit-making and altruistic purposes.

In our opinion, this is an unavoidable step to be taken, and it could make it possible to set a specific regulatory framework for benefit corporations, without getting to the point of hypothesizing, as it is already being done (albeit very questionably), new means for applying an allegedly sustainable corporate governance in a completely indiscriminate manner.

And, in this sense, the *Model Business Corporation Act* reform already seems like it was going in that direction, as the introduction of a new *Chapter 17*⁴⁸—which aims to serve as a reference for those states that have not yet adopted ad hoc regulations on benefit corporations, as well as for those that have statutes based on versions previously proposed by the Model B-Lab or individual state regulations⁴⁹—was discussed in Fall 2019.

⁴⁸Corporate Laws Committee, ABA Business Law Section (2019).

⁴⁹It also reflects many of the issues addressed by the American Bar Association (2013), which had already noted how the influence (and perhaps even interference) of B-Lab and its models had been decisive in shaping the relevant provisions, albeit not already included in the previous *Chapter 17* MBCA, but currently under reconsideration. The document, in its most recent formulation:

- (i) eliminates the requirement to disclose in the name the status of a benefit corporation, while maintaining the need for this clarification in share certificates (or *information statements for uncertificated shares*);
- (ii) lowers the *quorum* required to pass a resolution to change the *status* from a non-benefit corporation to a public benefit corporation or to amend the “*specific public benefit*”;

6 Preliminary and Tentative Conclusions

The perspectives of benefit corporations (i.e., corporations whose bylaws requires the pursuit of a dual purpose, on the one hand, for profit and, on the other hand, for altruistic purposes,⁵⁰ regardless of any legislative qualification in this regard) appear interesting, and it is easy to foresee that these corporate genres will continue to enjoy a certain success as *promotional tools* for their respective *economic activities*. This success is likely to increase in the years to come as choosing them means (and will mean) enjoying an undeniable reputational value in the eyes of the public and of the whole market. This attitude favors the spread and the success of benefit corporations, and it depends on the general awareness of consumers and public investors to the main issues that typically underlie the altruistic activities carried out by benefit corporations (e.g., sustainable growth; fight against climate change or pollution; protection of common goods such as air, water, etc.; fight against poverty and social inequalities, etc.).

Obviously, a closer inspection of economic return's prospects from the use of the benefit corporation in terms of **propaganda**, promotion, marketing is impossible here (and in any case would presuppose business skills that are beyond the reach and scope of the authors). However, it should be noted that the adoption of the benefit corporation model is, in practice, still rather rare among large companies, especially when listed.⁵¹ In this sense, the success of benefit corporations seems, at least up to

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- (iii) strengthens the duties of directors in the sense of providing for their duty to act in a responsible and sustainable manner and to consider the interests of shareholders as well as those of other *stakeholders*;
 - (iv) requires the drafting of an annual *benefit report*, to be made public and accompanied by a specific *judicial remedy* that shareholders who have not received such a report may activate;
 - (v) allows holders of at least five million \$ stocks, in the case of listed companies, to bring a *derivative action* against benefit corporations for breach of their obligations, even if they do not own 5% of the outstanding shares;
 - (vi) provides for the introduction of clarifications with regard to withdrawal, which is also permitted in the event of "consummation of an action requiring the approval of shareholders pursuant to section 17.03(a)(1) or a transaction requiring the approval of shareholders pursuant to section 17.03(a)(2), except that appraisal rights shall not be available under this subsection (a)(9) to any shareholder of the corporation with respect to any class or series of shares that would not become, or be converted into or exchanged for the right to receive, shares of a benefit corporation or shares or interests in an entity subject to provisions of organic law analogous to those in chapter 17" (§13.02(a)(9)).

⁵⁰In this sense, the "not-for-profit company" (carrying out activities with purely ideal, altruistic, social aims only) does not fall within the "notion" of a benefit corporation.

⁵¹In the U.S., as of July 2020, the only *Delaware Public Benefit Corporation* was Laureate Education (Posner (2020)). In France, to the best of our knowledge, the listed multinational company Danone S.A. embraced the model at stake by an almost unanimous vote of the shareholders at the shareholders' meeting held on 26 June 2020, following the December 2019 example of a closed company in Brittany (Yves Rocher).

In Italy, we have about 1500 benefit companies at the end of 2021 (80% of which were incorporated as limited liability companies and only 7% as joint-stock companies), but just one was actually listed on AIM Italia (a non-regulated market): the pioneering experience of Vita

now, essentially reserved for the segment of small or medium-sized companies or, again, for subsidiaries belonging to larger groups.⁵² In the latter hypothesis, benefit corporations stand as an entity of the group specifically dedicated to perform purposes to the benefit of the whole community, somehow replacing the presence of a foundation or a charity within the corporate group. Of course, this does not exclude a more extensive use of *B-Corps*, simply certified companies whose diffusion will reasonably increase in the years to come.⁵³

Ultimately, as far as trends are concerned, our impression is that, besides cases in which benefit corporations contribute—in practice due to the evocative power and reputational potential of the formula—to creating shareholder wealth, it is difficult to imagine it being used to a quantitatively significant extent. However, it should be pointed out that some have recently proposed, even authoritatively, to have recourse to *Public Benefit Corporations*⁵⁴ as a *default* model for every *public company* with revenues in excess of one billion dollars.⁵⁵ Now, regardless of the clamor that such an extreme (and at the same time substantially unfeasible) proposal would cause, due to its numerous potential shortcomings,⁵⁶ it is clear that generalized regulatory

Società Editoriale s.p.a. (2016) was recently followed by Reti s.p.a. (2020), operating in the IT consulting sector. For a more accurate elaboration of the empirical relevance of benefit corporations in Italy, see Bianchini and Sertoli (2018), p. 201 ff.

⁵²Most recently, we would like to recall the Italian experience of Arbolia, a benefit company established by the *joint venture* between Snam and Cassa Depositi e Prestiti, aimed at promoting the planting of 3 million trees by 2030 to absorb 200,000 tons per year of carbon dioxide and support national forestation (https://www.snam.it/it/media/comunicati-stampa/2020/CDP_Snam_societa_benefit_per_il_rimboschimento.html, November 2020).

⁵³Existing *B-Corps* are registered, without distinction of the place of incorporation, available at <https://bcorporation.net/directory>. In addition to the aforementioned Danone, which acquired its own B-Corp certification when it became a *société à mission*, we can recall the Italian case of Banca Prossima, from May 2019 belonging to the Intesa Sanpaolo Group and dedicated to secular and religious non-profits, B-Corp certified since 2016, the first among companies in the credit sector (as specified in the press release available at <https://group.intesasanpaolo.com/it/sala-stampa/comunicati-stampa/2016/12/CNT-05-00000004C7C50>). However, it does not represent a *unicum* in the global context, where there is no lack of examples of *B-Corps* also in the investment services, financial and banking landscape, which would seem *prima facie* less close to the issues at stake [specifically, 70 *investment advisors*, 30 *equity investors in developed markets*, 3 *equity investors in emerging markets*, 14 banks, from Bank Australia to DUCA Financial Services Credit Union (Toronto), from Raiffeissen Bank (Switzerland) to Tomorrow GmbH (Hamburg)]. On this topic, see also Sears (2019).

Also in Italy, listed companies were recently awarded with B-Corp certifications: this is the case of Sesa s.p.a., listed in the STAR segment.

⁵⁴See *supra*, fn. 22.

⁵⁵The size threshold is the same as the one envisioned in Democratic Senator Elizabeth Warren's *Accountable Capitalism Act* proposal back in the summer of 2018 (Warren (2018)), analyzed in Passador (2019), p. 192 ff.

⁵⁶Such a rule would be effective if it were adopted by all jurisdictions, or at least by a significant part of them; but it is difficult to imagine that such a reform movement could have a large following, if any at all. Moreover, if the rule were to be adopted by only one or a few jurisdictions, it would disadvantage companies subject to that jurisdiction vis-à-vis potential investors (at least as often as

interventions of this kind would, if ever adopted, end up substantially modifying the fate of the benefit corporation model.

Nevertheless, some problems remain as to the role, powers, and duties of directors and as to the safeguarding of the public's trust with respect to the pursuit of broader objectives. On the one hand, benefit corporations' directors appear, in line with the trend, to be endowed with such a wide discretionary power as to increase agency costs beyond tolerable limits. On the other hand, the legal instruments to make the pursuit of common benefit purposes effective are still far too weak. In this sense, an ad hoc intervention in the regulation should first take on the task of reducing ambiguity, especially taking the opportunity to frame the role of benefit corporations' directors in the most detailed and suitable manner.

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the pursuit of the common benefit would be expected to be detrimental to the interest of shareholders). Furthermore, it would have to establish the effect and consequences of such a provision on already established companies (without the purpose of common benefit): how would it be possible to transform their purpose and nature (from non-benefit corporation to benefit corporation), without granting the possibility of withdrawal to the shareholders? And if such a right of exit were recognised, would this be sustainable for the companies?

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Behavioral Perspectives on B Corps



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1 Context

The Friedman doctrine¹ asserts that a company's primary responsibility is to maximize shareholder wealth. For decades, it has been the core of the most influential ideas behind modern Western economics, shaping the private sector, particularly in the US. Leveraged at a time of uncertainty, it quickly gained corporate and political traction and became the dominant business mindset until recently. The doctrine prevailed over competing contemporary proposals, such as corporate social responsibility (CSR) advocated by Bowen, who stated that businessmen's obligations are to pursue policies and make decisions that are desirable and of value to society.² Friedman's doctrinal influence embedded itself into corporate cultures and emerging management styles, and concerns related to consumers, workers, and the environment remained secondary or even neglected as managers focused on profit maximization.

Hestad³ highlights that this still-widespread managerial culture—in which workers are conceptualized as economic agents, placed in a competitive environment, and incentivized to become increasingly productive, efficient, and profitable—generates false dichotomies. Specifically, dichotomies between present and future (i.e., maximizing profit each quarter while often disregarding long-term negative consequences), management and employees (i.e., establishing and maintaining a top-down culture of control and hierarchy), and lastly economy and nature (i.e., prioritizing financial growth at the expense of preserving the environment, frequently without adequate damage management and prevention). Recent studies highlight how these tensions are not actual intrinsic properties of business activities but rather mistaken human conceptualizations, as there are no real boundaries between organizations and the socio-ecological systems in which they are embedded.⁴ Transcending such artificially defined boundaries entails a shift in the cultural and value systems of enterprises and the development of integrated perspectives on business, society, and the environment, which considers their effects from a systemic perspective and goes beyond profit motives. In a limited-resource system bound by natural laws, pursuing perpetual growth in a framework of false dichotomies is not only unsustainable but actively damaging to human health and well-being, as well as to biodiversity and ecosystems.

¹Friedman M (1970) A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits. The New York Times. Available at: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

²Bowen (1953), p. 6.

³Hestad et al. (2020).

⁴Muñoz et al. (2018).

As a concrete example of the ineffectiveness of previous paradigms, pitting employees against each other in a quest to increase competition and efficiency resulted in the near-complete dissolution of Sears.^{5,6} Expecting that pure competition would stimulate highly rational decision-making and lead to the most profitable and efficient outcomes, Sears CEO Eddie Lampert divided the company into 30 units; however, this action backfired when unit executives attempted to undermine each other to boost their performance-dependent bonuses. As everyone became focused on self-interest and competition with other units, the importance of cooperation was forgotten, which actively led to overall brand damage.⁷ This case adds to unequivocal evidence from the behavioral sciences demonstrating that humans do not behave like rational economic agents, but rather frequently follow predictable heuristics (also known as *biases*) resulting from cognitive and affective decision mechanisms rooted in evolutionary adaptations.^{8,9} Not only is the assumption of rationality unsuitable, but additional evidence from social neuroscience emphasizes that the brain's intrinsic social wiring drives humans to cooperate and bond.^{10,11} Thus, an environment dominated by overcompetition and disregard for human instincts is more likely to result in reduced efficiency and trust as well as increased unethical behavior. This combination has negative implications for well-being and team performance and ultimately for firm profitability. For instance, on well-being, reports have shown an increased prevalence of mental health conditions related to work stress (such as anxiety and burnout): 44% of employees in 2018 reported work had caused or aggravated a mental health condition, representing a 10% increase from 2008 and an annual cost of £42–£45 billion to the UK economy.¹² Ripple effects have also been observed at other levels of society, prominently widespread public distrust resulting from high corporate executive pay, managerial corruption,

⁵Kimes M (2013) At Sears, Eddie Lampert's Warring Divisions Model Adds to the Trouble. Bloomberg. Available at: <https://www.bloomberg.com/news/articles/2013-07-11/at-sears-eddie-lamperts-warring-divisions-model-adds-to-the-troubles>.

⁶Paramore LS (2013) Ayn Rand Killed Sears. Salon. Available at: https://www.salon.com/2013/07/18/ayn_rand_killed_sears_partner/.

⁷For a detailed discussion on the caveats of extreme efficiency, see Roger Martin's article in the *Harvard Business Review*: <https://hbr.org/2019/01/the-high-price-of-efficiency>.

⁸See Kahneman (2011).

⁹See Samson (2014).

¹⁰See Raihani (2021).

¹¹See Lieberman (2013).

¹²Deloitte (2020) Mental Health and Employees - The Refreshing Case for Investment, p. 12. Available at: <https://www2.deloitte.com/uk/en/pages/consulting/articles/mental-health-and-employers-refreshing-the-case-for-investment.html>.

and unsuitable treatment of the workforce.¹³ Taken together, these findings portray various shortcomings of a shareholder wealth-maximizing economy. In parallel to the realization of these shortcomings, past years have seen a growing societal sentiment that both individuals and the private sector should not focus solely on profit maximization but also on ensuring a sustainable future. For instance, in 2016, only 19% of Americans aged 18–29 identified as capitalists according to a Harvard Institute of Politics study, a drop from 49% in 2010.^{14,15,16} Furthermore, mainstream media have increasingly raised awareness on the current climate and biodiversity crisis.^{17,18}

Thus, at the turn of the millennium, scholars¹⁹ and business leaders began questioning the validity—and more importantly the sustainability—of the notions of value, wealth, and efficiency. This reevaluation, along with a growing frustration with the “*growth at all costs*” mindset, has led to the reconsideration of alternative business doctrines, such as that proposed by Bowen.²⁰ It comes in the form of new frameworks for assessing performance, such as the triple bottom line (profit, people, planet),²¹ environmental, social, and governance (ESG) investment criteria,²² and hybrid companies or social enterprises,²³ such as B Corps²⁴ and benefit corporations,²⁵ all underlain by one common principle: purpose-driven strategy. Both the

¹³GFK (2011) State of Distrust: New Survey Indicates Corporate Trust Waning Among the Influential Americans. Available at: <https://www.prnewswire.com/news-releases/state-of-distrust-new-survey-indicates-corporate-trust-waning-among-the-influential-americans-123761169.html>.

¹⁴Guarna (2019), p. 6.

¹⁵Harvard Institute of Politics (2016) The Millennial Agenda for the Next President. Available at: https://iop.harvard.edu/sites/default/files/content/docs/160718_Harvard%20IOP%20Poll%20Convention%20Summary.pdf.

¹⁶We suspect this result also occurred because of a conflation of the meaning of capitalism, either as an economic system or as an implicit connotation of shareholder wealth maximization.

¹⁷WWF (2016) Living Planet Report 2016: Risk and Resilience in a New Era. Available at: https://awsassets.panda.org/downloads/lpr_2016_full_report_low_res.pdf.

¹⁸IPCC (2021) AR6 Climate Change 2021 - The Physical Science Basis. Available at: <https://www.ipcc.ch/report/ar6/wg1/>.

¹⁹See Edmans (2020); Martin (2020) and Raworth (2017).

²⁰Bowen (1953).

²¹See Elkington (1997).

²²Introduced by the International Financial Corporation in 2005, see: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins2005_wci_1319576590784#:~:text=The%20Who%20Cares%20Wins%20conference,in%20asset%20management%20and%20financial.

²³In this chapter, “social enterprise” is an umbrella term referring to any company that provides socio-environmental benefits to stakeholders and not just shareholders.

²⁴“B Corp” is a certification given by B Lab. See <https://www.bcorporation.net/en-us/certification/>.

²⁵A “benefit corporation” is a legal structure. For the difference between B Corps and benefit corporations, see: <https://benefitcorp.net/businesses/benefit-corporations-and-certified-B-Corps>.



Fig. 1 The spectrum of nongovernmental organizations (NGOs) and traditional for-profit organizations (Adapted from Alter (2007))

frameworks and company certifications revolve around a similar core concept, that of moving away from shareholder capitalism and toward stakeholder capitalism, in which other agents participating in or affected by the system are considered. These companies differ from traditional philanthropic or other nonprofit organizations as they still aim to generate a profit, and they are also distinct from traditional companies as they seek to create social and ecological value (e.g., sustainable resource use, worker well-being, protection of biodiversity) alongside financial returns (see Fig. 1 for a visual representation). It is worth noting that traditional companies have long incorporated purpose-driven practices under the most widely known form of CSR. CSR practices, however, are typically unverifiable, and while some companies have adopted them genuinely, inauthentic CSR used for advancing profit-maximization motives in disguise has faced repeated media coverage and public backlash. This phenomenon, often labeled “greenwashing,” has eroded public trust in CSR claims.²⁶ Thus, there is a need to differentiate honest social enterprises from greenwashers and create standards for firms aspiring to be considered social enterprises.

In this spirit, the California-based nonprofit organization B Lab launched B Corp certification in 2007. Since then, more than 4500 companies have been certified in over 75 countries and across 150 industries.²⁷ Notable global brands that have become certified include Patagonia, Danone, Ben & Jerry’s, and Seventh Generation. B Corps’ hybrid approach entails the pairing of economic motives with a social or environmental purpose and holistically considering all stakeholders and aspects that may be impacted by the company. B Lab evaluates potential applicants through the B Impact Assessment, which comprises five areas of evaluation: *governance*, *workers*, *customers*, *community*, and *environment*. To become certified, a company must obtain a minimum of 80 points out of 200. *Governance* primarily addresses ethics, mission, and transparency; *workers* evaluates aspects such as financial security, health and wellness, engagement, satisfaction, and employee career development; *customers* considers stewardship and whether the product or service provides a solution to a socio-ecological problem; *community* is concerned with diversity and inclusion, supply-chain ethics, engagement with local communities, and charity; and lastly *environment* focuses on sustainable practices, such as

²⁶Hamza and Jarboui (2020).

²⁷Data from B Lab. Available at: <https://www.bcorporation.net/en-us/> (as of January 2022).

recycled materials and renewable energy, alongside waste reduction and wildlife conservation.²⁸ B Corps are also subject to random on-site audits by B Lab, meant to enhance company accountability. Overall, the B Corp certificate is not just another label attached to a product, instead it represents a bottom-up effort to shift the status quo of corporate misbehavior to re-establish public trust²⁹ while creating a novel economic sector.³⁰ Interestingly, there are more emerging B Corps in industries that exhibit strong hostile shareholder-centric tendencies (e.g., mass layoffs, excessive income inequality between executives and employees) than in less hostile environments,³¹ further supporting the movement's driving ethos to counteract the negative consequences of a pure profit motive.

Much of the B Corps literature, reviewed by Diez-Busto and colleagues in 2021,³² focuses on conceptual analysis or review,³³ legal discussions,³⁴ financial or growth-oriented aspects,³⁵ and evaluating sustainability achievements.³⁶ There is, however, little scholarly work analyzing the benefits and challenges of B Corps from a behavioral perspective, as it is a rather young field. The few existing studies examine employee productivity,³⁷ entrepreneur and firm motivations,³⁸ and consumer motivations to purchase from B Corps.³⁹ Crucially, B Corps success is driven in part by placing humans and their values at the center of their entrepreneurial project. Given those behavioral sciences are intrinsically focused on understanding human behavior, they represent the foundation for analyzing how B Corps can, likely positively, influence workers, consumers, communities, or what factors determine successful policies. Therefore, to provide an informed overview of the behavioral aspects, we engage with interdisciplinary literature across the behavioral sciences, as well as sustainability investigations, consultancy research, and case studies. Together, these illustrate the ways in which B Corps positively contribute to society and how they can make use of insights from behavioral sciences to leverage their certification.

²⁸This overview is non-exhaustive.

²⁹Romi et al. (2018) p. 398.

³⁰Roth and Winkler (2018c) p. 15.

³¹Kim S et al. (2016) Why Companies Are Becoming B Corporations. Harvard Business Review. Available at: <https://hbr.org/2016/06/why-companies-are-becoming-B-Corporations>.

³²Diez-Busto et al. (2021).

³³Stubbs (2017); Mion and Adaui (2020); Kurland (2017); Harjoto et al. (2019); Bauer and Umlas (2017).

³⁴Woods (2016).

³⁵Paelman et al. (2020); Paelman et al. (2021); Patel and Dahlin (2022).

³⁶Wilburn and Wilburn (2015).

³⁷Chen and Kelly (2015); Romi et al. (2018).

³⁸Roth and Winkler (2018a); Pollack et al. (2021).

³⁹Bianchi et al. (2020); Bianchi et al. (2022).

Considering the five aforementioned areas of the B Impact Assessment, the remainder of this chapter explores the first four categories, as these represent aspects wherein human behavioral phenomena are most evident. Section 2 evaluates *governance*, specifically the influence of ethics, transparency, and accountability on the internal and external relationships of B Corps, as well as the implications of managerial style on interpersonal relationships and work culture. Section 3, *workers*, explores the relationship between working with purpose and employee performance and the effects of social inclusion on employees' health, presenting some examples of B Corps with leading practices in this regard. Next, Sect. 4 on *customers* (which we extend to consumers more generally) covers the synergy between consumer motivations and B Corp activity, caveats of moral behavior, and techniques to influence more sustainable consumer behavior; we also present our research regarding public awareness and perceptions of B Corp trust and greenwashing. Lastly, Sect. 5, *community*, discusses some of the ways in which B Corps engage with their communities through social media, corporate volunteering, and charity work, among others.

2 Governance

Governance represents the set of governing principles a company bases its activity on. While not a direct behavioral measure, it can greatly influence the behavioral dynamics within a company via corporate culture and subsequent team dynamics. The B Impact Assessment evaluates, among other aspects, governance ethics, accountability, and transparency, which are of particular relevance to behavioral outcomes.

2.1 *Ethics, Transparency, and Trust*

Ethics refers to the set of moral principles guiding integrity and honest behavior. In examining the relationship between implementing an ethics code, corporate philanthropy, and employee engagement and turnover in the hospitality sector, Lee and colleagues⁴⁰ found that awareness of a code of ethics positively contributed to corporate philanthropy and organizational engagement. Further, they found an effect of corporate philanthropy on job and organizational engagement, both of which were negatively correlated with turnover. Overall, a code of ethics and a culture of

⁴⁰Lee et al. (2014).

corporate philanthropy increase employee morale⁴¹ and commitment.⁴² Conversely, employees in work climates lacking a code of ethics experienced greater conflicts and increased turnover.⁴³ B Corps who excel in governance, particularly if they implement an internal code of ethics, would likely see similar benefits.

Accountability represents the obligation of being able to justify one's actions to those who may be affected by them⁴⁴ and can extend to requiring rectifying one's behavior in case of misaction. Similarly, transparency concerns reducing information asymmetry between managers and stakeholders,⁴⁵ which, in the business context, refers to openly communicating operating practices and reparatory actions with concerned stakeholders. Emerging literature suggests that B Corp certification can positively impact accountability and transparency, increasing the quality of corporate governance.⁴⁶ Across industries (e.g., hospitality,⁴⁷ telecom,⁴⁸ and finance⁴⁹), transparency has been consistently associated with higher stakeholder trust. In turn, higher trust is associated with higher predictability, representing a met expectation of the other party's good will,⁵⁰ both of which lay the foundation for mutuality of intention and enhanced cooperation. The importance of transparency in building trust is no longer a novel concept—in PwC's annual CEO survey,⁵¹ the percentage of CEOs who considered transparency critical for trust-based relationships in business increased from 37% in 2013 to 60% in 2018, indicating a shift in values at the highest corporate levels. Interestingly, the percentage decreased to 50% in 2019, suggesting a shift from simple concern to proactive action, as leaders started implementing trust-building strategies based on transparency to meet stakeholder expectations.⁵² When trust is eroded, accountability can be a means of restoring it; however, displays of accountability should not be used solely as instruments to repair a company's self-image. Similarly with how strategic CSR negatively impacts trust when it is used for self-interested motives, tactical accountability is detrimental

⁴¹ Porter ME, Kramer MR (2002) The Competitive Advantage of Corporate Philanthropy. Harvard Business Review. Available at: <https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy>.

⁴² Collier and Esteban (2007).

⁴³ Lee et al. (2014).

⁴⁴ Swift (2001). p. 17.

⁴⁵ Farvaque et al. (2011).

⁴⁶ Nigri et al. (2020).

⁴⁷ Shafieizadeh and Tao (2020).

⁴⁸ Islam et al. (2021).

⁴⁹ Augustine (2012).

⁵⁰ Swift (2001).

⁵¹ PricewaterhouseCoopers (2019) Transparency key to building trust in business. Available at: <https://www.pwc.com.au/ceo-agenda/ceo-survey/2019/transparency-key-to-building-trust-in-business.html>.

⁵² Ibid.

to an organization's trustworthiness.⁵³ When examining how B Corps integrate these principles with their operations, future research should assess whether B Corps and benefit corporations are indeed more transparent and accountable than matched peers and the subsequent implications for mutual relationships with stakeholders, as well as public perceptions of trustworthiness.

2.2 Implications of Entrepreneurs' Value Structures

Beyond the aspects evaluated by the B Impact Assessment, we posit that several other facets remain relevant when exploring governance's influence on behavior. As previously mentioned, governance plays a role in defining a company's culture, particularly via their leaders' personality and behavioral tendencies. It follows that the particular personality types of both founders and managers will further influence team dynamics. Good governance would thus consider the influence of leaders' personality types on organizational functioning, specifically considering interpersonal relationships.

Concerning entrepreneurs, Roth and Winkler⁵⁴ created a taxonomy of profiles by investigating personal motivations and values of B Corps entrepreneurs in Chile and categorizing them based on their social, environmental, and profit motivations. Four profiles emerged: (1) the *social idealist*, (2) the *sustainable impact seeker*, (3) the *hybrid achiever*, and (4) the *self-sustaining hedonist*. The first is characterized by defining success based on generated social value and a strong motivation to include both in-group and out-group members in the process.⁵⁵ *Social idealists* always prioritize social impact over financial gain and use profit only as a tool to support the continued activity of the B Corp. They are distinguished by their strong sense of community belonging and a desire for deeply connected relationships with others. *Sustainable impact seekers* define success as a combination of financial and social value generation metrics but continuing to show a strong motivation for welfare creation for everyone.⁵⁶ They value close, harmonious work relationships and include employee well-being as an indicator of success, which is measured by both financial and social impact indicators. *Hybrid achievers* also define personal achievement in a mixed manner similar to the second profile; however, the hybrid achiever's definition of success is more closely aligned to profit metrics when compared to the first two. Moreover, personal achievement is a primary motivator for this kind of B Corp entrepreneur. Nonetheless, they are unwilling to generate profit if negative consequences exist, as they value ethical business practices and

⁵³For a review of corporate transparency literature, see: Ardigó IA (2019) Corporate Transparency: Overview of Issues and Literature Review. Available at: <https://www.jstor.org/stable/resrep20480>.

⁵⁴Roth and Winkler (2018b).

⁵⁵Ibid. p. 92.

⁵⁶Ibid. p. 93.

transparency. Lastly, *self-sustaining hedonists* are driven by their profit-oriented definition of success and have no particular expressed motivation for social value creation for in-group or out-group members. Pursuing personal passions is their primary motivator. This type was the least common among the sample.

Studies have suggested that, generally, the motivation underpinning value creation reflects internal value structures⁵⁷ and that social entrepreneurs are more likely to be motivated by inherent personal values regarding a social or environmental cause.⁵⁸ It follows that internal value structures will influence work priorities and organizational culture. With the increasing use of greenwashing because of its potential as an avenue for higher profits, we argue the *self-sustaining hedonist* is more likely to diverge from the fundamental purpose of creating a B Corp than the other profiles and thus would pursue certification for self-gratifying motives. B Corps led by this type of leader could potentially threaten the credibility and trustworthiness of the B Corp label. Further, a self-interested leader is more likely to neglect the social harmony necessary for effective teamwork, which may be more important for B Corps than for standard companies given the former's focus on mutual value creation and stakeholder engagement. While no particular research has been conducted on the influence of the aforementioned profile types on B Corp culture, insights from social and organizational psychology support the idea that prosocial behaviors elicit positive outcomes such as creativity and innovation in organizational settings.⁵⁹ For example, ethical leadership (characterized by honesty, altruism, and trustworthiness) has been associated with positive organizational citizenship behavior,⁶⁰ employee creativity,⁶¹ and job performance.⁶² It also encourages employee participation and fosters an environment of openness and collaboration.⁶³ These effects can be explained using social exchange theory,⁶⁴ which posits that if the cost–benefit evaluation of a social interaction is positive (i.e., rewards are higher than costs), the interaction will be mutually beneficial. In the case of organizations, subordinates who perceive a strong positive exchange with their leaders will experience feelings of gratitude and trust, which elicit motivation to return the favor through their work behaviors.⁶⁵ Unsurprisingly, B Corps in Latin America that exhibit strong managerial support have higher rates of innovative work behavior.⁶⁶ Conversely, leaders exhibiting a lack of empathy or concern for others (e.g., as seen in subclinical psychopathy or narcissism), often induce psychological distress and

⁵⁷ Miller et al. (2012).

⁵⁸ Mody et al. (2016).

⁵⁹ Yaakobi and Weisberg (2020).

⁶⁰ Shareef and Atan (2019).

⁶¹ Javed et al. (2018).

⁶² Mo and Shi (2018).

⁶³ Ibid.

⁶⁴ Wang et al. (2020).

⁶⁵ For further discussion on prosocial behavior in organizations, see Reizer et al. (2020).

⁶⁶ Contreras et al. (2021).

distrust in their subordinates and generate unhealthy interpersonal relationships, which affects job performance and even individual health.⁶⁷

Taken together, we argue that, given their heightened prosocial tendencies, the first three profiles described above are more compatible with the B Corp philosophy as opposed to the *self-sustaining hedonist*. To avoid abuse of its label and increase the likelihood that B Corps reflect the movement's values, B Lab could include evaluating the individual value structure and motivations of B Corp certification-seekers in the B Impact Assessment. Future research should investigate the prevalence of leaders' prosocial tendencies among certified B Corporations and matched non-B Corp companies to identify whether differences exist. Other studies should attempt to identify the causal relationship between varied motivational profiles and their corresponding effects on organizational culture and stakeholder relationships in B Corps vs. standard firms.

In summary, governance encompasses several factors that have behavioral implications. First, the implementation of a code of ethics promotes internal coherence, employee morale, and reduced risk of conflict. Second, transparency facilitates stakeholder trust, and accountability can serve as a means of repairing trust in case of misaction. Lastly, because the intrinsic value structures and personality profile of B Corp leaders likely shape the development of B Corps, their internal functioning, and their credibility over time, B Lab could consider implementing a profile evaluation of B Corp certification-seekers to ensure compatibility between B Lab's goals and the philosophies of emerging B Corp entrepreneurs.

3 Workers

3.1 Working with Purpose, CSR, and Employee Performance

Time at work comprises nearly a third of a person's life, so making work meaningful through purpose is an increasing priority for many. In a survey by McKinsey,⁶⁸ 70% reported that work is important for their sense of purpose, yet 49% of frontline workers disagreed that their purpose is fulfilled at work, with a further 36% being unsure. Interestingly, this response contrasts with that of top executives, among whom 85% reported that their sense of purpose aligns with work. Employees who feel more aligned with their work purpose are more likely to report higher levels of energy, resilience, and commitment, in addition to improved physical health, a claim

⁶⁷ Spencer and Byrne (2016); Choi and Phan (2021); Erickson et al. (2015).

⁶⁸ McKinsey (2020) Help your employees find purpose - or watch them leave. Available at: <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/help-your-employees-find-purpose-or-watch-them-leave#>.

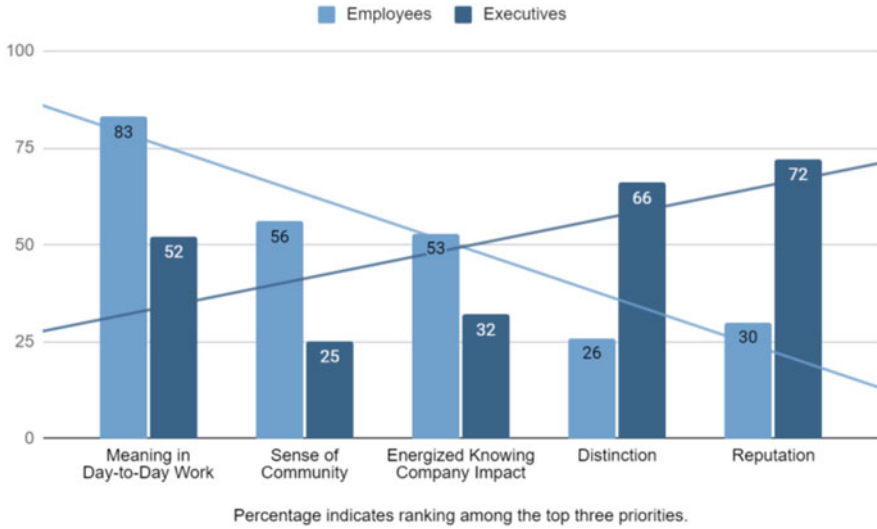


Fig. 2 Value of purpose at work among employees and executives (Adapted from PricewaterhouseCoopers (2016) Putting Purpose to Work: A Study of Purpose in the Workplace)

supported by medical research.⁶⁹ PwC's research⁷⁰ highlights another intriguing gap between employees and executives (see Fig. 2): employees value a sense of purpose for daily meaning, a sense of community, and the energized feeling of genuine impact, while executives prioritize it as means of gaining more distinction and improved reputation. Overall, there is widespread demand for purpose-driven work with 74% of people surveyed believing a successful business needs to have a genuine purpose that resonates with people, and 75% caring to work for a business that matches their values.⁷¹ Importantly, these trends are even stronger in younger generations: 10% more millennials (born between 1981 and 1996) care about making a positive difference in the world through their careers compared to Gen Xers (born between 1965 and 1980).⁷²

There is no doubt that employees have intrinsic motivations that keep them engaged beyond financial compensation and that conducting purposeful business comes with behavioral benefits at the worker level. Extensive research has explored the relationship between CSR and employee job satisfaction, performance, retention,

⁶⁹ Kim et al. (2020).

⁷⁰ PricewaterhouseCoopers (2016) Putting Purpose to Work: A Study of Purpose in the Workplace. Available at: <https://www.pwc.com/us/en/about-us/corporate-responsibility/assets/pwc-putting-purpose-to-work-purpose-survey-report.pdf>.

⁷¹ American Express (2017) Redefining the C-Suite: Business the Millennial Way. Available at: <https://www.americanexpress.com/content/dam/amex/uk/staticassets/pdf/AmexBusinessTheMillennialWay.pdf>.

⁷² Ibid.

and commitment.⁷³ CSR programs and prosocial incentives show positive correlations with satisfaction,⁷⁴ commitment,⁷⁵ and effort and productivity.^{76,77} Indeed, such results are consistent with theoretical arguments positing that prosocial incentives would motivate those who have intrinsic prosocial preferences.⁷⁸ This is also supported by real-world data showing that 71% of respondents to an IBM survey⁷⁹ exhibited prosocial preferences, stating they were more likely to both apply and accept a job from a company demonstrating social responsibility. Other important empirical findings suggest that CSR policies both attract and increase retention of better talent,⁸⁰ thereby lowering turnover⁸¹ and increasing engagement.⁸² Indeed, these trends in the more general CSR literature have begun to emerge in the nascent B Corp literature, as well. Romi and colleagues⁸³ found that for B Corps who scored highly (i.e., is an “area of excellence”) on treatment of workers on the B Impact Assessment, employee productivity was significantly higher compared to matched standard companies, and the relationship held true for sales growth, as well. Therefore, a work environment in which ethical concerns are evident and characterized by a broader consideration of its relationship to its surrounding systems is more positively perceived by employees and generates considerable behavioral benefits. However, the intention behind such prosocial policies matters. If they are used instrumentally, that is, as a proxy to achieve profit-centered goals and not for their intrinsic social or environmental value, they tend to backfire and lead to a negative perception of the firm and a loss of the desired behavioral improvements.⁸⁴

Having purpose at work and working in a prosocial and considerate environment are intrinsic to the aims of B Corp certification. The certification can appeal to prospective employees’ sense of purpose and social identity (i.e., positioning themselves in a social environment of shared values), thereby attracting mission-aligned talent. Unsurprisingly, B Corps are the first employer choice for millennials in the US.⁸⁵ Because the B Corp mission and employees’ ideological needs align, not only

⁷³For an overview, see: Romi et al. (2018). p. 398.

⁷⁴Vlachos et al. (2013).

⁷⁵Viswesvaran and Ones (2002).

⁷⁶Ibid.

⁷⁷Tonin and Vlassopoulos (2015).

⁷⁸Bénabou and Tirole (2003).

⁷⁹IBM Institute for Business Values (2021) Sustainability at a turning point - Consumers are pushing companies to pivot p. 7. Available at: <https://www.ibm.com/downloads/cas/WLJ7LVP4>.

⁸⁰Bhattacharya et al. (2008); Bode et al. (2015).

⁸¹Du et al. (2015); Carnahan et al. (2017).

⁸²Loor-Zambrano et al. (2022).

⁸³Romi et al. (2018).

⁸⁴Cassar L, Meier S, (2017) *Intentions for Doing Good Matter for Doing Well: The (Negative) Signaling Value of Prosocial Incentives*. Available at: <https://www.nber.org/papers/w24109>.

⁸⁵American Express (2017) *Redefining the C-Suite: Business the Millennial Way*. Available at: <https://www.americanexpress.com/content/dam/amex/uk/staticassets/pdf/AmexBusinessTheMillennialWay.pdf>.

is job satisfaction increased,⁸⁶ but affective commitment, which refers to an emotional bond to a cause's values or ideals that elicits the desire to pursue congruent actions,⁸⁷ is enhanced. Bingham and colleagues⁸⁸ posit that affective commitment is one of the strongest predictors of employees' behavioral support of an organization's cause, alongside (although to a lesser extent) normative commitment (employees feeling ethically obligated to support a cause because it is the normatively correct course of action and continuance commitment (employees being aware of the cost of not following the organizational cause).⁸⁹ Further, start-up B Corps or those that cannot match pay rates of standard for-profit businesses can still attract motivated talent, with research showing that employees are willing to accept a lower pay if working for genuinely responsible companies.⁹⁰

Together, the mission and purpose of B Corps have the potential to attract mission-aligned and committed talent with higher motivation and engagement to support a given cause. Additionally, B Corp leaders are more likely to value purpose at work for similar reasons as employees (i.e., day-to-day meaning, sense of community, making an impact) rather than for recognition and status, given their intrinsic social motivations (as described in Sect. 2).

3.2 *Social Inclusion and Well-Being at Work*

Moving on from work-related benefits to a more people-centric perspective, the interpersonal component of socially aware companies is equally important for generating a healthy and supportive environment. The United Nations (UN) World Happiness Report⁹¹ finds that social support explains the highest variance in measured happiness, ahead of GDP per capita, which ranked second. Social support is a powerful buffer against both work stress⁹² and negative affect more generally.⁹³ This is relevant both at the individual level, given that higher levels of work stress increase the risk of immune system and cardiovascular disorders and worsen mental health, and at the organizational level, as it decreases performance while increasing absenteeism and turnover.⁹⁴ Another central factor contributing to healthy and

⁸⁶Du et al. (2015).

⁸⁷Meyer and Allen (1991).

⁸⁸Bingham et al. (2013).

⁸⁹Ibid.; Meyer and Allen (1991).

⁹⁰Burbano (2016); Krueger et al. (2020).

⁹¹Helliwell JF, Huang H, Wang S, Norton M (2020) "Social Environments for World Happiness," Chapter 2, United Nations World Happiness Report. Available at: https://happiness-report.s3.amazonaws.com/2020/WHR20_Ch2.pdf.

⁹²García-Herrero et al. (2013).

⁹³Uchino et al. (2016).

⁹⁴García-Herrero et al. (2013).

supportive work environments is trust, which is a predictor of subjective well-being and social cohesion⁹⁵ and maintains its influence across environments (i.e., both in day-to-day life and at work). Moreover, a 10% increase in trust management corresponds to an increase in life satisfaction equivalent to a 36% increase in income.⁹⁶ Together, social support and trust represent a foundation for social capital, defined as “a combination of interpersonal links, shared beliefs and identities, and norms that together reduce the incidence of distrust in economic exchange and teamwork.”⁹⁷ Considering it as capital is appropriate because, just like financial capital, the weight of social networks accumulates over time and yields benefits such as reinforced trust, mutuality of intention, and efficient cooperation.

Interestingly, Culture Amp, a B Corp concerned with improving corporate cultures, has identified that B Corp employees express more trust regarding company commitment to positive social impact: 82% of employees agreed that their company’s commitment is genuine compared to 70% at non-B Corps.⁹⁸ While not a direct measure of interpersonal trust, this finding does reflect higher trust in management compared to non-B Corps, which has been shown to facilitate team performance.⁹⁹ Moreover, Culture Amp found a 12% difference between B Corp and non-B Corp employees on whether employees felt they could make a genuine impact, and overall, B Corp employees perceived their leadership as more inspiring and motivating.¹⁰⁰ This is consistent with case studies of B Corps¹⁰¹ that identified that such companies have empathetic leadership, implement democratic governance, and promote a collaborative work environment based on trust and equality.

Another example comes from Forster Communication, a UK-based company featured in B Lab’s Best for The World honorees list¹⁰² for their worker- and governance-related performance and named one of Britain’s Healthiest Workplaces.¹⁰³ Tackling formerly stigmatized topics such as mental health, this company seeks to create inclusive cultures wherein discussing employees’ emotional and personal needs is not prejudicial or puts their job at risk but rather is encouraged and welcomed.¹⁰⁴ To contextualize the importance of workplace mental health,

⁹⁵Helliwell and Wang (2011).

⁹⁶Helliwell and Huang (2010).

⁹⁷Mayer and Roche (2021). p. 155.

⁹⁸Sloan J (n.d.) The Data Is In: Here’s What Matters to B Corp Employees. Available at: <https://www.cultureamp.com/blog/the-data-is-in-heres-what-matters-to-b-corp-employees>.

⁹⁹de Jong et al. (2015).

¹⁰⁰Sloan J (n.d.) The Data Is In: Here’s What Matters to B Corp Employees. Available at: <https://www.cultureamp.com/blog/the-data-is-in-heres-what-matters-to-b-corp-employees>.

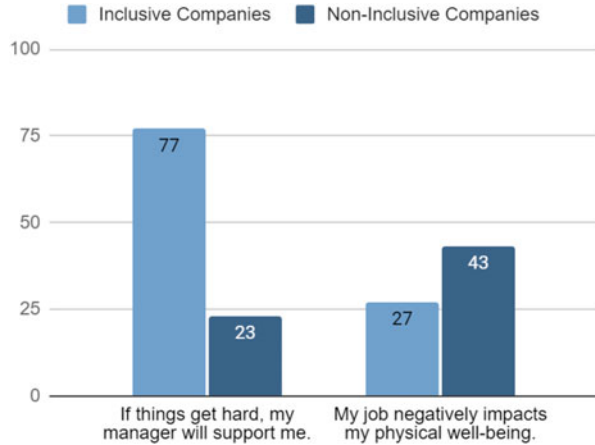
¹⁰¹Hankammer et al. (2021).

¹⁰²Data from B Lab: <https://bthechange.com/best-for-the-world-2018-all-honorees-f30a880f8ac0>.

¹⁰³Jack A (2019) Britain’s Healthiest Workplace winners. Financial Times. Available at: <https://www.ft.com/content/d0043cf6-9cbc-11e8-88de-49c908b1f264>.

¹⁰⁴Forster Communications (2018) Shining a light. Available at: <https://www.forster.co.uk/insight/shining-a-light/>.

Fig. 3 Percentage of people who agree with the specific statements, by company type (Adapted from: BCG (2021) Inclusive Cultures Have Healthier and Happier Workers. Available at: <https://www.bcg.com/en-ch/publications/2021/building-an-inclusive-culture-leads-to-happier-healthier-workers>)



Deloitte¹⁰⁵ estimates that in the UK alone, poor mental health currently cost employers £42–£45 billion a year in 2018, compared to £33–£42 billion in 2017, representing an approximate 16% increase. Despite this considerable impact, it remains a largely taboo topic, with as many as 300,000 people losing or quitting their jobs due to a mental health condition.¹⁰⁶ Furthermore, BCG's research¹⁰⁷ shows that a lack of perceived social support adversely impacts employees' work and private lives and that overall, employees whose work environments feel inclusive are 3.3 times more likely to feel supported by their managers and 2.6 times more likely to feel safe making a mistake (see Fig. 3). These results are complemented by insights from social neuroscience that show that social rejection activates similar brain networks to physical pain,¹⁰⁸ impairs high-order cognitive abilities such as problem-solving,¹⁰⁹ and increases risk of stress related disorders such as depression and anxiety. Conversely, social support is linked to cognitive resilience,¹¹⁰ enhanced global cognition,¹¹¹ and higher likelihood of good physical and mental health.¹¹²

¹⁰⁵ Deloitte (2020) Mental health and employers: Refreshing the case for investment. <https://www2.deloitte.com/uk/en/pages/consulting/articles/mental-health-and-employers-refreshing-the-case-for-investment.html>.

¹⁰⁶ Stevenson D and Farmer P (2017) Thriving at Work: The Independent Review of Mental Health and Employers. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658145/thriving-at-work-stevenson-farmer-review.pdf.

¹⁰⁷ Krentz M, Dartnell A, Khanna D, and Locklair S (2021) Inclusive Cultures Have Healthier and Happier Workers. BCG. Available at: <https://www.bcg.com/en-ch/publications/2021/building-an-inclusive-culture-leads-to-happier-healthier-workers>.

¹⁰⁸ Eisenberger et al. (2003); Morese et al. (2019).

¹⁰⁹ Campbell et al. (2006).

¹¹⁰ Salinas et al. (2021).

¹¹¹ Kelly et al. (2017).

¹¹² Eisenberger and Cole (2012).

In this context, Forster Communications' advocacy for destigmatization of mental health and wider social inclusion is not simply about following B Lab's health and well-being guidelines but is the scientifically sound course of action. It also sets an industry example for approaching mental health and inclusion and encourages other companies to follow suit. The company further proves its comprehensive understanding of the multifactorial determinants of health and well-being by, for instance, advocating for physical activity and balanced nutrition. Specifically, it incentivizes employees to bike to work^{113, 114} by offering equivalent time off from "pedal points," a policy that both lowers individual carbon footprints and improves personal physical health, further promoted by free on-site healthy breakfast options. Unsurprisingly, their health-related absenteeism and presenteeism is 15–30%^{115,116} lower than the UK average.

Other B Corps also show consideration for their workers' health as well as carbon footprints. US-based Dr. Bronner's offers free vegan and vegetarian food and subsidies for electric vehicles to its employees. Dr. Bronner's is particularly committed to B Lab's vision, having been included on B Lab's Best for the World honoree list several times and attaining a B Score of 178 out of 200.¹¹⁷ The company's most striking stance is its position on wage inequality; it limited top management's earnings at five times that of an entry level employee¹¹⁸ (compared to a US average of 351-to-1 in 2020¹¹⁹) and offers a minimum wage of almost US\$19 per hour,¹²⁰ 160% higher than California's US\$11 per hour in 2018.^{121, 122}

¹¹³Forster Communications (2018) Our people – our impact. Available at: <https://www.forster.co.uk/insight/our-people-our-impact/>.

¹¹⁴Parker K (2019) Creating a Healthy Workplace By Listening to the People Who Matter. Available at: <https://www.tbd.community/en/a/creating-healthy-workplace-listening-people-who-matter-yes-its>.

¹¹⁵Forster Communications (2018) Our people – our impact. Available at: <https://www.forster.co.uk/insight/our-people-our-impact/>.

¹¹⁶Parker K (2019) Creating a Healthy Workplace By Listening to the People Who Matter. TBD*. Available at: <https://www.tbd.community/en/a/creating-healthy-workplace-listening-people-who-matter-yes-its-employees>.

¹¹⁷Data from B Lab: <https://www.bcorporation.net/en-us/find-a-B-Corp/company/dr-bronnens/>.

¹¹⁸Dr. Bronner's (2016) Progressive business practices. <https://www.drbronner.com/about/our-employees/progressive-business-practices/>.

¹¹⁹CEO pay has skyrocketed 1,322% since 1978: CEOs were paid 351 times as much as a typical worker in 2020. In: Economic Policy Institute. <https://www.epi.org/publication/ceo-pay-in-2020/>.

¹²⁰Dr. Bronner (2019) All One Report <https://www.drbronner.com/allone-reports/A1R-2019/all-one-report-2019.html#p=8>.

¹²¹California Department of Industrial Relations (2021) Minimum Wage. Available at: https://www.dir.ca.gov/dlse/faq_minimumwage.htm.

¹²²It is beyond the scope of this chapter to review the many other CSR achievements of B Corps, for more information see: Wilburn and Wilburn (2015); Hankammer et al. (2021); B Lab's website (<https://www.bcorporation.net/en-us/find-a-B-Corp/search>) which lists certified companies across the globe and their respective B Scores.

In summary, now that purposeful work is more important than ever, B Corps' holistic value creation missions appeal to mission-aligned talent, which leads to increased retention, engagement, satisfaction, and performance. Emerging evidence demonstrates the movement's commitment to offering not just career opportunities and development but also its concern for workers' health and well-being through inclusion and social acceptance. In addition, B Corps consider fair wage distribution and employee financial security. Overall, B Corps are 55% more likely to cover at least partial health insurance costs and 45% more likely to offer bonuses regardless of employees' company rank, and 54% have reported their intention to share profits with employees.¹²³ Lastly, they acknowledge their influence on employees beyond arguably self-interested measures (e.g., employee performance), seeking to incentivize workers to become more responsible citizens through sustainable behaviors.

3.3 Future Research

In our literature review, we identified a lack of systematic studies comparing B Corp environments to those of companies with varying degrees of CSR commitments and of standard for-profit organizations as a baseline. Behavioral data specific to B Corps is sparse, and while the CSR literature is partially applicable, it is important to identify specific B Corp-related effects on employee behavior. The B Corp environment offers ample opportunity for research, particularly because a standardized framework of assessment is available, contrary to the CSR literature, which lacks rigorous and consistent definitions of CSR meaning and policies. Indeed, B Corps also differ in terms of individual area scores; however, certified companies with similar scores in one category will certainly be more comparable given the homogeneity of evaluation criteria. Future research can consider comparing B Corps and traditional companies on employee trust in management, self-reported fulfillment, mental health measures, and productivity and engagement. Findings would serve as a foundation for identifying what specific B Corp characteristics are most effective in driving a particularly desired behavioral outcome and which could inform future corporate policies aiming to tackle current challenges in the work environment.

¹²³Wilburn and Wilburn (2015).

4 Customers and Consumers

This section considers the relationship between B Corps and customers and consumers,¹²⁴ focusing on six components: (1) the consumer landscape and the general demands of current consumers; (2) consumer motivations to purchase from B Corps; (3) moral licensing and the caveats of ethical consumerism B Corps should consider; (4) inspiring consumer change, which highlights some behavioral insights B Corps can leverage to incentivize a shift in consumption patterns; (5) exploring public awareness and perceptions of B Corps; and (6) methodological notes and future research.

4.1 *The Consumer Landscape*

Consumer preferences are trending toward increased awareness and concern for social ethics and sustainability, following wider exposure through digital media (among other sources) to the need for more sustainable consumption. This trend has been further strengthened by a number of corporate scandals such as oil spills and plastic pollution. Accenture's 2018 Global Consumer Pulse Research¹²⁵ revealed that 62% of consumers "want companies to take a stand on current and broadly relevant issues" (e.g., sustainability, transparency, fair employment practices). IBM's research¹²⁶ mirrors this trend, with two out of three global respondents expressing deep concern for environmental issues and three out of four for social issues. This shift in consumer concerns has also been observed in the financial world, with an increased demand for sustainable investments, which resulted in a 96% growth between 2019 and 2020.¹²⁷ More recent data from Accenture's 2021 Global Consumer Pulse report¹²⁸ also found that 50% of consumers strongly agreed that the COVID-19 pandemic made them revise their personal purpose and what they deem as important in life (labeled *reimagined* consumers), while only 17% maintained the same attitudes (labeled *traditional* consumers). Of reimagined consumers, 70% believed private companies were just as responsible as elected governments for societal health compared to 40% of traditional consumers, a perspective that

¹²⁴The B Impact Assessment evaluates "customers" specifically; however, we extend our exploratory overview to consumer behavior more generally, including examples of B Corp customers.

¹²⁵Accenture (2018) From me to we: The rise of the purpose-led brand, p. 2. Available at: https://www.accenture.com/_acnmedia/Thought-Leadership-Assets/PDF/Accenture-CompetitiveAgility-GCPR-POV.pdf.

¹²⁶IBM Institute for Business Value (2021) Sustainability at a Turning Point p. 2. Available at: <https://www.ibm.com/downloads/cas/WLJ7LVP4>.

¹²⁷Ibid, p. 5.

¹²⁸Accenture (2021) Life Reimagined: Mapping the motivations that matter for today's consumers. Available at: https://www.accenture.com/us-en/insights/strategy/_acnmedia/Thought-Leadership-Assets/PDF-4/Accenture-Life-Reimagined-Full-Report.pdf.

correlates with their increased emphasis on categories such as *health and safety*, *product origin*, and *trust and reputation* when choosing products or services. In other words, for most individuals, price and quality are no longer the primary drivers of their decision-making. Intriguingly, reimagined consumers seem to have shifted their social attitudes as well, with 42% recognizing the importance of focusing on others and not just themselves, marking a shift toward empathy. Lastly, 57% of reimagined consumers were ready to switch from their current providers to alternative ones more aligned with their views on pandemic, economic, or societal issues. Importantly, 50% actually took action to change, a stark contrast with the so-called intention-action gap finding that captures a discrepancy in consumers behavior (i.e., 65% indicate they care to buy from purpose-driven brands, but only 26% act on their intention¹²⁹). This suggests the COVID-19 pandemic has been a catalyst for behavior change.¹³⁰

While all factors that became more important to consumers (*health and safety*, *product origin*, and *trust and reputation*) are aspects that B Corps can capitalize on when marketing themselves to consumers, the latter two are particularly relevant. First, product origin encompasses supply-chain ethics, an area where B Corps have potential to excel given that supply-chain ethics is a core determinant of whether a company receives B Corp certification. Delivering ethical products while being transparent about product origins is a major competitive advantage, as 94% of consumers report they are more likely to be loyal to brands that deliver complete transparency.¹³¹ As discussed in Sect. 2, transparency has implications for trust and reputation; specifically in the context of consumer decision-making, it has been found to promote customer loyalty. For example, the B Corp Ben & Jerry's found that consumers are 2.5 times more loyal to purpose-driven and trustworthy companies.¹³² Most importantly, trust safeguards against greenwashing skepticism, which is increasing together with conscious consumerism. Greenwashing suspicions are, predictably, inversely correlated with brand trust,¹³³ and faced with growing CSR claims across a wide spectrum of companies, consumers have difficulty differentiating between genuine CSR and CSR for self-interested purposes such as financial

¹²⁹White K et al. (2019) The Elusive Green Consumer. Harvard Business Review. Available at: <https://hbr.org/2019/07/the-elusive-green-consumer>.

¹³⁰See more consumer insights in: Nielsen (2015) The Sustainability Imperative: New Insights in Consumer Expectations. Available at: https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report_October20202015.pdf.

¹³¹Label Insight (2016) Driving Long-Term Trust and Loyalty Through Transparency. Available at: https://slidelegend.com/driving-long-term-trust-and-loyalty-through-label-insight_5b0290778ead0e800b8b4574.html.

¹³²Lomonaco (2018) Be Nice Or Leave: The Pragmatic Case For B Corps. In: Forbes. <https://www.forbes.com/sites/forbesagencycouncil/2018/01/22/be-nice-or-leave-the-pragmatic-case-for-B-Corps/?sh=405a8dea4621>.

¹³³Chen and Chang (2013).

gain.¹³⁴ Parguel and colleagues¹³⁵ suggest independently generated sustainability ratings as a possible solution. Thus, B Corps could educate and inform consumers more generally about B Impact Assessment scores and use their scores as performance markers in target marketing areas to differentiate themselves from competitors while ensuring scores genuinely reflect their practices. A limitation of this approach, however, is that in the case of various ratings, most companies could pick and choose to find one that provides “proof” of their positive impact. So, it is crucial for B Corps to clearly communicate their scores in a consistent and structured manner and to emphasize their accountability to B Lab’s assessment and on-site audits. Demonstrating accountability to a consistent third-party evaluator in a standardized manner will most likely increase trust and company reputation among consumers; however, a prerequisite of the success of this process is that consumers are aware of the certification itself and its rigorous standards.

4.2 Consumer Motivations Behind B Corp Purchases

To date, only two studies¹³⁶ have investigated consumer motivations and intentions to purchase specifically from B Corps; one is qualitative and the other quantitative, and both were carried out in Chile, a growing hub for B Corps.

The first study¹³⁷ relied on semi-structured interviews to identify decision chains that underlie participants’ purchase motivations. An analysis of which attributes of B Corp products or services are most often mentioned found that *recyclable, reusable, or recycled products*, and the *B Corp accreditation* itself were the main factors. When prompted on *why* these were important, participants responded by linking them to impacts such as *reduced pollution and waste, helping local communities*, and, more interestingly, a strong association between the *accreditation* label and *increased trust*, as mentioned in Sect. 4.1. At the very core of participants’ rationales behind the mentioned attributes and impacts, the researchers identified two overarching consumer values: (1) *intrinsic socio-environmental responsibility* and (2) *self-satisfaction*. Interestingly, the relationship between positive impacts (e.g., reduced pollution) and the *self-satisfaction* motive was interlinked by participants’ feeling they are an *agent of change* (i.e., on *reducing pollution, helping others/local communities, or being part of a purposeful movement*) and feeling gratified their actions to have an *actual positive impact*.

These two governing values are consistent with results from behavioral science suggesting that conforming to social norms and a desire to live in accordance with an

¹³⁴Parguel et al. (2011).

¹³⁵*Ibid.*

¹³⁶Bianchi et al. (2020); Bianchi et al. (2022).

¹³⁷Bianchi et al. (2020).

idealized self are powerful catalysts for behavior change.¹³⁸ Implicitly, if social norms favor heightened environmental responsibility, they will influence individuals' acceptance of these values as well, thus increasing the likelihood that individuals will develop an internal moral compass guided by sustainable-behavior norms. In turn, as their reference of what constitutes personal moral behavior changes, it precipitates behavior change such that they adhere to their own moral compass, ultimately leading to self-satisfaction. Thus, B Corps can appeal to various consumer values and motivations when promoting themselves. First, they can emphasize the role consumers play as *agents of change*, thereby eliciting *self-satisfaction* as well as appealing to their *intrinsic socio-environmental responsibility*; second, they can emphasize social norms by, for example, outlining the proportion of consumers who engage in ethical consumerism, thus incentivizing individual consumers to follow these social norms.

The second study¹³⁹ replicates the finding that intrinsic socio-environmental responsibility and increased self-satisfaction are related to consumer intentions to purchase from B Corps. In addition, they also find that perceived behavioral control is significantly correlated with purchase intention. Perceived behavioral control is the belief that one is able to execute a particular behavior. Financial resources are often necessary for sustainable consumption and are thus tied to the perceived behavioral control that one can indeed purchase from B Corps. It follows that the perceived behavioral control of consumers intending to purchase from B Corps will be influenced by their financial resources and willingness to pay. On sustainable consumption more generally, surveys have found that between 45%¹⁴⁰ and 57%¹⁴¹ of consumers were willing to pay a premium for sustainable brands or brands matching their values. However, we believe that B Corps, because of their commitment to consumers and communities at large, should also consider lower-income groups and attempt to make their products or services more accessible where possible. Inaccessible B-certified products or services would be demotivating to this demographic, caused by a loss of perceived behavioral control, which would likely result in lower adoption rates. In Sect. 4.5.2, we further present consumer insights on the price perception of B Corps in lower-income demographics.

Insights from Sects. 4.1 to 4.2 highlight several important aspects: (1) growing consumer demand for conscious providers, (2) a diversification of consumer priorities on what they value when making purchasing decisions, (3) growing greenwashing skepticism due to failed CSR claims, and (4) the need for trustworthy and credible companies that deliver on their commitments. These represent a vast

¹³⁸Dolan et al. (2012); White et al. (2019).

¹³⁹Bianchi et al. (2022).

¹⁴⁰Accenture (2021) Life Reimagined: Mapping the motivations that matter for today's consumers, p. 30–33. Available at: https://www.accenture.com/us-en/insights/strategy/_acnmedia/Thought-Leadership-Assets/PDF-4/Accenture-Life-Reimagined-Full-Report.pdf.

¹⁴¹IBM Institute for Business Value (2021) Sustainability at a Turning Point p. 4. Available at: <https://www.ibm.com/downloads/cas/WLJ7LVP4>.

opportunity for B Corps to leverage their certification to reaffirm customer trust, avoid greenwashing skepticism, and highlight their contributions through B Impact Assessment scores.

4.3 *Moral Licensing*

While an upward trend in ethical consumerism may appear strictly beneficial when taken at face value, its actual effects may be more complex. Behavioral research points to important considerations when evaluating the macro impact B Corp consumerism has on the environment, namely, moral licensing and single action bias. Moral licensing is the idea that a good deed may give individuals leeway to engage in subsequent unethical or immoral behavior.¹⁴² A similar concept is the single action bias posited by Weber,¹⁴³ which describes how decision-makers faced with a risk are likely to take a single action to reduce it, after which they are far less likely to take further actions. The action taken is not necessarily the best or most effective at achieving their goal, merely the first. Thus, consumers concerned with climate change may shop at a B Corp committed to reducing carbon footprint, consider their dues paid, and feel justified in continuing to engage in other harmful practices. Consequently, a mere increase in the number of B Corp customers is not necessarily reflective of an overall improvement in environmentally friendly actions. As Mazar and Zhong¹⁴⁴ notice, sustainable products do not automatically imply a greener, better consumer.

Numerous studies have found evidence of moral licensing in social and environmental domains; for example, a controlled field study followed a campaign to reduce water consumption¹⁴⁵ and found a successful decrease in water consumption was offset by an increase in electricity consumption by the same households. In a laboratory experiment in which participants shopped in either a green store or a conventional store, Mazar and Zhong¹⁴⁶ found that green-store shoppers were subsequently less generous and more likely to cheat and steal than their counterparts. Importantly, this effect was found only for those who actually shopped in the store, while mere exposure to the store actually led to more generosity, pointing to the importance of the action itself. Alongside moral licensing, ample evidence has been found for moral cleansing, the desire to perform a good deed after one deemed immoral,¹⁴⁷ which may lead to an increase of B Corp consumerism. Indeed, a recent

¹⁴² Merritt et al. (2010).

¹⁴³ Weber (1997); Weber (2006).

¹⁴⁴ Mazar and Zhong (2010).

¹⁴⁵ Tiefenbeck et al. (2013).

¹⁴⁶ Mazar and Zhong (2010).

¹⁴⁷ E.g., Jordan et al. (2011); Sachdeva et al. (2009); Conway and Peetz (2012).

study by Schlegelmilch and Simbrunner¹⁴⁸ found that people who had recently bought a luxury item, potentially considered wasteful and immoral, donated significantly more than those who had not.

Drawing on research of companies with CSR practices may also shed light on how moral licensing may be displayed by those working for B Corps. List and Momeni¹⁴⁹ found that, when randomly assigned to different company types, those hired to do a task by a company with notable CSR practices were more likely to misbehave on the job than people hired by companies without them. This was especially the case when CSR practices were framed as prosocial acts of the workers themselves, that is, “a donation to charity on behalf of the worker” rather than “a donation to charity.” Encouragingly, these effects disappeared when participants chose which kind of company they entered into contract with, which may indicate that those choosing to work for B Corps are less likely to use their employment as moral licensing for immoral actions. This finding highlights narratives that conflict with moral licensing, namely consistency and positive spillover effects. The consistency effect¹⁵⁰ refers to people’s desires to act in ways that are consistent with their long-term goals and personality traits. Thus, those who have strong environmental concerns are more likely to choose actions that are consistent with this ideal rather than using good deeds as justifications for bad ones.¹⁵¹ Similarly, positive (and negative) spillover effects¹⁵² describe how engaging in one action may act as a gateway for choosing similar actions in the future. These findings suggest that the mere implementation of CSR standards is insufficient to drive positive behavior change but should be matched by strategies to develop intrinsic motivation for prosocial behavior, which leads to consistent prosocial actions.

Overall, a concern for both consumers and workers who engage in ethical behavior is moral licensing (the tendency to feel justified in engaging in an unsustainable behavior after having performed an “ethical” action). However, this phenomenon is paralleled by that of consistency and spillover effects, which may reflect differing underlying values driving one’s action. For example, consumers or workers who engage in sustainable behaviors because of their intrinsic value structure are less likely to engage in moral licensing (and thus exhibit consistent actions). Conversely, those who engage in sustainable behavior as an external social sign of their own virtue are more likely to engage in moral licensing (and thus not display consistent actions). This process is also modulated by individuals’ perceptions of their action: namely, if they view it as *commitment* to a goal or as *incremental progress* toward a goal.¹⁵³ If the sustainable action is viewed as a *commitment* to a goal, they are likely to choose actions consistent with previous ones to honor the

¹⁴⁸Schlegelmilch and Simbrunner (2019).

¹⁴⁹List and Momeni (2021).

¹⁵⁰E.g., Conway and Peetz (2012).

¹⁵¹Meijers et al. (2019).

¹⁵²E.g., Thøgersen (1999).

¹⁵³Miller and Effron (2010).

commitment. Conversely, if they view it as *incremental progress*, a feeling of accomplishment might facilitate their moral licensing of a less sustainable choice. Taken together, this highlights the importance of how sustainable choices are presented. B Corps whose pitches appeal to people’s long-term commitment to sustainability and pro-sociality may be more successful in attracting those who have performed similar actions in the past and are driven by intrinsic values.

4.4 Inspiring Consumer Change

This section highlights how B Corps can inspire consumer change by promoting sustainability practices such as degrowth thinking and reduced consumption of unnecessary goods, as well as by applying “nudges”¹⁵⁴ and other techniques that influence behavior.

4.4.1 Sustainable Mindsets: Degrowth Thinking

Hankammer and colleagues¹⁵⁵ advocate for degrowth and identify principles that hybrid companies (which include B Corps) can employ to educate and incentivize consumer behavior. One such principle pertains to promoting social and business acceptance of degrowth thinking—that is, rejecting the idea that continued growth is a prerequisite for success or well-being and supporting a perspective beyond mainstream consumerism and materialism.¹⁵⁶ Separately, and inspired by Bhutan’s Gross National Happiness measure,¹⁵⁷ alternative or complementary measures of GDP per capita have been developed, which include psychological health, population health, and sustainability (e.g., the UN Human Development Index; the OECD Better Life Index), among others. Together these suggest a growing awareness of the need to redefine value and wealth beyond economic measures, to include metrics that reflect human and environmental well-being. In this context, B Corps can promote acceptance of degrowth thinking by communicating their corporate values and conducting educational campaigns. Another principle related to degrowth thinking is that of sufficiency; in other words, educating consumers to moderate their net demand of goods and services that are not necessary for survival (e.g., reducing clothing

¹⁵⁴ See Thaler and Sunstein (2009).

¹⁵⁵ Hankammer et al. (2021).

¹⁵⁶ Schneider et al. (2010); Lorek and Fuchs (2013).

¹⁵⁷ See *Oxford Poverty and Human Development Initiative* for more details: <https://ophi.org.uk/policy/gross-national-happiness-index/>.

demand, as fast fashion is a major freshwater pollutant¹⁵⁸). By combining degrowth and sufficiency, B Corps can also help facilitate the reuse and sharing of products in the transition from a linear to a circular economy (e.g., support of the 7R principle: rethink, refuse, reduce, reuse, repair, regift, and recycle).

4.4.2 Capitalizing on Decision-Making Research: MINDSPACE and SHIFT

Based on decades of aggregated decision-making research influenced by both cognitive and affective factors, scholars have formulated two powerful frameworks that can guide interventions on consumer behavior: MINDSPACE¹⁵⁹ and SHIFT.¹⁶⁰ MINDSPACE stands for: Messenger, Incentives, Norms, Defaults, Salience, Priming, Affect, Commitment, and Ego; SHIFT stands for: Social Influence; Habit Formation; Individual Self; Feelings and Cognition; and Tangibility. Each of these represent a set of principles that can be implemented at different levels (e.g., social norms, habits) to generate behavioral results with the potential to reduce consumers' intention-action gap. Tables 1 and 2 present a summary of each framework.

Noticeable overlap exists between the two frameworks; for example, Social Influence, which includes social norms, corresponds to Norms, and Individual Self corresponds to Ego. The scopes of the two frameworks are not mutually exclusive but complementary, each taking slightly different approaches. SHIFT demonstrates a more applied approach (e.g., tangibility, habits), while MINDSPACE focuses more on fundamental modalities underlying information processing (e.g., salience, priming), and both converge on complex information processing (e.g., social influence, affect). While discussing each principle in depth is beyond the scope of this chapter, we will highlight the principles we consider most relevant for B Corps to incorporate into their activities to positively influence consumer behavior. We strongly encourage those interested to read the cited articles for each framework.

Social Influence (Messenger and Norms) and the Individual Self (Ego)

The relationship between social norms and internalized values and their influence on acting in accordance with an ideal moral self was already introduced in the context of consumer motivations for B Corps purchases (see Sect. 4.2). These aspects represent a keyway B Corps can inspire consumer change. The B Corp label can encourage consumers who are not intrinsically motivated by ethical consumption to purchase

¹⁵⁸World Economic Forum (2020) These facts show how unsustainable the fashion industry is. Available at: <https://www.weforum.org/agenda/2020/01/fashion-industry-carbon-unsustainable-environment-pollution/>.

¹⁵⁹Dolan et al. (2012).

¹⁶⁰White et al. (2019).

Table 1 Summary of MINDSPACE

MINDSPACE	
Messenger	People are heavily influenced by who communicates information to them (e.g., they give more weight to voices of people similar to them, or they complying to authority figures)
Incentives	People's responses to incentives are influenced by mental shortcuts (heuristics) and cognitive biases (e.g., strongly avoiding losses [loss aversion]; tendency to overestimate small probabilities)
Norms	What others do and think (social norms) strongly influences individual behavior
Defaults	People's tendency to "go with the flow" of preset options (defaults)
Saliency	Attention is drawn to the most relevant or novel stimulus
Priming	Cognition and subsequent behavior are influenced by subconscious cues, particularly if these cues were presented repeatedly before (e.g., if one has seen the logo of a company multiple times without knowing what it stands for, they might be more likely to purchase an item that displays that logo later on, without being aware of it)
Affect	Emotions and emotional associations are powerful drivers of content and depth of thought, which subsequently shape behavior
Commitments	Making commitments and consistently honoring them increases self-efficacy and self-satisfaction, so seeking commitments can positively alter behavior
Ego	A tendency for people to act in ways that elicit positive self-feelings and/or are in accordance with their self-concepts

products by appealing to their sense of social identity or community pride (provided they recognize the label and are aware of what it stands for). This behavior is a form of signaling, that is, communicating one's values and preferences to other community members, thus using the label for its functional utility (gaining social recognition) rather than its intrinsic value. Regardless of motivation, the net result of this kind of behavior is positive. Similarly, consumers who intrinsically value ethical consumption will act according to their idealized self-concept and self-defined moral compass;¹⁶¹ therefore, in this case, the label would appeal to consumers' internal value system and lead to feelings of self-satisfaction or self-interest and help maintain a positive self-concept (again, provided the consumer recognizes the label's meaning).

A second way social norms can promote change is through peer comparison or peer relatability (which relates back to social identity). For example, when a hotel room displayed a sign asking people to recycle towels, 35% complied; however, when the sign included that *most guests* recycled towels at least once (thus including a social cue), 44% recycled.¹⁶² Similar results have been seen in other sectors,

¹⁶¹ Sunstein and Reisch (2013), p. 3.

¹⁶² Cialdini (2003).

Table 2 Summary of SHIFT

SHIFT	
Social influence	Comprises three aspects: (1) social norms: Beliefs about what is socially appropriate and approved of in a given context (2) social identity: Feelings of belonging to a certain group that create a social self (3) social desirability: The inclination to act in ways that make oneself feel socially desirable, as influenced by both norms and social identity (similar to norms in MINDSPACE)
Habit formation	Habits are persistent and automatic behaviors elicited by contextual cues. After having formed sustainable habits, behavior will be easier to maintain; however, a change in habits requires a catalyst (similar to commitments in MINDSPACE)
Individual self	Comprises several aspects, among which are: (1) A tendency to act to maintain a positive self-concept and/or (2) in one's self-interest (3) An inclination for self-consistency (repeating a positive action) to maintain (1) and (2) (4) The belief that one is capable of engaging in said action (i.e., self-efficacy; similar to Ego in MINDSPACE)
Feelings and cognition	Feelings: Both negative and positive feelings will influence decision-making and behavior change (similar to affect in MINDSPACE); the kind of emotion that is elicited will result in differentiated behavioral outcomes Cognition: The quantity and way in which information is presented matters (similar to framing in MINDSPACE).
Tangibility	Communicating the outcome of sustainable behaviors in a concrete, temporally close, and measurable fashion, in a local/proximal context, to counteract the often abstract, vague, and temporally distant mainstream communication

including energy saving,¹⁶³ charity donations,¹⁶⁴ and seatbelt wearing.¹⁶⁵ By including social norm cues in their promotion, packaging, and websites, B Corps can influence their customers (and consumers who come across the information randomly, for example on social media).

Lastly, *messengers*, or the parties who deliver the message, have tremendous influence on how much consumers consider and integrate information in their decision-making. Research has identified that signals of authority can influence people both positively (to integrate information) and negatively (to discard it), likely based on one's personality structure. Other strong influencers include indicators of prestige, socioeconomic status, competence, attractiveness, whether the communicator is similar or an in-group member, and displays of leader vulnerability.¹⁶⁶ When B Corps engage in public communication or promotion, they can decide what kind of communicator they want to employ, and which factors will influence their audience based on the audience's aggregate values. For example, if most of the

¹⁶³Allcott (2011).

¹⁶⁴Frey and Meier (2004).

¹⁶⁵Linkenbach and Perkins (2003).

¹⁶⁶For a detailed account see: Martin and Marks (2019).

audience is concerned with prestige, they are more likely to integrate information if someone famous supports a sustainable behavior. Likewise, if the audience's primary concern is environmental conservation, an authority figure (e.g., expert in the field) highlighting tangible actions that can be taken would be more suitable.

Feelings and Cognition (Affect)

Just as the assumption decision-making is a purely rational process dictated by utility maximization is incorrect, research has shown that assuming decision-making relies entirely on cognitive processes (and biases) is also inaccurate. Emotions are an integral part of decision-making and affect thinking in several ways, for example by influencing content and depth of thought and goal activation.¹⁶⁷ Content of thought refers to the type of information emotions elicit at a cognitive level, depth of thought to the thoroughness of analysis incited by different types of emotions, and goal activation to emotions' ability to activate the desire or motivation to attain a certain goal. Further, emotions can be characterized beyond their valence (i.e., positive or negative); for example, they can be associated with appraisals of high or low certainty ("*certainty is the degree to which future events seem predictable and comprehensible*").¹⁶⁸ Specifically, fear is associated with appraisals of low certainty and anger with high certainty. A low-certainty emotion (e.g., fear) will elicit a systematic and thorough type of thinking, while a high-certainty emotion (e.g., anger or happiness) is more likely to lead to heuristic thinking, thus altering the content and depth of thought. Concerning goal activation, anger represents a powerful catalyst by activating a desire to change a situation.¹⁶⁹ In the context of B Corp activities, an interesting example is Patagonia's "The president stole your land" campaign, which was a response to Donald Trump's reduction of protected national parks land in Utah. It frames the act as an injustice and is likely to trigger the public's anger and subsequent goal activation, increasing the likelihood that the public will engage in rectifying actions and mount political pressure. Concerning positive emotions, engaging in sustainable behaviors often leads to a "warm glow" (overall positive feelings characterized by the satisfaction and fulfillment of having done something considered good), which leads to perceiving the action in a positive light. Another example is that of pride, which results from achieving something one deems as moral and responsible and relates to the maintenance of a positive self-concept as exemplified in Social Influence (Messenger & Norms) and the Individual Self (Ego). Both pride and warm glow have been identified as precipitants of continued sustainable behaviors.¹⁷⁰

¹⁶⁷ Lerner et al. (2007, 2015).

¹⁶⁸ Lerner et al. (2015), p. 806

¹⁶⁹ For more details on emotions and appraisal tendencies, see: Lerner et al. (2015); Lerner and Keltner (2000); Lerner and Keltner (2001).

¹⁷⁰ Bissing-Olson et al. (2016); van der Linden (2018).

To summarize, B Corps can strategically design their campaigns (whether promotional or activist) to elicit specific emotions that will shape their consumers' content and depth of thought and goal activation. For example, in the context of reducing plastic pollution, B Corps can leverage fear of the effects of microplastics on human health to motivate consumers to reduce their plastic consumption and demand, given that fear is characterized by low certainty of future outcomes and can thus promote actions aimed to reduce uncertainty (in this case, reducing consumption). Similarly, B Corps can trigger a sense of pride in consumers who have achieved a specific target, further motivating them to continue engaging in that behavior and maintain a positive self-concept.

Commitments and Habit Formation

Behavior change is a resource demanding goal-directed process that requires cognitive control in the form of cost-benefits calculations to estimate optimal choices. Conversely, once a habit has been formed after repeatedly engaging in a goal-directed action through exposure to a cue, actions become automatic (i.e., transitions from a goal-directed system to a less computationally intensive "model free" system)¹⁷¹ and bear considerably lower cognitive costs, thus facilitating sustainable engagement. One way to facilitate the habit formation process is by creating commitments that serve as a cognitive guide during goal-directed behavior, potentially increasing the likelihood of sustained sustainable behaviors. B Corps can leverage three techniques to promote both commitments and habit formation: (1) prompts/nudges (succinct messages about what ought to be done to achieve a goal); (2) targeted incentives (e.g., rewards, gifts, matching donation schemes); and (3) feedback that positively reinforces a consumer behavior (e.g., through personalized consumer messages). All of these can be successfully implemented in addition to social comparisons. For example, a prompt can say "*60% of our customers have reduced their plastic use by switching to our reusable water bottles*" or, to increase relatability, "*70% of customers in your age group have switched to reusable water bottles.*"

Decision Fatigue, Priming, and Salience

The phenomenon of choice overload has been widely documented¹⁷² and refers to the diminishing returns of increasing choice; in other words, there is an optimal point at which multiple options are beneficial, after which having many options becomes detrimental and has been associated with dissatisfaction and decision avoidance and

¹⁷¹O'Doherty et al. (2017).

¹⁷²See Schwartz (2004).

paralysis.¹⁷³ With numerous brands claiming various degrees of CSR and with consumers unsure which are genuine or not, having an easily perceivable and trustworthy visual cue can facilitate decision-making. Here, priming is achieved through repeated exposure to the B label or B Corp-related visual cues. After repeated priming to this cue, it is likely the label will become more salient (i.e., more easily recognizable and evident). Thus, the B label can guide ethics-concerned consumers into choosing a product more easily and serve to mitigate the costs of choice paralysis and avoid decision fatigue. B Corps can ensure they routinely prominently display the certification and do their best to prime their consumers with related visual cues that create positive associations (e.g., a smiley face, a green symbol, or succinct information about CSR achievements in addition to the label).

4.5 Exploring Public Awareness and Perceptions of B Corps

Public awareness is paramount to ensuring the success of the B Corp movement: if consumers do not recognize the B certification label, the behavioral phenomena outlined above are unlikely to be effective, as consumers would not be able to use recognition or rely on take-the-best heuristics. To date, there has been only one estimate of public awareness of B Corps, which resides at an astonishingly low of 7% in 2017,¹⁷⁴ far from levels required to capitalize on the aforementioned benefits. The lack of awareness on what a B certification means can impact several other factors, such as perceptions of trustworthiness or, inversely, greenwashing skepticism, thus undermining one of the main motives for establishing standards, as discussed at the end of Sect. 1. As already mentioned, trust is paramount to building mutual and lasting relationships with all concerned stakeholders. It follows that if consumers intuitively perceive the B label as a marketing gimmick to sell more under the guise of sustainability, the movement's future development will be negatively impacted. Likewise, without a nudge to incentivize consumers to switch to more sustainable alternatives, they are likely to continue using the default or status quo option. Thus, both recognition and trust of the label are necessary for adoption and successful nudging. B Corps could learn from other types of labeling, such as "bio" or "organic" labels in the food industry, for which marketing studies¹⁷⁵ demonstrated a significant relationship between the use of food labels, knowledge, and consumer choice. Further, no research to date has investigated public perceptions of trust and greenwashing concerning B Corps nor compared perceptions of B Corps and other types of companies (specifically, for-profit companies with generic CSR programs). Thus, we conducted a survey to generate novel data to evaluate

¹⁷³Iyengar and Lepper (2000); Adriatico et al. (2022); Manolică et al. (2021).

¹⁷⁴Guarna (2019), p. 24.

¹⁷⁵Miller and Cassady (2015).

these aspects. The sections that follow discuss the survey methods, results, and implications.

4.5.1 Materials and Methods

We implemented an online survey in the UK and US with 620 participants (recruited via the online platform Prolific¹⁷⁶). Of these participants, 312 were in the UK (MedianAge = 41.7, MinAge = 18, MaxAge = 73, SDAge = 13.8, 49.3% female) and 308 in the US (MedianAge = 33, MinAge = 18, MaxAge = 80, SDAge = 14.3, 48.7% female). The survey comprised several sections, including: (1) a sociodemographic questionnaire; (2) a 7-point Likert scale to measure self-reported B Corp familiarity; (3) an objective knowledge quiz about B Corps; (4) a 7-point Likert scale to measure perceptions of whether B Corps provide societal benefits, as well as their perceived trustworthiness and likelihood to engage in greenwashing compared to for-profit companies with CSR policies, and (5) what factors (e.g., better environmental practices, ethical treatment of labor force, transparency, etc.) would be important to respondents when choosing a company's product/service. Between sections (3) and (4), participants were presented with detailed information on B Corps (and its distinction from benefit corporations), alongside a short video summarizing what a B Corp is. In the middle and at the end of the survey, participants had the opportunity to answer an open question regarding their general perceptions of B Corps. The online survey was designed in Psytoolkit¹⁷⁷ and can be accessed online.¹⁷⁸

4.5.2 Results and Discussion

Public Awareness

Consistent with the previous data,¹⁷⁹ our results showed that familiarity with B Corps is still low: across both samples, only 15% of the respondents agreed (with just 3.5% strongly) with the statement, "I am familiar with B Corps," while the majority (83%) disagreed. However, although still low, this result indicates that public awareness of B Corps has slightly increased compared to the 2017 survey. The lack of familiarity with B Corps was further reflected in the questions measuring participants' level of knowledge of B Corps. In a multiple-choice question where participants had to choose three out of five statements that correctly defined B Corps, fewer than 3% identified all three, and only 15% identified at least two, with the rest

¹⁷⁶<https://www.prolific.co/>.

¹⁷⁷ See Stoet (2017) for details.

¹⁷⁸ http://tiny.cc/BP_Survey.

¹⁷⁹ Guarna (2019), p. 24.

identifying a mixture of both correct and incorrect answers. It was also reflected in additional qualitative data obtained through participants' open-ended responses, which indicated they desired more access to information about B Corps, for example: *"I wish there was more outreach to the public to understand which companies have this and which do not"*; *"I had never heard of them before this study - I am unsure if they are more common in the USA? There is a risk that, with a combination of other ethical standards, that the impact could be diluted by the presence of others (e.g. fair trade etc.)"*; *"Often as a consumer, it is hard to distinguish what aspects of production are genuinely ethical and what is 'just for show.'"* In sum, our results highlight that more work needs to be done by B Lab, B Corps, and other similarly oriented social enterprises to extensively engage with consumers to raise awareness on these new types of purpose-driven agents, their importance for society in promoting sustainable practices, and for other businesses considering becoming certified.

Perceptions of Societal Benefit, Trustworthiness, and Greenwashing

Despite most respondents' lack of knowledge on B Corps, they tended to have a positive perception of B Corps. After being provided with a description of what B Corps are and what their ethos is (via a freely available video paired with descriptions), the vast majority (74%) indicated they believed B Corps are beneficial for society. Similarly, 60% of participants reported they believed B Corps could be instrumental in improving business ethics practices. Participants also indicated a preference for B Corps over standard for-profit companies with CSR policies regarding trusting their products or services and said they found B Corps more credible.¹⁸⁰ This higher credibility and trustworthiness was further corroborated by responses on the extent participants believed B Corps' CSR policies were genuine or merely greenwashing: 55% of respondents indicated they believe them genuine. Despite these positive perceptions, when asked directly whether these practices were used instrumentally for financial gains, only 42% of participants disagreed, suggesting a majority are either unsure or actively believe so. Interestingly, we found a significant gender difference,¹⁸¹ with men more likely to distrust B Corps' intentions compared to women.¹⁸² Lastly, when asked to rank from most to least likely to engage in greenwashing (between four options: B Corps, benefit

¹⁸⁰ Measured on a sliding scale between 1 and 10, with 5 representing no preference between the two and above 5 indicating a preference for B Corps. The average score for credibility was 7 and 6.7 for product/service trustworthiness. Both scores were highly significant compared to a distribution with a mean score of 5 (reflecting no preference); p -value < 0.0001.

¹⁸¹ $p = 0.03$

¹⁸² While attributing this finding to a cause is difficult, we speculate gender-based personality differences, such as lower agreeableness and trust in men compared to women, can modulate their respective perceptions of social enterprises. See Weisberg et al. (2011) for more gender-based personality information.

corporations, standard companies with CSR policies, and social enterprises), 67% of participants ranked B Corps as their third or fourth options, and 63% of participants ranked standard companies with CSR policies as their first or second most likely to greenwash.¹⁸³ These somewhat mixed results¹⁸⁴ indicate that better communication on what B Corps are, how compliance with standards is determined, and the motivations of entrepreneurs behind purpose-driven businesses, is necessary to decrease the risk of B Corps misperceptions, which could potentially impact their credibility and success.

Important Factors Consumers Consider When Purchasing from B Corps

In our survey, we also investigated what motivated participants to purchase from B Corps. We found that besides price and quality, environmental, ethical, and social concerns were among the most important factors: 61% were motivated by *ethical treatment of labor force*, 58% by *better environmental practices*, 49% by *transparency*, 36% by *locally produced (if goods)*, 24% by *social/environmental activism*, and 18% by *customer education on sustainable practices*. These results are consistent with information presented in Sect. 4.1. Furthermore, we found a significant¹⁸⁵ gender difference on factors considered most relevant: women were more likely than men to consider (1) *ethical treatment of labor force*, (2) *customer education on sustainable practices*, and (3) *social/environmental activism* when evaluating which brand to purchase from. These results are in line with literature showing that women exhibit more sustainable behaviors¹⁸⁶ and help explain the finding that women are more likely to seek a B Corp certification for their businesses.¹⁸⁷

Qualitative Responses

Despite an overall inclination by participants to trust B Corps more than for-profit companies with CSR policies, some remained skeptical toward this type of social enterprise. Several participants expressed strong views in optional open-answer feedback questions, for instance: “*B Corp seems like a new way to spin CSR with maybe little to no actual positive externalities*”; “*Getting logos on goods is a favourite marketing strategy. It’s mostly to fool the customer*”; “*I am very cynical of these kinds of schemes*”; “*Never heard of B Corps, but all for profit companies*”

¹⁸³Results for benefit corporations and social enterprises were neutral, with 50% of answers on each side.

¹⁸⁴I.e., with a majority being unsure or agreeing that B Corps might still be engaging in CSR only for-profit purposes.

¹⁸⁵*p*-values between 0.02 and 0.04

¹⁸⁶Brough et al. (2016).

¹⁸⁷Grimes et al. (2018).

put profit first. Most engage heavily in marketing, including greenwashing. None can be trusted"; *"Most corporations, no matter what they say, are always in it purely for profit"*; *"I feel that a lot of companies jump on the 'going green' bandwagon for the wrong reasons and to profit from it."* Others also expressed distrust in relation to price: *"My concern that B Corps will use their environmental credentials as an excuse to put a higher price on a product that is 'saving the planet'"*; *"I'm not interested in paying more money to subsidise a marketing gimmick."* These attitudes reflect the damage that instrumental CSR and greenwashing have done at a public level and further supports the need for public education campaigns to restore trust discussed throughout the chapter.

Other respondents expressed aversion to engage with B Corps because of their potential higher prices: *"The key driver of how people feel about this is surely income levels - I unfortunately don't have the luxury of being able to shop as 'ethically' as I would like to, due to being restricted by a low income. If money were not a factor, I would do my best to support companies promoting general social values. However, it IS a factor. As it stands, I would prefer not to order from a company like Amazon, and yet sometimes it is all but unavoidable"*; *"I want to support more sustainable practises, and in theory would be willing to pay more for them. However, just surviving and making it from one month to the next of bills, groceries and supporting a family, can make it harder to care about a B Corp label if it's costing me more money"*; *"Having a disability and not being able to work means that I have to choose the cheapest products, even though it may not tally with my political beliefs"*; *"Everything I pay (usually) is based on lowest price alone. I do care about environment, recycling, etc, but I feel like the people in charge don't care about me, and what I can/cannot afford."* As presented in Sect. 4.2, ensuring that B Corp services and products are financially accessible is crucial to increasing customer base. With rising inflation and depressed wages caused by the COVID-19 pandemic,¹⁸⁸ it is likely that demographic groups falling behind economically will continue to express such feelings of exclusion. Lowering prices while maintaining high ethical and sustainable standards is undoubtedly difficult for many B Corps, particularly small and medium-sized businesses; however, considering more income demographics in their pricing will benefit everyone. On a more positive note, other participants expressed their gratitude for such initiatives—"Considering how much power and influence corporations have in government, I am greatly relieved such initiatives exist. That there are, surprisingly, some good organisations and corporations that realise their power and influence and seem to genuinely care enough to use it for good, for the betterment of society and the planet we live on. It gives me a little more hope for the future of humanity,"—which shows the impact responsible companies can have at a psychological level, as well.

¹⁸⁸Boissay F et al. (2021) Labour Markets and Inflation in the Wake of the Pandemic. Available at: <https://www.bis.org/publ/bisbull47.pdf>.

4.6 *Methodological Note and Future Research*

While surveys and studies relying on self-reports (presented and discussed in Sects. 4.1 and 4.2) are insightful, these have some limitations: (1) the evidence obtained is merely descriptive and cannot be used to support causal inference; (2) qualitative interviews typically rely on non-representative small sample sizes, which affects the generalizability of results; and (3) because of the nature of sustainability-related questions (such as those used in Accenture's research and our survey), it is likely that the results are biased, for instance, due to social desirability effects¹⁸⁹ (i.e., the tendency of individuals to answer in a way they think will favor them in the eyes of others). Such biases are persistent even in anonymous online contexts, as they often operate unconsciously.¹⁹⁰ For example, participants may overreport their willingness to use reusable compared to single-use coffee cups if they believe the former is the socially accepted standard. Such biases might be responsible for the intention-action or attitude-behavior gap; often surveys show increasing public interest in sustainability and positive consumer attitudes while behavioral patterns lag behind expressed intentions.¹⁹¹ We believe such methods can be accompanied by more ecologically valid measures, such as lab or field experiments that entail decision-making processes beyond conscious awareness¹⁹² and offer experimental manipulations that address which factors (e.g., knowledge, experiences) cause preference for B Corps. As discussed in Sect. 3, to determine B Corp-specific effects, future studies should consider systematic comparisons between B Corps and matched for-profit firms to determine whether consumer perceptions and preferences differ. Other aspects of interest would be to investigate if different B Impact scores or a country's legal support of benefit corporations¹⁹³ influence consumer preferences.

5 Community

B Corps have the potential to encourage change beyond their immediate stakeholders (e.g., workers, customers), and, similarly to their general influence on consumers, B Corps can leverage their position to drive systemic change in their communities. The possibilities are only limited by each B Corp's motivation, but to name a few examples, they can stimulate civic engagement, charity, education, and activism; enforce ethical labor throughout their supply chain; and design their activities to contribute to the UN's Sustainable Development Goals (SDGs). This

¹⁸⁹Crowne and Marlowe (1960).

¹⁹⁰Dodou and de Winter (2014).

¹⁹¹Vermeir and Verbeke (2006).

¹⁹²E.g., willingness-to-pay tasks; see Gao and Schroeder (2009).

¹⁹³Or similar, e.g., Societa Benefit in Italy.

section will briefly overview a few ways through which B Corps have been shown to effectively contribute to communities and society at large.

5.1 *Civic Engagement Through Social Media*

Social media communication is particularly accessible and beneficial to the predominantly small and medium-sized B Corps given the low entry barriers and access to large-scale audiences. Such communication can be used for self-promotion, education, and CSR reporting and serve to strengthen the relationship with surrounding communities. CSR communications can enhance brand visibility and reputation and positively influence consumer perceptions.¹⁹⁴ It is important to keep in mind that CSR communications need to be matched with appropriate accountability methods to avoid generating greenwashing-related mistrust. Indeed, some companies withhold from communicating their accomplishments due to wariness they might backfire.¹⁹⁵

To explore how B Corps engage with their communities through social media, one study¹⁹⁶ analyzed Twitter activity throughout the pandemic through the lens of the triple bottom line.¹⁹⁷ They found that communication themes belonged to three principal categories: (1) *social and environmental*, (2) *COVID-19*, and (3) *product and brand promotion*. In the first theme, the most frequent tweet content referred to sustainable practices/materials/products, education, and stakeholder engagement in sustainability. The second's most frequent topics referred to COVID-19-related donations, healthcare worker appreciation, and public health advocacy, while the third's constituted mostly collaborations with influencers and general brand/product promotions. Most interestingly, the frequency of each of the individual topics was approximately equal, suggesting the genuine concern of these B Corps to engage and educate their audience on a wide array of subjects, which is consistent with the movement's overarching ethos. Lastly, when evaluating the social dimension of the triple bottom line (people), specifically in the context of the pandemic, the authors note that B Corps' communications were concerned with building a sense of community by providing emotional support and encouragement, emphasizing the importance of empathy, and consistently showing appreciation for healthcare workers and frontline staff. The latter demonstrates particular consideration given that healthcare workers suffered extensively throughout the pandemic, with burnout

¹⁹⁴U.S. Chamber of Commerce Foundation (2017) *The CSR Effect: Social Media Sentiment and the Impact on Brands*. <https://www.uschamberfoundation.org/reports/csr-effect-social-media-sentiment-and-impact-brands>.

¹⁹⁵Ginder et al. (2021); Mann et al. (2021), p. 5

¹⁹⁶Mann et al. (2021).

¹⁹⁷See Elkington (1997).

rates being as high as 80%.¹⁹⁸ It remains unclear whether their communication was significantly different from that of non-certified companies. Future research should evaluate whether social media engagement of B Corps differs from that of standard companies matched in size (e.g., does it contain more education/sustainability-oriented content), whether it is more positively viewed by their audiences compared to CSR claims of standard companies, and, more interestingly, whether the presence of a new B Corp in a community increases people's respect toward other people and the environment. Nonetheless, during a global crisis, B Corps showed holistic engagement with their communities.

5.2 Civic Engagement Through Corporate Volunteering and Charity

To benefit local or global communities, B Corp employees can engage in two main activities: corporate volunteering and donating to charity. Corporate volunteering enables workers to experience a sense of belonging by connecting with others¹⁹⁹ and subsequently experience heightened psychological well-being by satisfying intrinsic psychological needs. Such outcomes have been associated with lower negative affect in the workplace,²⁰⁰ as well as increased work engagement.²⁰¹ Presumably, the relationship is reciprocal between employees and the receiving community, insofar as the community would also experience social connection and a sense of belonging with implications for psychological well-being.

Overall, B Corps are 2.5 times²⁰² more likely than standard companies to offer employees a minimum of 20 hours per year of paid volunteering time for their nearby communities. This contributes to increasing individuals' intrinsic motivations, as they perceive their work as more meaningful and are thus more inclined to join their company's volunteering programs as an expression of gratitude,²⁰³ which might explain B Corps employees' increased proclivity to volunteer. For example, 39% of Forster Communications' staff²⁰⁴ engaged in 8 h of volunteering per employee above their minimum target, supporting a total of eight charities, while King Arthur Flour (a company certified in the first wave of B Corp certifications in 2007) saw a 500% increase in volunteering hours and a 461% increase in the number

¹⁹⁸ Leo et al. (2021).

¹⁹⁹ Brockner et al. (2014); Rodell et al. (2017).

²⁰⁰ Mojza et al. (2011).

²⁰¹ Boštjančič et al. (2018).

²⁰² Wilburn and Wilburn (2015).

²⁰³ Boštjančič et al. (2018).

²⁰⁴ Forster Communications (2018) Society and the Environment – Our Impact. Available at: <https://www.forster.co.uk/insight/society-environment-impact/>.

of employees who volunteered between 2007 and 2010.²⁰⁵ Concerning charity, certified companies are 68% more likely to donate at least 10% of their profits while also incentivizing their employees to do so. For example, Danskø, a footwear company, matches employee donations,²⁰⁶ while Jelt, a company producing belts from recycled materials, donates all profits to charities supporting veterans and environmental protection.²⁰⁷ Intriguingly, matching donations have been shown to be more effective in engendering philanthropic behavior, alongside increased net sums donated, compared to other donation schemes such as rebates or standard donations.²⁰⁸

5.3 *Beyond Immediate Impact*

The possible contributions of B Corps to communities and the environment extend beyond those mentioned above. First, they strive to include disadvantaged communities and minority groups: 53% of B Corps reported that at least 40% of staff corresponded to minority or disadvantaged groups, and 18% were more likely to partner with suppliers from low-income communities.²⁰⁹ An inspiring example is Jelt, which employs people from prisons through the Montana Correctional Enterprise Program, enabling inmates to acquire job experience and earn a wage that can be used for restitution, child support, or savings; this is one of the many initiatives they established to empower disadvantaged communities.²¹⁰ Data show that inmate education and vocational training have an instrumental role in reducing recidivism.^{211,212} Second, B Corps implement sustainable practices and are 47% more likely to utilize renewable energy: 90% of B Corps reported using recycled materials, which shows awareness and implementation of circular economy practices.²¹³ Third, emerging evidence from Colombia suggests B Corp activity is contributing to the SDGs.²¹⁴ This might be one of the most impactful aspects of B Corp activity,

²⁰⁵ Wilburn and Wilburn (2015).

²⁰⁶ Ibid.

²⁰⁷ Hankammer et al. (2021). p. 10.

²⁰⁸ Eckel and Grossman (2006); Bernardic et al. (2021).

²⁰⁹ Wilburn and Wilburn (2015).

²¹⁰ Hankammer et al. (2021).

²¹¹ Northwestern University (n.d.) Benefits of Prison Education – Northwestern Prison Education Program. Available at: <https://sites.northwestern.edu/npep/benefits-of-prison-education/>.

²¹² Bushway S (2016) Reentry and Prison Work Programs. In: Urban Institute. Available at: <https://www.urban.org/research/publication/reentry-and-prison-work-programs>.

²¹³ Wilburn and Wilburn (2015).

²¹⁴ Tabares (2021).

since achieving the SDGs would require between US\$5 to \$7 trillion per year,²¹⁵ far from current investment levels and unattainable by government spending alone. In fact, experts consider that without private sector involvement, attaining SDGs is impossible.²¹⁶ As such, B Corps' involvement in achieving the SDGs both through education and action is crucial. Altogether, the potential for B Corp contribution to society reaches far beyond their local microeconomies comprising their relationships with workers, customers, and local communities; it extends into society at large through their social media education, high rates of corporate volunteering, charity, inclusion of marginalized members of society, and SDG contribution.

6 Conclusion

B Corps are in an ideal position to meet the emerging needs of consumers, employees, and communities with their more holistic, stakeholder-conscious paradigm; more collaborative, purposeful, and healthy work environments; sustainable options for consumers; and practices and mindsets that favor sustainability and social responsibility. Research has shown that younger generations particularly value companies that actively promote these values and practices. Furthermore, the B certification has great potential as a tool to combat the mistrust generated by greenwashing and instrumental CSR, reestablishing trust between for-profit companies and the communities in which they are embedded. However, there are large gaps in the public's understanding of the B Corp label and what the certification entails, and a label is only as powerful as the public's awareness of what it represents. Therefore, it behooves B Corps to invest in education and information campaigns to market their strengths to potential employees and customers. In addition, to date, there is very little research on B Corps and how they compare to similar companies in their practices, communication, and perception by employees and consumers. Future studies in this area would provide valuable insight into B Corp performance and highlight areas for future improvement.

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²¹⁵United Nations Conference on Trade and Development (2014) *World Investment Report 2014*. Available at: https://unctad.org/system/files/official-document/wir2014_en.pdf.

²¹⁶van Zanten and van Tulder (2018).

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B Lab and the Process of Certifying B Corps



Ana Montiel Vargas

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1 Introduction

In recent years, especially after the global economic crisis of 2008, the debate on what future enterprises should be like has intensified, leading to the acceleration of development of social enterprises worldwide. Along with the increase in the number and importance of traditional social economy enterprises (e.g., cooperatives, mutual insurance companies, and foundations), new forms of social entrepreneurship have

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emerged (e.g., low-yield joint stock companies, the economy of communion enterprises).¹ In addition, there has also been an intense process of legal regulation as a public recognition of social enterprises; sometimes included in the category of social economy enterprises, and in other cases with special and autonomous regulations.² This has led to different understandings of social enterprises depending on location, which the EU has attempted to soften with different initiatives. As an example of these efforts, one can point to the content of the 2011 European Commission Communication entitled “Building an ecosystem to promote social enterprises at the heart of the social economy and social innovation,” known as the Social Business Initiative, as a reference. This communication, strongly influenced by the work of the EMES network, defines social enterprise as³:

An enterprise whose main objective is to have a social impact, rather than to generate profits for its owners or its partners. It operates in the market by providing goods and services in an entrepreneurial and innovative manner and uses its surpluses mainly for social purposes. It is subject to responsible and transparent management, in particular through the association of its employees, its customers, and stakeholders.

Further, Muhammad Yunus, the Bangladeshi economist who won the 2006 Nobel Peace Prize for the implementation of the concept of microcredit since 1974 and the founding of the Grameen Bank in 1983, defined it in simple terms⁴:

As a non-loss, non-dividend enterprise designed to address a social objective.

In this complex context of social enterprises, the certified B-Corp phenomenon emerged a few years ago. It is a type of social enterprise framed in the fourth sector, which stands out for its great international extension, in contrast with the few existing doctrinal studies on the subject. Certified B Corps are companies that have successfully completed the process required to obtain private certification, granted by the B Lab foundation. Against this background, the general objective of this study is to explain the certified B-Corp phenomenon. First, we explore the origin of the B Movement, which began with the creation of the B Lab foundation. Then, we analyze the international expansion of this entrepreneurial phenomenon. Second, we discuss the B Impact Assessment, a tool used to measure the impact of each company and evaluate the fulfillment of economic, social, and environmental objectives. Following the accreditation scheme, once a company completes the B Impact Assessment, it receives the B Impact Report and is able to proceed to the signing of the Certified B Companies Agreements, which outline the rights and obligations that must also be met.

¹In 2015, there were two million social enterprises in the EU, representing 10% of all European enterprises. In 2017, the United Nations General Assembly, in its Report “Cooperatives in Social Development,” indicated that the social economy contributed approximately 7% of the world’s annual GDP. See WBCSD—World Business Council for Sustainable Development (2019).

²On the subject of this process, the study *A map of social enterprises and their ecosystems in Europe*, by the European Commission (2015), is of great interest.

³European Commission (2011, p. 2).

⁴Yunus (2010, p. 13).

Finally, it is important to note that the number of certified B Corps has been increasing worldwide. Therefore, in a book dedicated to benefit corporations, it is of interest to carry out a detailed study analyzing both the B movement and the private figure par excellence that represents it, that is, the certified B Corps.

2 Origin, Structure, and Development of the Certificated B Corp Movement

In 2006, in the United States, Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy were searching for a different business model that transcends economic concerns, after witnessing the social consequences that the sale of the companies they had created to multinationals had on their local environment (especially the cancellation of contracts with suppliers and workers).⁵ Subsequently, after considering different options, they created the B Lab foundation in the city of Pennsylvania in 2006.⁶ The goal of this non-profit organization [incorporated under Section 501(c)3 of the U.S. Code] was to promote the creation and development of B Corps with the idea of changing the way companies do business and creating positive social and environmental impacts.⁷ The letter “B” translates into obtaining a benefit for society beyond the traditional definition of profit that responds only to the interests of shareholders, thus achieving both social and economic objectives.⁸

B Lab defines certificated B Corps as⁹:

Companies whose shareholders assume the management of social and environmental impacts with the same rigor as financial ones; approve an external evaluation founded on global, robust, and recognized parameters; and modify the fiduciary responsibility in the legal constitution of the company to include the commitment to consider non-financial interests at the same level as financial ones and to have a positive impact on society and nature.

⁵Bart Houlahan and Jay Coen Gilbert were co-founding partners of the basketball shoe company AND1, which was sold in 2005 to American Sporting Goods for \$250,000,000; an offer accepted under pressure from shareholders. Something similar had already happened years before, with the sale of the famous Ben & Jerry’s ice cream company, in which co-founding partners Ben Cohen and Jerry Greenfield were forced by their shareholders to sell it to the multinational Unilever (Honeyman and Tiffany 2019).

⁶Blanco et al. (2018, p. 81).

⁷Marquis (2020).

⁸Suntae et al. (2016).

⁹Official definition from its website: <https://bcorporation.net/about-b-corps>.

2.1 *B Lab and the International Expansion of the B Corp Movement*

B Lab is the organization in charge of advising, supporting, and finally granting B Corp certifications, as well as their supervision and control. It is financed by annual fees from companies certified as B Corps and private investments. B Lab is structured around three bodies: the Board of Directors, the Global Governance Council, and the Standards Advisory Council. The Board of Directors appoints advisory boards to ensure the continued incorporation of best ideas and practices into B Lab's objectives and activities, and has final decision-making authority over their recommendations. The Global Governance Council consists of representatives from each global partner organization (the U.S., Canada, etc.) and the Board of Directors, which includes among its responsibilities the global expansion of the B Corp movement. The Standards Advisory Council consists of 20 independent members, including academic experts and practitioners who create and oversee the performance standards used to certify B Corps.¹⁰

To support and develop the B Corp movement worldwide, B Lab has created a network of B Lab Global Partners as affiliated institutions. Currently, they exist in Latin America (Sistema B¹¹), the United States and Canada (B Lab US and Canada¹²), the United Kingdom (B Lab UK¹³), Oceania (B Lab Australia & New Zealand¹⁴), Taiwan (B Lab Taiwan¹⁵), and the European Union (B Lab Europe¹⁶). In addition, B Lab has B Market Builders, as sub-subsidiaries in the East Asian area, in countries where the movement is still in its early stages, such as Japan, China, Korea, Singapore, and Hong Kong.

Finally, there are other types of entities that promote and support the B Corp movement; which can be divided into two groups. The first group include the different foundations that represent B Lab in specific countries such as B Lab Spain,¹⁷ B Lab France,¹⁸ B Lab Benelux,¹⁹ B Lab Canada, B Lab Denmark,²⁰ B

¹⁰The functions and composition of these organs can be seen in more detail in the link above: <https://bcorporation.net/about-b-lab/standards-and-governance>.

¹¹About Sistema B and their main goals, see: <https://sistemab.org/quienes-somos-4/>.

¹²Access to its website: <https://bcorporation.net/about-b-lab/country-partner/canada>.

¹³Access to its website: <https://bcorporation.uk>.

¹⁴Access to its website: <https://www.bcorporation.com.au>.

¹⁵Access to its website: <http://blab.tw>.

¹⁶Access to its website: <https://bcorporation.eu>.

¹⁷Access to its website: <https://www.bcorpSpain.es/>.

¹⁸Access to its website: <https://www.bcorporation.fr>.

¹⁹Access to its website: <https://bcorporation.eu/about-b-lab/country-partner/benelux>.

²⁰Access to its website: <https://bcorporation.net/country-incorporation/denmark>.

Lab Italy,²¹ B Lab Germany,²² B Lab Portugal,²³ B Lab Switzerland²⁴; or in Latin America, Sistema B Argentina,²⁵ Sistema B Brazil,²⁶ Sistema B América Central,²⁷ Sistema B Chile,²⁸ Sistema B Colombia,²⁹ Sistema B Ecuador,³⁰ Sistema B México,³¹ Sistema B Paraguay,³² Sistema B Peru,³³ and Sistema B Uruguay;³⁴ which accompany the companies in the evaluation process, hold workshops, organize events, and develop alliances with other entities and interaction programs with citizens.³⁵ The second group includes associations created for specific purposes, such as the B Lawyers Group, whose main objective is to promote the legalization of social enterprises in EU countries; or Academia B, which is a digital library composed of studies and articles related to B enterprises and the social economy.

Certified B Corps have been spreading worldwide, with 4489 accredited entities present in 77 countries, as of December 2021. Of these, 1611 are in the United States, 1100 in Latin America, and 1146 in Europe. Several multinationals have received B Corps certification, such as *Patagonia*, known for its sustainable clothing and environmental initiatives; *Ben & Jerry's*, an ice cream company that actively supports local farming and ranching communities as well as social and environmental policies; *Alma Natura*, a company whose aim is to revive rural areas and rejuvenate life in the countryside through improving technology, education, employment, and health; and *Bikonsulting*, an open cooperative of consultants, drivers of system change toward the common good.

²¹ Access to its website: <http://www.societabenefit.net>.

²² Access to its website: <https://bcorpdeutschland.squarespace.com>.

²³ Access to its website: <https://bcorporation.eu/about-b-lab/country-partner/portugal>.

²⁴ Access to its website: <https://www.blab-switzerland.ch>.

²⁵ Access to its website: <https://sistemab.org/argentina/>.

²⁶ Access to its website: <https://sistemab.org/brasil/>.

²⁷ Access to its website: <https://sistemab.org/americancentral-y-caribe/>.

²⁸ Access to its website: <https://sistemab.org/chile/>.

²⁹ Access to its website: <https://sistemab.org/colombia/>.

³⁰ Access to its website: <https://sistemab.org/ecuador/>.

³¹ Access to its website: <https://sistemab.org/mexico/>.

³² Access to its website: <https://sistemab.org/paraguay/>.

³³ Access to its website: <https://sistemab.org/peru/>.

³⁴ Access to its website: <https://sistemab.org/uruguay/>.

³⁵ To learn about some of the specific functions performed by these national B Labs, you can consult, as an example, the B Lab Spain website: <https://www.bcorpSpain.es/>.

3 B Impact Assessment

The procedure for obtaining the B Corp certificate, as indicated by the B Corp organization, is as follows.³⁶ To be recognized as a B Corp, the company must be certified by the official certifying body of the place where the company is domiciled, either by Sistema B (only in Latin America) or B Lab (in the rest of the world). The procedure to obtain this accreditation is relatively simple: the company, which must have been established for at least 12 months,³⁷ must undergo an impact assessment (B Impact Assessment).³⁸ The assessment consists of 175 questions covering five areas. It should be noted that not all answers have the same score or rating. In addition, most of the questions offer several answers with the option of completing sections that are considered necessary, while others are yes or no questions. Finally, the B Corp certification meets all the standards required for an audit³⁹ because it consists of an adaptation of the balanced scorecard.^{40, 41}

3.1 B Impact Assessment

The five areas of the B Impact Assessment are governance, workers, community, environment, and customers.

3.1.1 Governance

The governance of a company is defined as the source and origin of the decisions made in the company. It is one of the most highly valued aspects of this assessment (25 questions, 15 of which are scored for evaluation). The main objectives of this analysis are to identify the company's mission, existing commitment to social

³⁶For more information, please visit their website at this link: <https://bimpactassessment.net/es>.

³⁷Certification B Pending is a certification that can be requested by companies that do not meet this requirement; once a year has elapsed since their incorporation, they will have to retake the B Impact Assessment to be normally certified.

³⁸The questionnaire is accessed through its own web page once the profile of the company to be accredited has been completed. The link to start this evaluation is added below: <https://app.bimpactassessment.net/>.

³⁹Campos-i-Climent (2016).

⁴⁰As stated by Kaplan and Norton (1996), the Balanced Scorecard (BSC) is a strategic management methodology that allows comparing the strategic objectives of a company: mission (purpose), vision (short and long term), fundamental values, perspectives, and objectives, with performance indicators (such as KPIs), allowing a global analysis of the company.

⁴¹For the detailed study of this measurement system applied to the case of B Corps, see Baque Jiménez et al. (2017).

groups in the environment, corporate plan (structure and performance), and transparency.

In the first section, the questionnaire aims to obtain a description of the company's commitments in terms of priorities, with an emphasis on its social and environmental impacts. Next, it assesses the existence of a general commitment to social and environmental responsibilities or a specific positive impact in these areas (e.g., waste reduction through products reused for other purposes or a commitment to serve a group of vulnerable beneficiaries). An essential aspect of this part of the assessment is understanding how the company identifies, measures, and manages the most significant social and environmental issues related to its operations and business model. This is called the materiality of the company's social and environmental commitments. For the evaluation of this materiality, we can rely on several methods such as the monitoring of impact metrics, the realization and evaluation of materiality in this area, or the establishment of performance objectives and the measurement of social and environmental results in relation to key performance indicators (KPIs) which are "units of measurement that allow a company to know the level of achievement on previously established objectives."⁴²

A company's ethics and transparency are principles of great relevance to this evaluation. It is highly valued that the company has a "code of ethics," a formal document that establishes its values and the way it acts in different situations. In addition, this section assesses whether there is a policy for controlling contributions to individuals, entities, and institutions (lobbyists, charities, etc.) as well as sponsorships; and whether there is public disclosure of such policies. Finally, it evaluates the existence of systems for preventing and reporting acts of corruption in the company and the reliability of its financial statements.

On transparency, the questionnaire asks whether the company publishes information on its social or environmental performance, as well as its methodology, on an annual basis and in a public manner. Specifically, the questionnaire asks whether the company provides comprehensive descriptions of its social and environmental programs, whether it publishes the results or indicators of social or environmental performance, whether the way in which the sustainability report is disclosed complies with the standards developed by independent entities specialized in the field (e.g., the Global Reporting Initiative (GRI)⁴³), and whether an independent entity has validated or guaranteed the accuracy of the information disclosed. To complete the governance section, it is assessed whether the company's partners are considered in decision-making for the development of activities that are not economically profitable but beneficial in social terms, which allows greater protection against possible claims from minority shareholders.

⁴²Schwarzbichler (2018, pp. 223–278).

⁴³GRI is an independent institution that created the first global standard for sustainability reporting by companies that assess their economic, environmental, and social impacts. For more information, see Porter et al. (2006).

3.1.2 Workers

The next section covers the employee relations with the company in aspects such as salaries, training, shareholding, and work environment (with 54 questions, 40 of which can be scored for evaluation). As in the previous section, this section is divided into five blocks: employee metrics, economic security, health, well-being and safety, professional development, and satisfaction and commitment.

Initially, basic questions are asked to obtain information on the type of company analyzed and the labor relationship with its workers. These questions include number of workers, type of remuneration, fixed or hourly wages, average wages, whether there is subcontracting in the company, number, and percentage of full- and part-time workers, and whether the company structure facilitates worker participation in social bodies (as occurs in cooperatives or worker-owned companies). On the “financial security” of workers, this section asks about the lowest hourly wage, the percentage of employees who receive the equivalent of the living wage and the official minimum wage, and what percentage above this minimum wage is paid to the employee who receives the lowest wage. Moreover, it examines whether the company offers its employees salary supplements, cash bonuses, or other benefits (e.g., salary adjustment for cost-of-living increases), savings programs (pension and retirement plans), or other financial services (whether it provides low-interest loans, debt refinancing, financial counseling, or tax return services).

Further, the questionnaire looks at the “health, welfare, and safety of employees.” It asks what type of public health care is offered in the country where most employees reside and what additional health benefits the company offers to complement it (e.g., disability or accident insurance, life insurance, private dental insurance, and supplementary paid medical insurance). Additional health and wellness initiatives offered by the company are also analyzed, such as encouraging employee participation in health and wellness activities during the workweek (e.g., programs to encourage the use of stairs or the promotion of walking or biking to work),⁴⁴ whether the company has workplace ergonomic policy, or whether the majority of employees have completed health risk assessments in the past year.

On the “professional development” of employees, which can be defined as a person’s growth option within a company, the questionnaire assesses the accessibility of specialized training, the policy of encouraging internal promotion and recruitment, the policies for hiring trainees and apprentices, and the different types of coaching for managers to better manage their subordinates. Finally, the “satisfaction and commitment” of employees are analyzed in the following aspects: the existence of an “employee handbook” as well as its content, such as whether it includes a statement on non-discrimination, an anti-harassment policy, a statement on working

⁴⁴ An example for these good practices was implemented by the New Resource Bank, which created the #appellforabattle movement, placing containers with apples on each table of its workers, encouraging them to eat one and offer them to customers before facing any negotiation; See Jeynes (2000, pp. 223–225).

hours, issues on salary payment and job performance, and disciplinary measures. In addition, it asks whether employee satisfaction or engagement surveys are conducted on a regular basis and, if so, what percentage of the company's employees are satisfied or engaged. It also considers whether there are flexible work options, parental leave policies, minimum number of paid leave days (including vacation), and whether they are offered to the majority of employees.

3.1.3 Community

This third section analyzes the positive impact of the company's business model on external stakeholders in its own community, such as suppliers, distributors, the economy, and the local community (with 44 questions, of which 35 are scored for evaluation). This section is divided into five blocks: introduction to the area of community impact, diversity, equity and inclusion, economic impact, civic engagement and donations, and supply chain management.

On the "introduction to the area of community impact," it specifies the mechanisms by which the company generates a positive, substantial, and specific benefit for other stakeholders in the community in which it operates. A second section in this area is "diversity, equity, and inclusion," which assesses the existence of an inclusive recruitment and hiring process (i.e., whether the company evaluates resumes and job applications without having access to names or other characteristics to identify applicants or whether the company recruits personnel through organizations or services that work with people from disadvantaged or underrepresented communities or sectors), and whether the company facilities are designed to meet accessibility requirements for people with physical disabilities. Additionally, it investigates the percentage of staff who are part of a racial or ethnic minority, whether they are women or have any type of disability, and how many of them are directors or managers in the company.

The third section deals with "economic impact," which analyzes the number of jobs created in the last year and asks about the percentage of partners, workers, suppliers, and banking services that reside in the same local community as the company. The fourth section, "civic engagement and donations," assesses the civic engagement practices implemented by the company (e.g., donations, community investments, community or pro bono services, collaboration with charities or participation in community organizations, discounts on products or services for disadvantaged groups, free use of company facilities for community events). In addition, it includes the existence of any formal commitment in relation to charitable donations or the promotion of social benefits, such as contributions to academic research on social or environmental topics, as well as the participation in round tables and other forums for public debates related to social or environmental issues.

Finally, the "supply chain management" is addressed by analyzing the impact created by significant suppliers. The company should indicate in the questionnaire what type of control it exercises to measure the impact of its suppliers (control of compliance with legislation, promotion of good governance practices, ethical

policies, labor practices, etc.).⁴⁵ It must also validate the existence of a code of conduct with respect to suppliers that includes policies aimed at encouraging increased hiring, that support employment opportunities in groups with chronic underemployment, that implement practices to promote and improve social and environmental performance, and that support small suppliers with difficulties or independent contractors.

3.1.4 Environment

The fourth section analyzes the direct and indirect environmental impacts of the company. This is the most extensive portion of the assessment (65 questions, 55 of which are scored). In the “introduction” section, the company is asked to provide information on its energy consumption, carbon footprint, and waste management to determine whether its products and processes contribute to preserving and restoring the environment. The “environmental management” section evaluates whether the company’s facilities have an ecological accreditation certificate or whether they meet the requirements to obtain one. It also assesses the implementation of green purchasing policies for environmentally friendly products, such as electronic products, food, and office supplies.⁴⁶ This section also considers the existence of an environmental management system (EMS) that regulates waste generation, energy consumption, water consumption, and carbon emissions. The score varies depending on whether it is established only through a formal statement, whether quantifiable targets have been set, or whether there is a dependent or independent audit (the latter being the most highly valued option). Finally, reference is also made to the percentage of products sold that have an impact assessment certification until they are obtained, which is known as the company’s footprint, defined as “the trace left by a company if it is eliminated in an instant.”⁴⁷

The questionnaire is divided into two sections based on the type of consumption: “air and climate” for energy consumption and “water” for water consumption. The first section includes questions related to energy consumption in the company, electricity, heating, and hot water, differentiating whether the company controls energy consumption and whether it sets targets for reducing the intensity of emissions. In addition, the percentage of renewable energies used in the company and the number of those that have a low impact are analyzed, that is, those whose production and storage have a minimum environmental impact, such as wind and solar energy.⁴⁸ Another relevant point is the energy efficiency of the facilities, scored based on the implementation of energy-saving or efficiency systems in the company’s offices. In addition, an analysis is conducted on whether the company and its supply chain

⁴⁵See Wilkinson et al. (2010).

⁴⁶See Sommer (2012).

⁴⁷See Decker and Mellewig (2012, p. 169).

⁴⁸See Boyle (2004, p. 456).

manage their greenhouse effect and monitor their atmospheric management and carbon emissions. Particularly, the questionnaire assesses the possible reduction of these emissions through the implementation of specific policies. Finally, the reduction in carbon emissions related to the transportation of workers with their commuting (business trips) is also measured, as well as the implementation of measures to minimize it (environmentally responsible driving, promotion of public transport, and cycling) and the introduction of measures to offset these carbon emissions.

On water resources, similar to the previous point, this section analyzes whether the company monitors the water supply and the presence of conservation methods in the company's facilities, such as the use of "gray water" (tap water) for irrigation, low-volume irrigation, or rainwater harvesting. Undoubtedly, companies that use water from recycled sources and implement cost minimization policies achieve positive scores. The last section on environmental impact, "land and life," deals with the production and monitoring of waste (hazardous and non-hazardous), chemicals, and biodiversity in the company. This is followed by a review of the recycling programs for paper, cardboard, plastic, glass, metal, and composting at the company and its suppliers.

3.1.5 Customers

The last block evaluated in the questionnaire addresses the design of the products developed by the company and their relationship with the resolution of a specific social problem and the creation of a concrete and substantial positive impact for its customers beyond the value normally provided by its products or services. To achieve a high evaluation in this area, the shortest section of all (with only four evaluable questions), it is necessary to list the identified social problems, the offered solutions, and the quantification of their effective reduction.

The evaluation of "customer management" considers the relationship that the company maintains with its customers once the product or service has been supplied. It analyzes the practices that the company implements to manage the impact and value created for customers (e.g., it offers guarantees on its products or services, has quality certifications issued by third parties, has mechanisms in place to receive customer feedback or complaints, monitors the level of customer satisfaction, conduct ethical marketing, had advertising or customer engagement practices, manages the privacy and security of customer data,) and whether it takes any steps in relation to managing the potential impact of its products on customers/beneficiaries (i.e., it monitors customer outcomes and well-being and/or has a program to incorporate customer feedback and research into product design).

3.2 Validation of the B Impact Report and Call for Review

By filling in the questionnaire described above, the B Impact Assessment is completed and the B Impact Report is obtained, which shows the total score of the company's impact in the areas analyzed. If it is higher than 80.0, the essential requirement to obtain accreditation as a B Company is fulfilled. Subsequently, the verification report must be completed, attaching the requested documents according to the answers given.⁴⁹ In addition, through an arranged video call, a B Lab personal advisor proceeds to “validate the report,” certify the answers, resolve doubts, and check the documentation provided by the company. The consultant can revise the score obtained by the company in the evaluation, upwards or downwards. If the score is still at least 80 points, the company moves to the last phase of the process. Otherwise, the assessor would work with the company and attempt to improve the different areas of the B Impact Report to increase the score obtained in the next assessment.

4 Formalization of the Certification Agreement, Declaration of Interdependence, and Payment of Fees

If the company exceeds the minimum score required in the B Impact Report to complete the process of qualification as a B Company, all that remains is to complete the various legal formalities and proceed to pay the fees.

4.1 Agreement for Certificated B Corps

The B Corp Agreement,⁵⁰ or Certified B Corporations™ is the contract signed between B Lab and the company interested in obtaining certification as a B Corp, where the rights, duties, and obligations of the parties are listed. The agreement begins with an introduction naming both parties. On the one hand, Lab B is the nexus of the organization, and on the other hand, the company with which this agreement is signed is a B Corp.

⁴⁹This verification process is subject to a non-refundable filing fee of USD 150 for all first-time filers. This fee has been introduced as of April 15, 2021 following the update of the fees to become a B Corp due to the exponential growth of the B Corp community movement in Europe (30% annual increase in the last two years). For more information, you can visit the website: <https://bcorporation.net/certification>.

⁵⁰This “Agreement” can be obtained and consulted free of charge on its website <https://media-ashoka.oiengine.com/attachments/119496dd-be3e-402e-9550-bfadc1dce64b.pdf>.

This agreement (“Agreement”) sets forth the terms under which _____ (the “Company”) will pursue Certification / Recertification as Company B and B Lab will authorize the Company to use certain intellectual property rights.”

The “Agreement” continues explaining who B Lab is and the mission it fulfills:

B Lab is a nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through several interrelated initiatives:

- Building a community of Certified B Corporations to make it easier for all of us to see the difference between “good companies” and just good marketing;
- Passing benefit corporation legislation to create a new corporate form that meets higher standards of purpose, accountability, and transparency;
- Driving capital to higher impact investments through use of its impact ratings and analytics platform;
- Offering the B Impact Assessment as a free powerful tool to businesses to measure, compare, and improve their social and environmental performance.

The duration of the credential granted is two years. Once this time has elapsed, you will have to go through the recertification process again, by undergoing the B Impact Assessment. In addition, during the two years as a B Corp, you may be selected (with a 20% chance of all certified companies) to undergo an on-site B Impact Assessment Review, which is considered more accurate than the original B Impact Assessment. The investigated company bears the cost of this review, which can range from USD 2500 to 5000 (depending on the size and location of the activities). As a rule, without malicious misrepresentation by the company, this review usually results in an adjustment of the score. If the score falls below the required minimum of 80 points for certification, B Lab allows 90 days to remedy the situation and provides the company with some recommendations to improve the score. If this process reveals that the company has made a materially false and deliberate misrepresentation of some aspects of its business, its certification as a B Corp is revoked.

4.1.1 Bylaw’s Modification

From the beginning of the B Corp movement, the modification of bylaws was considered an indispensable requirement for B Corps, especially as a tool to legitimize their social and environmental actions, even if they were against obtaining the maximum economic return for the members. The founders of B Lab, after analyzing

different cases of companies, such as Ben & Jerry's⁵¹ and Whole Foods Market,⁵² concluded that having leaders concerned with and committed to the environment was not sufficient. For a company to grow and endure over time, its value must be part of its corporate structure. Therefore, they proposed two bylaw amendments: the first aimed at broadening the company's purpose, thus separating it from the constant pursuit of profit maximization,⁵³ and the second focuses on protecting managers in making decisions based on that corporate purpose.⁵⁴ With the adoption of these amendments, a company can meet the requirements of adopting the "Legal Framework for B Companies." Specifically, within one year of certification, a copy of the company's amended bylaws (adopted by a qualified majority) must be submitted to B Lab. If the company does not adopt this legal framework within this period, it

⁵¹Since the founding of Ben & Jerry's in 1978, Ben Cohen and Jerry Greenfield had the firm purpose of safeguarding the environment while being socially responsible. Their 100% natural ice cream stood out and began to attract the attention of different multinationals, concluding with the purchase by Unilever in 2000. From then on, they lost their social and environmental advantage and were even forced to remove the slogan "100% natural" from the packaging. Several years after the purchase, after many restructurings and management strategies, they achieved some independence of action as a subsidiary and returned to their original values, becoming certified as a B Corp in 2012. What is interesting, is that as advocates of the B movement, they claimed that after their IPO "Ben & Jerry's had a legal responsibility to consider takeover bids. (...) That responsibility is what forced the sale," "the laws forced the board of directors of Ben & Jerry's to accept an offer, to sell the company even if they did not want to sell it," "we were a publicly traded company, and the primary responsibility of the board of directors is the interest of the shareholders." After Vermont enacted its Benefit Corporation Law in 2011, its partners stated that "if the Vermont law had existed 11 years ago, Ben Cohen and Jerry Greenfield might not have had to sell their ice cream company. ... Shareholder liability laws forced the hippie founders to sell, even though they wanted to keep control. Now, under current law, a new type of corporation is created that prevents exactly that." See Honeyman and Tiffany (2019, p. 50).

⁵²Its founder and CEO, John Mackey, had managed to place his organic and natural food company among the largest in the world thanks to its ethical and environmentally responsible values. However, after going public, he could not avoid the sale of the company to the multinational Amazon, even if it meant the loss of the values they had always pursued. Therefore, customers stopped buying their products and the company experienced several years of financial losses for the first time in its history. Mackey, in different interviews, has pointed out that he would have liked to be certified as a B Corp, and to be able to establish solid values that would endure over the long term of his company, in the face of the greatest "disease of conscious capitalism: economic short-termism." See Honeyman and Tiffany (2019, p. 54).

⁵³To simplify this process, B Lab proposes that the following style clause be included in the corporate bylaws, under the corporate purpose section: "*In carrying out its corporate purpose, the Company shall ensure that it generates a positive social impact for society, its stakeholders, and the environment.*" See Frederick Alexander (2018, p. 72).

⁵⁴To protect directors in their actions, B Lab requires that the following style clause be added to the articles of association in the articles regulating the management body: "*In the performance of their duties, directors shall take into account in their decisions and actions the effects of such decisions or actions on the interests of (i) shareholders, (ii) employees of the Company and its subsidiaries; (iii) customers, suppliers, and other parties directly or indirectly related to the Company, such as the community where, directly or indirectly, the Company operates. They shall also ensure the protection of the local and global environment and the Company's interests in the short and long term.*" See Frederick Alexander (2018, p. 69).

cannot be re-certified as a B company. In the event of a change in corporate control or a public offering of its shares (“IPO”), the company must be re-certified within 90 days. In addition, owing to the legal differences between companies worldwide, the B Corp website has a “Legal Requirements Tool” that can be accessed to understand what structural changes or legal framework a company must have to become B Corp within the legal framework of the country.⁵⁵ In addition, as of 2021, B Lab imposes, as an indispensable requirement, that B Corporations certifying in a country with this approved legal status,⁵⁶ legally incorporate as such (or commit to do so within a maximum period of two years).^{57,58, 59}

Under this “Agreement,” the entity agrees to the requirements on the use of the trademarks and intellectual property owned by B Lab: Certified B Corporation^{MR}, B CorporationTM Seal, and B Corporation^{MR}.⁶⁰ In addition, the company agrees that B Lab may use its name and logos to promote the interests of the B Corporation community and the movement initiatives they sponsor.

4.2 Declaration of Interdependence

To obtain B Corp certification, another document that the company must subscribe to is the “Declaration of Interdependence” as a restatement of the fundamental message and idea of B Corps. Specifically, the company is committed to using the power of the market as a force for positive change in the world, with a common purpose of generating benefits for all stakeholders, thus establishing itself as a driver of global change in the way business is done. In this statement, the company also commits to disclosing sales and paying the corresponding fees annually.

⁵⁵ Access to this tool is added at the following link: <https://bcorporation.net/certification/legal-requirements>.

⁵⁶ See Frederick Alexander (2018).

⁵⁷ Owing to this new requirement, the online legal tool offered by B Lab is more useful than ever, as it allows to know exactly if there is a benefit corporation law in a state where the company is headquartered. Thus far, the number of countries that have decided to create benefit corporation laws is limited: 37 states in the United States (four more states have bill pending approval); four Latin American countries (i.e., Colombia in 2016, Ecuador and Peru in 2018, and Uruguay in 2021; Argentina and Chile have bills pending approval); in Europe it is regulated in Italy since 2015 and in France since 2019; and in East Africa it is regulated since 2021 in the Republic of Rwanda. Likewise, at the provincial level, it has been regulated in British Columbia (Canada) since April 2019.

⁵⁸ It should be noted that, although there are various legislations, in reality, they are all derived from a direct translation of the legality model proposed by B Lab, which has been used as the original jurisdictional model and serves as the basis for all others. See Zavala (2013).

⁵⁹ See Montiel Vargas (2022) for a cross-country study of certified B Corp and Benefit Corporations.

⁶⁰ The terms legally registered are “B Corporation,” “the B Corporation Seal,” and “the change we seek” as trademarks of B Lab, Inc. ©2016.

4.3 *Jurisdiction and Exclusion of Liability*

Apart from other additional terms and sections that complete the agreement for B Corps, the contractual regulation of the jurisdiction to which the agreement is subject is particularly important. Specifically, the fifth point entitled “applicable law” states that all legal relations shall be governed in accordance with the laws of Pennsylvania, establishing a clause excluding any other jurisdiction. This clause, signed by two companies, is considered valid and is not subject to the regulations that protect consumers in their contractual relationships. Therefore, it is important for entities that want to obtain certification as B Corps to know that in case of any dispute arising from breach of contract or agreements signed, Pennsylvania law will apply. In other words, for a legal claim, it would be necessary to go to Pennsylvania courts, with the high cost that this could entail. Finally, a liability exemption clause is added on the part of B Lab in which they are exempt from any liability, except for fraudulent misconduct or gross negligence on their part (in such case, they will only be liable for the refund of the fees paid by the company).

4.4 *Fees Payment*

Once B Lab and the company sign the above contractual documents, the last step to obtain the B Corp certification is the payment of the first annual fee. The fees are published on the B Lab website and are listed in Table 1.⁶¹

5 Conclusions

In this study, we explored the private B Corps certification process, which drive a worldwide social and environmental movement that has experienced exponential growth of more than 30% in the last three years. Having analyzed the origin, structure, and evolution of the B Movement promoted by B Lab, we must conclude by pointing out that it appears to be a strong, expanding network with a growing number of participants.

Certified B Corps represent a hybrid structure between purely for-profit companies and social economy entities, which have decided to obtain this private certification to confirm that they are willing to change their way of conducting business and pursue objectives that go beyond economic ones.

⁶¹The annual certification fee varies by region. This table lists the fees for companies based in the United States and Canada: <https://bcorporation.net/certification>. Companies in Latin America, East Africa, Europe, the UK, Australia, or New Zealand need to go to their global partner’s website to see their local certification fees posted.

Table 1 Annual Fees for B Corp Accreditation. Source: The B Corp Website

Annual Sales	Annual Certification Fee
\$0–<\$150,000	\$1000
\$150,000–\$499,999	\$1100
\$700,000–\$999,999	\$1300
\$1 MM–<\$1.4 MM	\$1400
\$1.5 MM–<\$1.9 MM	\$1600
\$2 MM–<\$2.9 MM	\$1800
\$3 MM–\$4.9 MM	\$2000
\$5 MM–\$7.4 MM	\$2500
\$7.5 MM–\$9.9 MM	\$3750
\$10 MM–\$14.9 MM	\$6000
\$15 MM–\$19.9 MM	\$8500
\$20 MM–<\$29.9 MM	\$12,000
\$30 MM–<\$49.9 MM	\$16,000
\$50 MM–\$74.9 MM	\$20,000
\$75 MM–\$99.9 MM	\$25,500
\$100 MM–<\$174.9 MM	\$30,000
\$175 MM–249.9 MM	\$35,000
\$250 MM–\$499.9 MM	\$40,000
\$500 MM–\$749.9 MM	\$45,000
\$750 MM–\$999.9 MM	\$50,000
\$1B+	Based on size and complexity of your business

B Corps are companies that have obtained B Corp certification after successfully completing the “B Impact Assessment.” Once the content of the different areas of the assessment has been analyzed, it can be seen that the questions are reasonably well chosen and accurate, providing a good picture of the social, environmental, and economic impacts of the company. Furthermore, the B Impact Assessment is a methodical, complex, and customized survey according to size and sector. Objectively, this appears to be an efficient system for assessing a company. Moreover, even for companies that do not achieve certification (only 12% of the companies that initiate this questionnaire do so), it can be a good mechanism to learn about their strengths and weaknesses, as well as their areas for improvement.

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Introduction to the Law of Benefit Corporations and Other Public Purpose-Driven Companies



Luis Hernando Cebriá

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1 International Developments of Corporate Social Responsibility: New Forms and New Legal Requirements

1.1 *A First Approach from the Common Law*

Benefit corporations originate from different legal means to attend to corporate social responsibility in the United States company law. In some of its jurisdictions, at the end of the last century, rules aimed at recognizing an “enlightened value” were adopted, in contrast to the notion of “maximizing shareholder value,” to assess the scope of the company’s economic activity for its stakeholders.¹ In the first decade of this century, other states went one step further and accepted the establishment of a special type of company called the benefit corporation as a way to internalize the consideration of general or collective interests and to reconcile the lucrative interest of the shareholders with the institutional consideration of the company.² By doing this, regulations contemplate a broader vision of the common interest than the exclusive maximization of the financial interests of the shareholders.³

Although benefit corporation has attracted greater recognition due to its acceptance in the State of Delaware and others after its enactment in the State of Maryland in 2010, other public purpose-driven companies have followed this trend to render the profit maximization rule more flexible.⁴ This is the case, in the first place, of the Low-Profit Limited Liability Company (L3C) created in Vermont in 2008,⁵ which has a more restrictive vision of profit maximization. Previously, inserted in this phenomenon of the public purpose-driven companies, from across the Atlantic the Community Interest Company, introduced in the United Kingdom through the Companies (Audit, Investigations and Community Enterprise) Act of 2004, retains a limitation regarding distributable profits.

¹About the “Constituency Statutes,” in general, see Mitchell (1991); Bainbridge (1992); and Springer (1999).

²As example, § 362 (a) of Subchapter XV of Book 8 of the Delaware General Corporation defines the “public benefit corporation” as a for-profit corporation that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation. According to the Model Benefit Corporation Legislation, on the other hand, a benefit corporation is deemed to have the corporate purpose of creating general public benefit, but also may elect to pursue specific public benefits.

³The bibliography is very extensive. Some of the first papers on this matter are Munch (2012) and Hiller (2013).

⁴The legal treatment of the Public Benefit Corporation is limited to just nine articles, from 361 to 368 of Subchapter XV of Book 8 of the Delaware General Corporation Law, with effect in 2013.

⁵Vermont Statutes § 4001 (14) (-Vermont Statutes Title 11: Corporations, Partnerships and Associations, Chapter 21: Limited Liability Companies-) in relation to § 4161 and 4162. About the L3C, refer to Schmidt (2010); Artz et al. (2012); and Bishop (2017).

The Community Interest Company is, thus, situated between traditional companies and charities (non-profit) and allows economic operators to enjoy the organizational flexibility of commercial companies and to overcome the limitations that the directors of “traditional” companies face in guiding their decisions for securing the interests not exclusive of the shareholders.⁶ However, the general purpose of an “inclusive economy” that gives proper consideration to the stakeholders is also recognizable in section 172 of the English Companies Act of 2006. It sets forth the need to promote the success of the company for the benefit of its members as a whole. In doing so, section 172 demands that directors consider, among others, all the probable consequences of any decision in the long term and the interests of the company’s employees as well as other stakeholders, including the community and the environment.⁷

Turning back to the United States’ regulations, the States of California and Washington enacted in 2011 and 2012 other forms of public purpose purpose-driven corporations called the Flexible Purpose Corporation and the Social Purpose Corporation, respectively.⁸ Subsequently, the State of Florida adopted the Social Purpose Corporation, while in 2015, the name of the Californian Flexible Purpose Corporation was changed to equate it with the Social Purpose Corporation and give greater emphasis to its social purpose or collective interest.⁹ These regulations grant greater discretion to directors regarding the advisability of dedicating the entity’s resources for social or environmental purposes. Although these corporations maintain the pursuit of an objective that does not particularly align with those of the shareholders, its intensity and the mechanisms for its achievement diverge from the benefit corporation schemes.¹⁰

⁶On the creation, orientation, and evolution of the figure, Lloyd (2010).

⁷It also includes the need to foster business relationships with suppliers, customers, and others, the convenience of maintaining the reputation of high standards of business conduct, as well as the need for loyalty toward company members. On the need to define and align the purposes of company, see the British Academy’s publication, *Reforming Business for the twenty-first Century (A Framework for the Future of the Corporation)* 2018, pp. 16–17. Likewise, the 2018 UK Corporate Governance Code establishes, in principle A, the duty of the board of directors to “promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society.” It must be complemented with principle B, as directors must attend to “the company’s purpose, values and strategy, and satisfy itself that these and its culture are aligned.”

⁸S.B 201 of October 9, 2011 for the Flexible Purpose Corporation in California; and HB 2239 of June 7, 2012 in Washington State for the Social Purpose Corporation.

⁹With the S.B. 1301 of California in 2015, the Flexible Purpose Corporation changed its name to Social Purpose Corporation to place greater emphasis on the entity’s social orientation and promote its acceptance by the shareholders.

¹⁰§ 2602 (2) of the California Corporations Code; § 23B.25.020 of the Washington Business Corporation Act; and § 607.501 of the Florida Business Corporation Act. For an approximation to the legal regimen in each jurisdiction, Kimball (2014); Ho (2015); and Ames and Cohn (2014).

1.2 *The Phenomenon from the Traditional Continental European Company Law*

Legal systems that allow greater involvement of employees' representatives in corporate bodies or even those that accept an overall institutional trend in company law, such as Germany, in principle, do not have the need for new legal forms that encapsulate the promotion of the general interest or collective interest. From this perspective, a broader conception of companies' interests goes beyond the contractual framework of the company and its orientation toward maximization of the shareholders' investment.¹¹ Nevertheless, even Germany—where traditionally an institutional conception of the company based on the Rhenish economy prevails—accepts certain forms of companies with general purposes through its tax regulations. To achieve this, the German legislation recognizes the qualification of the *gemeinnützige GmbH* and the *gemeinnützige Aktiengesellschaft* for companies with a non-for-profit and selfless interest, exclusively and directly pursued.¹²

In Spain, however, there are limitations in the company law with regard to accepting an aim other than obtaining profits for partners because of Article 116 of the Commercial Code and Article 1665 of the Civil Code, which has been in effect since the 19th century. As a result, the *Ley 5/2011 de Economía Social* includes a set of entities that pursue either the collective interest of their members the general economic or social interests, or both. Within this broad formulation, which gives primacy to stakeholders and to the general welfare over capital and to solidarity over investors, these entities of the “social economy” include some specific corporative forms. Labor companies (*sociedades laborales*) and agrarian transformation companies (*sociedades agrarias de transformación*), without prejudice of cooperatives, are, therefore, business associations that may benefit from a favorable tax treatment as entities of the “social economy.”¹³ However, recently, the Spanish Dirección General de Seguridad Jurídica y Fe Pública accepted the by-laws of a company according to which “the company lacks of any for profit interest” (*la sociedad carece de ánimo de lucro*), because the profit motivation shall just be seen as a natural element, usual, but not essential, unlike the common purpose of the company, whatever it is, that must always exist.¹⁴

From a broader perspective, in France, the most recent Loi n. 2019-486 of May 22, 2019, related to the growth and transformation of companies, known as “Loi

¹¹ With reference to the German case and the effects of co-determination and co-decision rights of employees, refer to Fauver and Fuerst (2006, p. 679) and Kim et al. (2018, p. 1251). In extenso, Habersack et al. (2016, passim).

¹² From the tax regulation (*Abgabenordnung*), see an overall study in Weidmann and Kohlepp (2014, passim).

¹³ Articles 4 and 5 of *Ley 5/2011, de 29 de marzo, de Economía Social*. Regarding the typology of the social economy entities, Alfonso Sánchez (2016, p. 109) and Embid Irujo (2019, p. 15).

¹⁴ Decision of the Dirección General de Seguridad Jurídica y Fe Pública on December 17, 2020 (BOE January 9, 2021).

Pacte,” has rendered a relevant modification to Articles 1833 and 1835 of its 19th-century Civil Code.¹⁵ In relation to the phenomenon of social responsibility, *Loi Pacte* has added the requirement to Article 1833 that the company must be managed according to its interest and, to that end, its directors must also consider the social and environmental challenges resulting from its activity.¹⁶ Such provision, therefore, affects all French civil and commercial companies, even when its significance must be assessed in accordance with the general terms in which it is expressed.¹⁷ In this way, the French legislator has not decided to create a new legal form to accommodate social and environmental concerns but rather demands that companies and their functioning adapt to a market economy more oriented toward social reality and “responsible capitalism.”¹⁸

Beside Article 1833, Article 1835 of the current French Civil Code authorizes the bylaws to specify the *raison d'être* of corporate governance according to the principles that inspire decisions within the company, which may affect the means for its achievement.¹⁹ The *raison d'être*, as a sort of “rule of reason” of the company, functions as the compass for directors’ behavior and incorporates the assumption of responsibilities in the social or environmental order and in any other aspect of social life that the partners may consider in the bylaws.²⁰ In any case, the *Loi Pacte* also has an influence, in relation to the previous legal requirements, on the duties of the directors because of the reform of Articles L225-35 and 225-64 of the French Code de commerce.²¹

¹⁵*Loi Pacte*, Loi n 2019-486 du 22 mai 2019 *relative à la croissance et la transformation des entreprises*.

¹⁶In any case, it must be considered as a duty of promotion (*obligation de moyen*) and not to achieve any specific result -Projet de Loi Pacte, 545-. In response to a more specific previous proposal, according to which any company must have a legal business plan and operate in the common interest of the partners and any third party, such as employees, collaborators, credit grantors, suppliers, customers, or otherwise, participating in the development of the company, that must be carried out under conditions compatible with the increase or preservation of the common assets (“*Toute société doit avoir un projet d’entreprise licite et être gérée dans l’intérêt commun des associés et des tiers prenant part, en qualité de salariés, de collaborateurs, de donneurs de crédit, de fournisseurs, de clients ou autrement, au développement de l’entreprise qui doit être réalisé dans des conditions compatibles avec l’accroissement ou la préservation des biens communs*”), Conac (2019, p. 574).

¹⁷Conac (2019, p. 570).

¹⁸Urbain-Parleani (2019, pp. 579–580).

¹⁹“*Les statuts peuvent préciser une raison d’être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité.*”

²⁰Urbain-Parleani (2019, p. 575) believes that this modification reflects an eminently political intention to influence corporate behavior and adapt companies’ regulations to the new realities of the 21st century and is not limited to aspects of social responsibility, since it is an open concept that may be applied for different purposes of the shareholders.

²¹“*Le conseil d’administration détermine les orientations de l’activité de la société et veille à leur mise en oeuvre, conformément à son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité. Il prend également en considération, s’il and a lieu, la raison d’être de la société définie en application de l’article 1835 du code civil.*”

1.3 The Evolution of Large Companies Toward the Obligation to Disclose Their Non-Financial Activities

With a different profile, the social, environmental, and corporate governance concerns oriented toward improving relationships with employees and other groups, or even the whole community, have led to the imposition of disclosure requirements on large companies. Besides financial information, these companies, due to their size or sector of their economic activities and their relevance within the market, must also provide non-financial information to the stakeholders.²² This regulation does not seek to interfere with the regular development of the company and, consequently, does not impose obligations of social and environmental practices but only of reporting such practices, if any.²³

The OECD guidelines for multinational enterprises include social, environmental, and risk reporting; this is particularly relevant in terms of greenhouse gas emissions and biodiversity protection. Another example related to company activities is reporting of information on the environmental activities of subcontractors and suppliers or resulting from the commitments of these enterprises with partners in joint ventures.²⁴ Thus, the preparation of social and environmental reports, according to internationally accepted standards, has attained increasing importance for a wide variety of users, ranging from shareholders to other stakeholder groups, such as employees, local communities, governments, and society in general.²⁵

Within the European Union, Article 19a of Directive 2014/95/EU, amending Directive 2013/34/EU, regarding the disclosure of non-financial and diversity information by certain large undertakings and groups, imposes the obligation of disclosing a specific non-financial statement on large undertakings that are “public-interest entities.” The statement focuses on social and employee-related matters, such as gender equality, health and safety, and preventive measures against human rights

²²Efficient information mechanisms, both economic and social, may help investors to define their position and company strategies within a competitive market—by identifying different values. To this end, investors and analysts may use them to better recognize the strengths and weaknesses of business strategies in the medium and long term to provide a more complete view of the situation and company policies, and to elicit greater shareholder involvement in corporate governance.

²³According to Jentsch (2018, p. 2), this remains on the margins of self-regulation, while Portale (2018, p. 607) believes that it follows the principle of “comply or explain,” which is merely voluntary.

²⁴Pages 29 and 30, in its 2011 version. The OECD guidelines for multinational enterprises state that “Enterprises should apply high-quality standards for accounting, and financial as well as non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported” (p. 28).

²⁵For more details, see the OECD Due Diligence Guidance for Responsible Business Conduct of 2018.

violations, anti-corruption, and bribery matters.²⁶ Through this public information mechanism, the EU legislator attempts to convey the necessary transparency for collective or general interest activities, in addition to the financial statements of such entities.²⁷

2 Environmental, Social, and Business Governance (“ESG”) Objectives Within the Sustainable Development Goals (“SDGs”) as a Typological or Transtypological Issue

2.1 The Voluntary Acceptance of Corporate Social Responsibility Through Ethical Codes and Self-Regulation

The conception of social responsibility as an external factor to the company, evidenced by non-financial statement disclosure, may induce the adoption of social, environmental, and governance measures aimed at serving collective interests beyond those of shareholders and partners. However, there are other mechanisms that serve to internalize these policies. The acceptance of ethical codes and self-regulation does not consist of information on whether the company has implemented such types of policies, but rather incorporates due behaviors for corporate bodies. By doing so, the company incorporates such commitments as part of the partners’ and shareholders’ own values, even when the actions of certain social groups may also encourage their voluntary acceptance. In contrast, the partners and shareholders may also consider the incorporation of codes of conduct or ethical commitments to improve the image and reputation of the company in the public domain.²⁸

²⁶For translation of this regime in each state member, refer to Schön (2019, p. 391); Henrichs (2018, p. 206); Bruno (2018, p. 974); and del Val Talens (2019, p. 183).

²⁷This social responsibility concern, due to the economic crisis, had its first expression in European regulation with Directive 2013/34/EU on the annual financial statements. Directive 2013/34/EU included other non-financial matters, such as the transparency of payments made to governments by the entities active in the extractive industry or in logging of minerals, oil, natural gas, and primary forests. Likewise, Directive 2014/56/EU, amending Directive 2006/43/EC, on statutory audits of annual accounts and consolidated accounts, in relation to Regulation (EU) 537/2014, of the European Parliament and of the Council of April 16 on specific requirements regarding its statutory audit, added the concept of “public-interest entities,” shaping a new typology of companies. More recently, see Regulation (EU) 2019/2089 of the European Parliament and of the Council of November 27, 2019, amending Regulation (EU) 2016/1011, as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks; in its Annex III, it contains the Methodology for EU Climate Transition Benchmarks, particularly, for carbon emissions.

²⁸According to OECD Principles of Corporate Governance of 2015, “[h]igh ethical standards are in the long-term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments. To make the objectives

Self-imposed rules and codes of conduct become, by virtue of the principle of freedom to contract, a sort of due diligence, which requires, first, their correlative reflection in the decisions that the directors may consider. The codes of conduct can, therefore, include commitments to ethical values in areas such as environment, human rights, labor standards, consumer protection, or taxation.²⁹ Furthermore, for the sake of effectiveness, the companies must regularly communicate their achievements to the shareholders and disclose certain standards of behavior to the stakeholders. To that end, it is necessary to incorporate procedural aspects and information mechanisms that allow a correct evaluation of compliance.³⁰

However, the incorporation of social, environmental, and corporate governance values aligned with stakeholder interests and company commitments to the community through codes of ethics and conduct or internal regulations of the corporate bodies may clash with the financial interests of the partners and stakeholders. This prompts us to consider two main aspects: First, its potential impact on the individual rights of the partners and shareholders, insofar as it affects the economic rights that they have recognized, even in abstract, as members of the company. Second, from a typological perspective, the introduction of this type of measure may also have an impact on the business purpose of the company contract as a shaping element compared to other typical forms of legal organizations, such as the associations. It seems that, in any case, even from a merely contractual conception of company, it is still plausible to admit that a company has the aim of reporting some patrimonial advantage, even indirectly, to the partners and shareholders *uti singuli* considered.³¹

Therefore, the typicity of commercial companies imposes certain limitations in company law to adapt the purpose of the company through contractual freedom. However, it is also convenient to avoid maximalist positions about the “share value”

board clear and operational many companies have found it useful to develop company codes of conduct based on, inter alia, professional standards and sometimes broader codes of behaviour, and to communicate them throughout the organisation. The latter might include a voluntary commitment by the company (including its subsidiaries) to comply with the OECD Guidelines for Multinational Enterprises which reflect all four principles contained in the ILO Declaration on Fundamental Principles and Rights at Work” (p. 47).

²⁹OECD Principles of Corporate Governance of 2015 further states: “Company-wide codes serve as a standard for conduct by both the board and key executives, setting the framework for the exercise of judgement in dealing with varying and often conflicting constituencies. At a minimum, the ethical code should set clear limits on the pursuit of private interests, including dealings in the shares of the company. An overall framework for ethical conduct goes beyond compliance with the law, which should always be a fundamental requirement” (p. 47).

³⁰Information systems, operating procedures, and training requirements already appeared in the 2011 edition of the OECD Guidelines for Multinational Enterprises, in conjunction with the Global Reporting Initiative, to develop reporting standards that enhance companies’ ability to communicate how their activities influence sustainable development outcomes.

³¹Such distinction is clarified in Article 1:1 of the Belgian Code of Companies and Associations of March 23, 2019 (*Code des sociétés et des associations*), according to which, in contrast to the disinterested objective of associations, a company must necessarily have the aim of “distributing or providing its members with a direct or indirect economic advantage” (“*Un de ses buts est de distribuer ou procurer à ses associés un avantage patrimonial direct ou indirect*”).

doctrine in exclusive favor of the shareholders, and to accept other ways, not purely financial in nature, that may contribute to this end. Contractual freedom may allow some margin for this purpose as long as it does not affect the shaping principles of the corporate type. Nevertheless, legal certainty also requires the recognition of the internalization of these social and environmental concerns in company law. This is the framework adopted, from a more institutional perspective, in the modern Corporate Governance Codes for publicly listed companies, even when expressed in terms of “soft law.”³² There is still the alternative of some type of corporate model that gives legitimacy to the adoption of policies with a broader purpose than the one envisaged in general rules inspired in principles of the liberal economy of the 19th century in the times of codification.

2.2 Adoption of Public Purpose-Driven Companies

The *Société à finalité Sociale* (SFS) approved in Belgium in 1995 and introduced in Articles 661 to 669 of its *Code des sociétés*, although bypassed in the Belgian *Code des sociétés et des associations* of March 23, 2019, serves as a precedent among corporate types. This social form is a special case with respect to other general forms of companies, characterized by rules that limited the maximization of benefits, and

³²As set forth in the German Code of Good Governance for Listed Companies (2015 revised version)—*Deutsche Corporate Governance Kodex* (known as “DCGK” or “Kodex”)—the management boards and supervisory boards must consider the interests of the shareholders, the enterprise’s workforce, and the other groups related to the enterprise (the stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise’s best interests). Moreover, in France, section 24.3.3 of the *Code of Government of Entrepreneurship of Societies Cotées* maintains the need to align the directors’ interests with the “social interest of the company” and with those of the shareholders. The Code of Good Governance of Spanish listed companies of 2015, reviewed in 2020, describes in its Recommendation 12 the social interest of these companies as the achievement of a profitable and sustainable long-term business, which promotes their continuity and maximizes the economic value of the company, and adds that, in the pursuit of social interests, respect for laws and regulations and behavior based on good faith and ethics and respect for customs and accepted good practices. It seeks to reconcile the interest of the company with, as appropriate, the legitimate interests of its employees, suppliers, customers, and other interest groups and the impact of company activities on the environment and on the community as a whole (“*la consecución de un negocio rentable y sostenible a largo plazo, que promueva su continuidad y la maximización del valor económico de la empresa. . . en la búsqueda del interés social, además del respeto de las leyes y reglamentos y de un comportamiento basado en la buena fe, la ética y el respeto a los usos y a las buenas prácticas aceptadas, procura conciliar el propio interés social con, según corresponda, los legítimos intereses de sus empleados, sus proveedores, sus clientes y los de los restantes grupos de interés que pueden verse afectados, así como el impacto de las actividades de la compañía en la comunidad en su conjunto y en el medio ambiente*”).

established the need for the satisfaction of collective interests and welfare in general.³³ Consequently, in the previous regulation, the correspondent subsidiary provisions of the elected general form of company were applicable to the *SFS* as a special type of company.³⁴

From other perspective, some US jurisdictions have followed different paths. The Low-Profit Limited Liability Company L3C took the Limited Liability Company, widely accepted by the constituencies, as a reference to promote greater freedom in its contractual configuration. However, criticisms were pointed out against the difficulties in the adaptation of this special form and the lack of timely control over its activities. This favored the appearance of the benefit corporation, which submits its legal regime subsidiarily to the business corporation regulations. The constraints on corporate governance to act outside the financial interests of the partners contributed to its further development. Simply put, benefit corporations are organizations that, with the pertinent precautions in regard to translating solutions from legal systems with a different legal tradition, may be considered as a sort of “companies with enlightened values or with shared interests.”³⁵

As a special corporation, the Delaware General Corporation Law only dedicates Subchapter XV of its Book 8, paragraphs 361–368, to public-benefit corporations, while the Model Benefit Corporations legislation occupies just over a dozen paragraphs; additionally, it even allows benefit corporations to maintain the characteristics of closed corporations.³⁶ However, this legislative approach when regulating the benefit corporation contrasts with the broad legislative treatment that the Social Purpose Corporation receives, for example, in the State of California.³⁷ In this entire context, the legislator exercises particular caution in distinguishing these legal forms of corporations at the time of their “incorporation” from other special types of companies available. Nothing prevents, therefore, these special corporations from being compatible with other existing ones, such as insurance, banking, or

³³Defourny et al. (1998, p. 73); and D’Hulstère and Pollénus (2008, *passim*). In any case, currently, see Articles 41 and 42 of the *Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses*, of March 23, 2019.

³⁴They include *la société en nom collectif*, *la société en commandite simple*, *la société privée à responsabilité limitée*, *la société anonyme* and *la société en commandite par actions*, together with *la société cooperative*. Furthermore, when the company adopted the form of a limited liability cooperative, which was the most frequent in practice, the regulation required certain capital guarantees (Articles 664 and 665 CdS).

³⁵Hiller (2013, p. 290). Additionally, Brodsky and Adamski (2013, p. 1546–1547) highlight the tenuous line that separates the traditional for-profit and non-profit sectors due to the consideration of the modern entities of the social economy as entities with a business purpose and due to the appearance of the new benefit corporations as a result of the evolution of the law to attend to certain public needs.

³⁶On the close social purpose corporation, see § 2602(b)(7) of the California Corporations Code.

³⁷Both in the regulations of the States of Washington and California, which also admit the possibility to register public-benefit corporations; particularly, California has a complete legal regime for the Social Purpose Corporation (see to this effect § 2500 to 3503 of the California Corporations Code).

professional corporations.³⁸ In any case, it requires the obligatory mention of the general social purpose and, optionally, the specific aim that constitutes their entire corporate purpose.

Other jurisdictions outside the United States that have approved a kind of public purpose-driven company were inspired particularly by the form of benefit corporations. However, in some cases, they have not followed the North American pattern.³⁹ In contrast, even when recognizing a special type of company, and therefore not autonomous, they have allowed this new form of company to use the basic rules of any of the general companies admitted in law. Thus, in Italy, the *legge n. 208*, of December 28, 2015, of the *società benefit* does not limit the use of this regulatory model, as it would be correlative to the *società per azioni*, but allows to submit the *società benefit* to the regulation of any general type of company, including cooperatives.⁴⁰

Under Article 2247 of the Italian *Codice civile*, the objective of the company remains to “divide the profits” (*allo scopo di dividerne gli utili*). This constraint has led to the recognition of the limitations of company law in its classical conception to accept social, environmental, and governance concerns in the stakeholders’ interests as part of the organizational goals.⁴¹ Thus, the Italian regulation of the *società benefit* validates that corporate governance integrates such purposes and internalizes the principles of social responsibility in the company. Consequently, the directors must balance shareholder interests with those of entities on whom the company’s economic activity may have some impact.⁴²

This characteristic adds to the purpose of the company other external purposes different from the internal interests owed to partners and to the shareholders by virtue of the company contract. However, the *società benefit* does not enjoy the freedom to adopt policies related to social, environmental and governance objectives, as large companies, due to their greater institutional nature. As a special legal form, its preferential use is oriented mostly to companies of smaller dimensions and of a predominantly contractual nature. Therefore, it grants legitimacy to corporate governance that aspires to attend to these other collective or general interests beyond the external regulations that protect the specific rights of the stakeholders.⁴³

³⁸See §2602(b)(4)(5)y(6) of the California Corporations Code.

³⁹According to Montalenti (2017, pp. 82–83), la *società benefit* responds to a “transtypical model” adopted by the Italian company law.

⁴⁰Relating the Book V, titles V and VI, of the Italian *Codice Civile*. About this, Corso (2016, p. 1000); and Stella Richter (2017b, pp. 278–279).

⁴¹Critically, Calandra Buonaura (2010, p. 101); Angelici (2014, p. 255); and Montalenti (2018, p. 303).

⁴²Article 1, comma 377 of *legge n. 208/2015 de la società benefit*, that must be connected with the commentary to the §101 of the Model Benefit Corporation Legislation and with §362 of Book 8 of Delaware General Corporation Law. On this regime, De Donno and Ventura (2018, passim.); and Ventura (2018, p. 559). Also Stanzione (2018, p. 487).

⁴³On the limitations of this legal form for large public companies, Stella Richter (2017a, p. 957).

Latin-American countries that have incorporated, with a different name, the specific figure of the *sociedad de beneficio e interés colectivo* (*sociedad BIC*), among their special social types in company law, have followed the same pattern as Italy. Despite other legislative projects related to this legal form, Colombia has been the benchmark in this region with the enactment of the Law of June 18, 2018, which has created and developed the commercial companies of benefit and collective interest (*Ley del 18 de junio de 2018, por medio de la cual se crean y desarrollan las sociedades comerciales de beneficio e interés colectivo*). In this sense, Articles 1 and 9 of the Law authorize any existing or future commercial company of any type recognized by law to voluntarily become a *sociedad comercial de beneficio e interés colectivo*. In such case, the law of the *sociedades BIC*, the provisions existing in the bylaws and regulations applicable to each type of company, according to this priority order, shall regulate the governance of the company.

More recently, the Ecuadorian company law has adopted a legislative model that also configures *la sociedad de beneficio e interés colectivo* as a special company. This regulation allows any commercial company under the control and supervision of the *Superintendencia de Compañías, Valores y Seguros*, on a voluntary basis, to assume such status. Therefore, it does not imply the transformation of the company or the creation of a new company, but only a specialization of a general category.⁴⁴ Along with the aforementioned legislation, within the Andean countries, as of November 23, 2020, Peru has also enacted the *Ley 31.072* regarding the *Sociedad de beneficio e interés colectivo Sociedad BIC*.⁴⁵ By doing so, the legislature has also created a new legal category that presupposes the types established in the general law of companies, where the partners are expected willingly to generate a positive impact by integrating a purpose of social benefit into the company's economic activity. In this context, on July 14, 2021, Uruguay also enacted its *Ley de Sociedades de Beneficio e Interés Colectivo*, so that any of the entities regulated by the *Ley de Sociedades Comerciales* (No. 16,060), including trusts, may assume such status.⁴⁶ And even from a global dimension of the phenomenon, in Africa also Uganda passed the same year, on February 5, a Law governing companies (no 007/2021). Particularly, its Articles 269–273 regulate the “community benefit company” (“CBC”) as a legal form that is to have a general positive impact on society and on the environment, and that may incorporate other specific public goals.

⁴⁴ *Sección Innumerada Empresas de Beneficio e Interés Colectivo*, added to the *Ley de Compañías* by the *Disposición Reformatoria Novena de la Ley s/n, Suplemento del Registro Oficial 151* as of February 28, 2020. About this legislative movement in Latin-America, Alcalde Silva (2018, p. 381) and Mujica Filippi (2019, p. 7).

⁴⁵ See also the regulation passed by the *Decreto Supremo núm. 004-2021-PRODUCE* as of February 23, 2021. On this topic, Caillaux and Ochoa (2021, pp. 15–22), and previously in Perú, Caravedo Molinari (2016, 1–155).

⁴⁶ On the evolution of the BIC Corporations' legislative production in Ibero-American countries and the state of the draft regulations in Chile, Argentina, Brazil, Panama or Mexico, in *Las empresas con propósito y la regulación del cuarto sector en Iberoamérica* (2021), pp. 14–16, and Alcalde Silva (2021, RR12-1.6).

3 Conclusions

Corporate social responsibility and its basic principles constitute a sociological reality that occurs with greater intensity at times following economic crises and extends beyond company law to cover the entirety of economic regulation. Company law introduces this phenomenon through the rules of corporate governance for social, environmental, and governance matters oriented toward collective or general interests, based on the specific or general objectives envisaged in the law. The formulation of law for public purpose-driven companies, such as benefit corporations, however, adopts different projections according to tradition and the legal constraints of companies in pursuing socially responsible investments without contradicting the *causa societatis* and the “for-profit principle.”

From an initial perspective, with the adoption of specific corporate forms such as the Belgian *Société à Finalité Sociale*, the English Community Interest Company or the North American Low-Profit Limited Liability Company, the different legislators have tried to overcome the operational and financial limitations of foundations and other non-profit entities. However, they have maintained a certain endowment of company assets, through limitations to distribute benefits in favor of the partners. Furthermore, their activity and projection for general or collective interests have been subject to the control of specific organizations, mostly public, in particular, because these entities may receive certain tax incentives or a more favorable tax regime than the strictly for-profit companies.

The formation of these “hybrid” companies, situated between for-profit companies and non-profit entities, presents certain limitations with regard to the freedom of the partners in exercising their economic rights due to the legal configuration of these organizations. In this sense, such entities are closer to non-profit organizations than to for-profit companies, even when they use their organizational framework, share their associative origin, and promote a common goal for their members. Therefore, the figure of the public benefit corporations or simply benefit corporations has arisen in certain US jurisdictions and, later on, in jurisdictions outside the United States that have imported its legal form. Nevertheless, the latter jurisdictions retain the freedom of adapting benefit corporations to any other existing general type and apply its regime subsidiarily. These regulations lay down the limitations regarding these companies’ operations because of the need to cater to public or collective interests.

In consideration of its condition, the benefit corporation is required to have a relevant impact on public benefit, which leads to the imposition of rules on information disclosure and transparency. In principle, it extends to the standards of impact based on the principles of corporate social responsibility. This directly affects corporate governance, both by considering a shared interest adapted to these social and environmental values and, in some cases, delegating responsibilities of handling these matters to specific members of corporate bodies. Such obligations are extensible, due to their mandatory nature, to specific liability procedures and legitimation for the exercise of legal actions in the case of the directors’ fault for the lack of promotion of the general or collective purposes recognized in the bylaws.

Benefit corporations face the problems of dual governance objectives, which require conciliating the different conflicting interests of the shareholders and the stakeholders. This task will not always be easy, but to maintain the status of a benefit corporation, evidence of compliance with its social and environmental requirements is at least required. Moreover, benefit corporations may be subject to eventual internal audits through third-party verification and external controls by the surveillance entities.

To overcome these problems, the social purpose corporation presents a more flexible character. Simply put, the social purpose corporation grants directors a wide range of freedom to decide whether to adopt social, environmental, or governance policies, allowing for these to be further limited than in the benefit corporations, without being subject to liability actions. Furthermore, the bylaws may configure the framework of the beneficiaries other than the shareholders very broadly, which grants an extensive autonomy to the directors. In any case, the shareholders maintain the censorship faculty over the directors and may revoke their position. In this context, the legal regime also maintains the need to disclose non-financial information in a timely manner. Nevertheless, the directors may implement a value system that goes beyond the pursuit of purely financial interests of the shareholders without being responsible for damages to the company.

In the European Union, the “public-interest entities,” due to their size or the relevance of their activity in the market, are also bound to report information on their non-financial activities through specific reports separately from their financial statements and annual accounts. In this manner, at least the companies that cover large undertakings have to be transparent about their policies in aspects of collective and non-financial interests. Such requirements are also extended to the phenomenon of groups of companies and to accounting consolidation rules and reflect the orientation of large corporations towards an institutional perspective.

In some countries of continental Europe, where the institutional theory is more prevalent, as in the German or French cases, it seems that corporate social responsibility does not constitute mainly a matter of corporate typicity. In this sense, French law has allowed the inclusion of the values of social responsibility into its national company law by explicitly introducing the need to consider social and environmental issues in every general type, including civil companies. In other jurisdictions, the existence of specific “social economy entities” and their guiding principles, especially those that assume a corporate structure, also restrict the need to adopt the specific form of public purpose-driven companies or, simply, benefit corporations.

Alternatively, Italy has enacted *la società benefit* and some Latin American jurisdictions, where there are additionally various regulatory projects in progress, *las sociedades comerciales de beneficio e interés colectivo*. Here, it is possible to find certain “transtypicity” with respect to benefit corporations. Despite the corresponding adaptation to their regulatory schemes and their own legal policy concerns, these laws have accepted the basic features of the benefit corporation. Nevertheless, by doing so, they consider the different existing types among the companies generally recognized so that these special companies are not limited to a single general legal regime.

In conclusion, companies constitute, strictly speaking, instruments at the service of the partners and the shareholders for the management of their interests. Consequently, the usefulness of the benefit corporations and public purpose-driven companies depends, largely, on the legislative framework that allows their integration. Perhaps, a flexible or simplifying vision of the legislative model for these companies, with the appropriate legal security measures, along with the incentives to their formation with respect to other companies, may better promote their use. Nevertheless, the distinction between benefit and social purpose corporations do not favor a unitary vision of the phenomenon. Moreover, it is convenient to consider the imposition of the disclosure of non-financial information for “public-interest companies,” which moves the issue of these special companies from typicality to typology to recognize their preferable use by private entities as legal forms for medium and small undertakings.

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Benefit Corporations and the Common Law Tradition



Brian M. McCall

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1 History of the Corporate Form in the Common Law Tradition

To understand the development of benefit corporations and their place in modern company law, we must put them in their historical context. We will sketch at a high level the development of company law from ancient times to the last century. In so

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doing, we will note the interrelation between the public and private purposes of companies.

1.1 Corporations as Quasi-Public Entities: From Rome to the Early Modern Period

In ancient Rome, there were two types of legal associations that could be formed to pursue a common purpose: a *universitas* and a *societas*.¹ A significant distinction between these two forms in Roman law is that the former was directed to a public or quasi-public end and the latter was formed for the personal profit of the members. A *universitas* is defined as “[a] number of persons associated into one body, a society, company, community, guild, corporation, etc.”² As the definition implies, this legal form included a sense of something coming into existence, a community, beyond the coordination of individuals. The terms *universitas* and *corpus* (body) are used interchangeably to refer to a collective body with a common end but distinct from an explicitly political community, such as a city.³ Although distinct from a true political body, Roman jurists saw these entities as analogous to true political bodies. For example, the Roman jurist Ulpian notes the similarity between a municipality and a corporation in how they act:

If members of a municipality [*municipes*], or any corporate body [*universitas*] appoint an attorney for legal business, it should not be said that he is in the position of a man appointed by several people; for he comes in on behalf of a public [*republica*] authority or corporate body [*universitas*], not on behalf of individuals.⁴

Although the words “municipality” and “corporation” are used in parallel in this context, they were distinct. In a certain sense, *universitas* was an entity that occupies a place between the political community (pure public good) and an association of

¹Scruton and Finnis (1989), p. 242.

²Lewis and Short (1975).

³See, e.g., 2 THE DIGEST OF JUSTINIAN, bk. 2.4, no. 10.4 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) [hereinafter DIGEST OF JUSTINIAN] stating:

One who is manumitted by some guild [*corpore*] or corporation [*collegio*] or city [*civitate*], may summon the members as individuals; for he is not their freedman. But he ought to consider the honor of the municipality, and, if he wishes to bring an action against a municipality [*rem publicam*] or a corporation [*universitatem*], he ought to seek permission under the edict although he intends to summon a person who has been appointed their agent.

Notice the term *universitatem* is used to refer to a *collegium* and *corpus* whereas *rem publicam* is used to refer to the *civitas*. A *universitas* was also referred to by the words, *corpus* (body) and *collegium* (college). See Berman (1983), p. 215.

⁴DIGEST OF JUSTINIAN, bk. 3.4, no 2. (“*Si municipes uel aliqua universitas ad agendum det actorem, non erit dicendum quasi a pluribus datum sic haberi: hic enim pro re publica uel universitate interuenit, non pro singulis.*”).

individuals pursuing their collective ends (private good). Such an understanding is evident in Justinian's Institutes, in a passage in which he describes different forms of ownership. He argues that some things are by natural law common to all persons (*omnium*), some are public (*publica*), some belong to a corporate body (*universitatis*), some to no one, with the greater part being the property of individuals.⁵ Ownership by a *universitas* is distinguished in Roman legal thinking from both ownership by the whole political community and private ownership by individuals. Finally, a *universitas* was distinct in the ends it pursued, which were neither that of the whole political community nor that of individuals. Such bodies were dedicated to a wide variety of ends, such as religious organizations, burial clubs, political clubs, guilds of craftsmen or traders, orphanages, and asylums.⁶ Although their particular end was unique, such organizations shared the attribute of being formed to pursue some aspect of the public good and not merely a for-profit business activity. Accordingly, the property of a *universitas* did not belong to the members who comprised the *universitas*.⁷ The assets were owned by the corporate entity for the purpose of pursuing its particular mission and not to enrich the members.

In contrast to a *universitas*, a *societas* is defined as a "pooling of resources (money, property, expertise or labor, or a combination of them)"⁸ to form a partnership "for trading purposes."⁹ Unlike a *universitas*, whose end encompasses the good of others not merely its members, the end of a *societas* is solely the profit of the partners from trading. Unlike members in a *universitas*, the partners in a *societas* were seen as having a form of ownership directly in the assets of the *societas*. Although the nature of the partners' ownership of contributed assets changed (the partners became joint owners of the assets, contractually agreeing to limit the use of their joint property in accordance with their specific common business purpose),¹⁰ they still retained an ownership interest directly in the joint assets. In contrast, the assets of a *universitas* were those of the body, not of the members.

Following the fall of Rome, for-profit business was conducted either through a *societas* or pursuant to new contractual arrangements between individuals.¹¹ Yet the legal form of the *universitas* continued to attach to enterprises that pursued other quasi-public ends, such as religious communities and guilds.¹² In addition, the legal

⁵ See, e.g., J. INST. 2.1 (Peter Birks & Grant McLeod, ed. & trans., 1987) ("Things can be: everybody's by the law of nature; the state's; a corporation's; or nobody's. But most things belong to individuals, who acquire them in a variety of ways...").

⁶ Berman (1983), pp. 215–216.

⁷ The later Medieval canonists claimed that the property of a *universitas* was owned by nobody and the managers acted as mere guardians of this property. See Scruton and Finnis (1989), p. 242.

⁸ Zimmermann (1990), p. 451; see also Hansmann et al. (2006), p. 1356.

⁹ Lewis and Short (1975), in 1715.

¹⁰ See Zimmermann (1990), pp. 454–456 and 465–466; see also DIGEST OF JUSTINIAN, bk. 17.2, no. 1 (describing the assets of the partnership being held in common by the partners).

¹¹ Particularly the *societas*; however, other contractual forms such as the *census* and the *commenda* were used. See McCall (2009), pp. 22–23.

¹² Micklethwait and Wooldridge (2003), p. 12; see also Avi-Yonah (2005), p. 783.

term was appropriated to describe the new centers of learning that were founded in the twelfth century, what we now call “universities.” The medieval universities were considered distinct legal entities comprised of individual scholars, teachers, and students who pursued the common end of learning and intellectual debate. The jurist Bartolus of Sassoferrato describes a university in a way that recognizes that something exists beyond the particular members and their individual goals at a particular place and time. He says:

[A] university [*universitas*] represents a person, which is different than the scholars, or its members [*hominibus universitatis*]. . . . Thus, if some scholars leave and others return, nevertheless the university [*universitas*] stays the same. Similarly if all members of a people [*omnibus de populo*] die and others take their place, the people [*populus*] is the same . . . and thus a corporate body [*universitas*] is different from its members [*persone*]. . . .¹³

Bartolus is clearly commenting on the Roman law concept of the *universitas* in general, which term still had a broader meaning than an institution of learning. When speaking about a university, in the modern sense of the word, he needs to qualify it as a *universitas scholares*. An academic university was an example of a *universitas* as a collective entity that pursued a quasi-public good and not mere profit from trading. The *universitas* differs from a mere partnership of members (*societas*) as it survives the complete replacement of all members and its end transcends that of the partnership.

Although the *universitas* was developed and preserved to pursue quasi-public ends, by the High Middle Ages, merchants engaged in profit-making businesses began slowly adopting this form to pursue profits, with the first arguably being the Aberdeen Harbour Board in 1136.¹⁴ This slow development occurred since corporate bodies established as a *universitas* gradually pursued ends that encompassed both individual profit and quasi-public goods. Guilds, which were legally organized as a *universitas*, are a good example of this transformation. They pursued an end that was both public and private. Guilds were organized to advance the interests of various artisans and merchants, but their work transcended commercial activity to encompass religious festivities, poor relief for families of deceased members, and patronage of the arts.¹⁵

¹³ Avi-Yonah (2005), p. 781 (quoting BARTOLUS OF SASSOFERRATO, *Commentary* on Dig. 3.4.1.1 (1653)).

¹⁴ Micklethwait and Wooldridge (2003), pp. 12–13.

¹⁵ See Micklethwait and Wooldridge (2003), p. 13; see also Duffy (1992), pp. 141–154 (discussing guild involvement in the parish).

1.2 *The Modern Era: The Transition from Quasi Public to Private Purpose*

By the early modern period, the eighteenth century, some corporate entities were formed throughout the British empire to pursue large-scale commercial and colonization ventures rather than undertaking them as a partnership (*a societas*).¹⁶ Yet even these early corporations, in the modern sense of the term, exhibited an admixture of characteristics of a private for-profit business association and a public institution. They sought commercial profit but also possessed elements typically associated with governments: standing armies and democratic elections.¹⁷ In the age of mercantilism, these corporations generally undertook large-scale projects in partnership with the government, such as exploration of new lands and establishment of colonies. Thus, the for-profit end of the company was mixed with a quasi-public goal of the government. Employees of the great mercantile corporations in England even referred to themselves as “civil servants.”¹⁸

As the corporate form developed in the United Kingdom and common law jurisdictions that followed their company law, governments became somewhat skeptical of the use of these perpetual entities for profit-making activities since they could be used to evade regulation and taxation by their perpetuity.¹⁹ By the eighteenth century, British corporations were subjected to inspection by a committee of visitors, “which represented the interests of the founder and of the wider community.”²⁰ This board of visitors served the function of overseeing the public impact of these great mercantile corporations. This skepticism, combined with a financial collapse, led to new restrictions on the use of the corporate form (*universitas*) to conduct business.²¹ After the passage of the Bubble Act in England, business ventures, in an effort to escape the new restrictions it imposed on the use of the corporate form for private profiteering, had to be formed as creatures of contract through a deed of settlement signed by all shareholders.²² Corporate law in this phase had to rely on contract (particularly partnership contracts) and trust law. The corporate form was reserved solely for public goods, such as scholarly universities.

With the advent of the English Companies Act of 1844 (which became a model for other common law legal systems), and later the English Joint Stock Companies Act of 1856, the corporate form once again became available to for-profit businesses. These new corporate statutes facilitated registration with the government as a company or joint stock company rather than the execution of a contract or deed of

¹⁶ Avi-Yonah (2005), p. 783.

¹⁷ Micklethwait and Wooldridge (2003), pp. 21, 33–36.

¹⁸ *Id.* at 35, 95.

¹⁹ *Id.* at 13.

²⁰ Avi-Yonah (2005), p. 783.

²¹ Micklethwait and Wooldridge (2003), pp. 28–32 (describing the financial bubbles of the Mississippi Company and the South Sea Company).

²² Bottomley (1997), p. 282.

trust by all shareholders as a means to found a company.²³ As a part of this legislative change, a positive act of the government—the issuing of a charter—became essential to create a corporate body; in England, this could only be issued by an Act of Parliament, and in the United States by an act of a state’s legislature.²⁴ In order to obtain a charter, these companies generally had to demonstrate to the legislative body that the company would be established for a limited declared public purpose (i.e., fulfilling some aspect of the common good, such as the exploration of new lands, the building of railroads, etc.).²⁵ Although the chartered company could seek to obtain profits for its investors, its business plan had to involve pursuing some aspect of the public good in that pursuit of profit. This once again transformed the corporate form into a hybrid entity that pursued profit but only if that profit derived from activity supporting the public good.

The requirement of a public aspect of the purpose of a chartered corporation began to break down by the latter part of the nineteenth century. In the 1830s, Massachusetts and Connecticut removed the requirement that a corporation be engaged in some form of public works to obtain limited liability.²⁶ Eventually, a corporate charter could be obtained by filing a record with a public office (such as Companies House in England) rather than requesting a legislative act. Yet throughout common law jurisdictions, a corporate charter still had to articulate some particular business activities in a purpose or company object clause. Over time, this purpose clause began to detach from the requirement of connection to a public good. Stephen J. Leacock explains how lawyers in common law jurisdictions added flexibility to company charters by expanding the objects or purpose clause:

First, under English company law, historically, a company could not legally engage in any business activity at all, unless empowered to do so in the objects clause - or clauses - of its memorandum of association. Consequently, in practice, the drafters of objects clauses tended to include a plethora of primary as well as secondary activities in addition to peripheral objects and subordinate powers. All of this was done, in an attempt to provide the company with the greatest flexibility - semantically possible - to engage in every legal business activity imaginable.²⁷

By the late twentieth century, many American states amended their corporate legislation to simplify the process for a corporation to be unlimited in its purpose. Rather than requiring positive articulation of a list of purposes, corporations were permitted to engage in all lawful business activities unless the founding documents

²³*Id.*

²⁴See Micklethwait and Wooldridge (2003), pp. 40–44.

²⁵*Id.*; see also Avi-Yonah (2005), p. 784 (noting that “only corporations that were clearly vested with a public purpose and benefited the public fisc, like the East India and Hudson Bay Companies, received royal approval”).

²⁶Micklethwait and Wooldridge (2003), p. 46. By the end of the nineteenth century, the regulation of corporate bodies changed to do away with specially defined purposes and gave way to broader, more general purposes. See Bakan (2004), pp. 13–14; see also Micklethwait and Wooldridge (2003), pp. 45–46.

²⁷Leacock (2006), p. 72.

restricted it.²⁸ For example, the Delaware General Corporation Law now explicitly states that a “corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”²⁹ The same law also makes clear that although the certificate of incorporation must contain a statement of the “nature of the business or purposes to be conducted,” it will be “sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity.”³⁰

When the United Kingdom amended its Companies Act in 2006, it adopted the same approach as Delaware. The Companies Act now reads “Unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted.”³¹ Thus, objects or purpose clauses in both the United States and the United Kingdom have become merely a formality that enables companies to engage in any lawful business activity. The one limitation that may still remain is that an activity which although lawful has no “business” purpose may be outside the power of a for-profit company.³² This question was addressed in Delaware in the case of *eBay Domestic Holdings, Inc. v. Newmark* in 2010.³³ In this case, eBay, a minority shareholder, challenged the adoption of takeover defense measures that were designed to prevent eBay from acquiring control after the death of the founders and then changing the culture of Craigslist by increasing monetization of listings. Although the Delaware Court of Chancery found that the directors did not act in furtherance of a business (meaning profit-generating) purpose in adopting takeover defenses, they did not find that the current corporate practice of “seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements” was outside the power or purpose of the corporation. The case was focused rather on the overreaching of the directors who attempted to protect that purpose after their death.³⁴

Throughout this varied history, we see that the *universitas*, or body corporate, was a legal entity directed toward a public or quasi-public end. In early modern times, the corporate entity evolved to be one that merged private profit seeking with some larger public good, such as infrastructure building or exploration. By the turn of the twentieth century, that mixed purpose gave way to purely private business profit seeking, although one that still needed definite articulation. Finally, the law across the Anglo-American world evolved to allow the establishment of companies

²⁸ *Ibid.*, at 73.

²⁹ DEL. CODE ANN. tit. 8, § 101(b).

³⁰ DEL. CODE ANN. tit. 8, § 102(a)(3).

³¹ UK COMPANIES ACT Sec. 31(1) (2006). See also, UK PALMER’S COMPANY LAW, 2.601 (“To begin with, a company formed and registered under the 2006 Act is taken to have unrestricted objects unless the company’s articles specifically restrict its objects.”). See also Avi-Yonah (2005), p. 803.

³² See Leacock (2006), p. 73.

³³ 16 A.3d 1, 34 (Del. Ch. 2010).

³⁴ *Id.*

for any lawful business purposes rather than particularly articulated ones. An open question remained if a corporation could pursue nonbusiness purposes.

2 Emergence of the Shareholder Wealth Maximization Norm

One result of the history sketched in Sect. 1.1 of this chapter is the emergence within the common law legal systems of the shareholder wealth maximization norm for company directors. In common law countries, this norm is grounded, by different scholars, in common law concepts of property, tort, and contract.³⁵ William T. Allen, former Chancellor of the state of Delaware, summarizes aptly the view that decision-makers in companies must pursue the wealth maximization of their owners: “The corporation’s purpose is to advance the purposes of these owners (predominantly to increase their wealth), and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners.”³⁶ Directors and managers are viewed by this persistent theory as “mere stewards of the shareholders’ interest.”³⁷ As Milton Friedman, champion of this conception of the responsibilities of directors of a corporation, stated, the responsibility of directors is to “conduct the business . . . to make as much money as possible while conforming to the basic rules of the society.”³⁸ Professor Joel Bakan cynically observes: “CEO’s . . . ‘have learned to repeat almost mindlessly’, like a mantra, that ‘corporations exist to maximize shareholder value’; they are trained to believe self interest is ‘the first law of business.’”³⁹ Whereas in the ancient and medieval period a *universitas* was seen as an entity that brought together a variety of individual and public interests, the modern business corporation in common law countries is to manage for the narrow purpose of shareholder wealth maximization. As Henry Hansmann, summarized it:

The principal elements of this emerging consensus are that ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance. . . .⁴⁰

³⁵ See McCall (2011), pp. 513–521.

³⁶ Allen (1992), pp. 264–265.

³⁷ Bainbridge (2002), p. 6.

³⁸ Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 33.

³⁹ Bakan (2004), p. 142 (quoting Robert Simons et al., *Memo To: CEOs*, FAST COMPANY, June 2002, at 117, 118).

⁴⁰ Hansmann and Kraakman (2001), pp. 440–441.

Although the shareholder wealth maximization norm remains the dominant theory in common law corporate legal discourse,⁴¹ by the late twentieth century, at least some jurists began to question its worth. Some common law jurists began to develop what has become known as the stakeholder or constituency model of the corporation. The theory is difficult to describe due to the diversity of definitions of stakeholders and constituencies offered. Yet in the midst of these disagreements, a group of scholars can generally be discerned as sharing a common opinion that, to a varying degree, boards of directors may or should consider the interests of identifiable groups of parties other than shareholders in managing a corporation.⁴² Yet starting with the early pioneer of this theory, E. Merrick Dodd, in the 1930s, most jurists argue merely that corporate managers should be permitted to take into account private interests other than shareholder wealth, not that these other interests must be accommodated.⁴³ By the latter part of the twentieth century, the stakeholder theory had resulted in some jurisdictions adopting “constituency statutes.”⁴⁴ These amendments merely permitted directors to consider, to an unspecified degree, private interests of groups other than shareholders. These laws did not change the shareholder wealth maximization norm; directors still needed to make decisions that advanced that goal, but in so doing they could consider the effects on other groups. These statutes did not return to the corporate form a requirement of pursuing a public good as the interests that directors could consider were essentially private interests.

To return to the *eBay Domestic Holdings, Inc. v. Newmark* case discussed in the prior section, it was not considered unlawful for the corporation to provide listing facilities at low monetization rates to assist the community, but it was considered a breach of the duty of directors to pursue the goal of community access to listings at the expense of wealth maximization for the shareholders, such as eBay. The court explained:

Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim’s and Craig’s desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other

⁴¹ Cortright and Naughton (2002).

⁴² See, e.g., Colombo (2008), p. 257 (“[T]here is some consensus among stakeholder theorists with regard to what a board of directors ought to be doing with regard to nonshareholder stakeholders.”).

⁴³ See, for example, Fairfax (2006), p. 681 (citing Merrick Dodd (1932), pp. 1160–1161).

⁴⁴ Allen (1992), p. 276. Chancellor Allen continues by noting that:

The statutes of Indiana, Pennsylvania, and Connecticut are particularly notable. The Indiana statute, as amended in 1989, and the Pennsylvania statute enacted in 1990, explicitly provide that directors are not required to give dominant or controlling effect to any particular constituency or interest. These statutes appear explicitly to decouple directors’ duties to the corporation from any distinctive duty to shareholders.

Id. (Internal citations omitted).

stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders. . . .⁴⁵

The corporate form, although allowing for a broad definition of purposes that could include providing listing services to the community, did require that any such decision had to be in furtherance to some degree of shareholder wealth maximization. As the chancellor noted, the decision of the directors that was the subject of the dispute was contrary to wealth maximization and was therefore a breach of the directors’ fiduciary duties. This case is a good example that demonstrates why a new form of entity not beholden to the shareholder wealth maximization norm is necessary.

3 The Emergence of Benefit Corporations

3.1 *Ben & Jerry’s Case*

Commentators often credit Unilever’s acquisition of Vermont-based Ben & Jerry’s Homemade Holdings, Inc., as the catalyst for the emergence of benefit corporations.⁴⁶ The case is also used as a “cautionary tale”⁴⁷ to explain the necessity of benefit corporations. Ben & Jerry’s famous ice cream company claimed to operate the business consistently with social responsibility. Yet when Unilever made an offer to purchase the publicly traded company, the board concluded that they had to support the offer since it was a good deal for shareholders. At the time the board was considering the offer, cofounder Ben Cohen said: “It’s my strong personal belief that the only way that the company can actualize its progressive values is to remain independent, so within the bounds of my fiduciary duties as director, I am working hard to find a way to remain independent and return adequate value to the shareholders.”⁴⁸ Ultimately, the board concluded that since Unilever offered a significantly greater price than the value of similar companies, the board had to proceed

⁴⁵ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

⁴⁶ See, Gleissner (2013), p. 24; Lawrence (2009).

⁴⁷ *Id.*

⁴⁸ Carey Goldberg, *Vermonters Would Keep Lid on Ben & Jerry’s Pint*, NEW YORK TIMES, 22 Dec. 1999, www.nytimes.com/1999/12/22/us/vermonters-would-keep-lid-on-ben-jerry-s-pint.html.

with the sale or face lawsuits from shareholders for breach of fiduciary duties.⁴⁹ This support for a sale was necessary even though the directors had reason to believe Unilever would not continue the social goals of the company after the acquisition. Since the acquisition, Ben and Jerry “have since expressed concerns that the company has shifted away from its original mission of social responsibility.”⁵⁰ Some commentators have claimed that “had Ben & Jerry’s been a benefit corporation, there would have been little, if any, fear of a legitimate legal threat against the board of directors” for refusing to sell to Unilever on the ground that the new owner would not operate the company consistently with its social mission.⁵¹

Not all commentators agree that corporate law forced the Ben & Jerry’s board to accept Unilever’s offer.⁵² They argue that shareholder wealth maximization was not a mandated rule that inevitably led to the legal conclusion that the board must sell. Yet, notwithstanding the nuances of this legal argument, we have the actual decision of the board. The directors believed that a decision to refuse the large premium offered by Unilever would have led to risky and costly litigation against them. The cofounders themselves who did not want the sale to occur believed at the time that the law required the result.

3.2 The Emergence of New Legislation and the Founding of B Lab

Regardless of how one views the Ben & Jerry’s case, shortly after the purchase by Unilever, a movement began to emerge for the reconceptualization of corporate forms in the common law world. This movement had two prongs. First, a model Benefit Corporation Act was prepared by a group led by attorney William Clark to propose a new form of entity, and B Lab was founded.⁵³

In 2008, Vermont enacted the first US legislation providing for a new form of for-profit business organization that could pursue goals other than shareholder wealth.⁵⁴ Vermont chose the name low-profit limited liability company (also called L3C).⁵⁵ In 2010, B Lab drafted and proposed a model form of benefit corporation legislation (the “Model Legislation”) to encourage more states to adopt a statutory alternative to the traditional corporation.⁵⁶ By November 2020, 36 US states had

⁴⁹See Gleissner (2013), p. 25.

⁵⁰Lawrence (2009).

⁵¹Gleissner (2013), p. 25.

⁵²See e.g., Page and Katz (2012).

⁵³Shackelford et al. (2020), p. 701.

⁵⁴See Burand and Tucker (2019), p. 33; VT. STAT. ANN. tit. 11 § 3001 (23) (2008).

⁵⁵See id.

⁵⁶See Colombo (2019), p. 77.

adopted laws authorizing one or more new forms⁵⁷ of business entity, and four states were considering proposed legislation.⁵⁸ Most did not follow Vermont's lead and chose the name benefit corporation.⁵⁹ Most states that adopted such legislation generally followed the Model Legislation, with the notable exceptions of Delaware and Colorado, which chose to depart in significant ways from its approach.⁶⁰ As of November 2017, the five states with the most incorporated benefit corporations were Nevada (974), Delaware (774), Colorado (513), New York (457), and California (269).⁶¹

The United Kingdom enacted, as of 2005, legislation providing for a new company form focused on social enterprises, a community interest company (CIC).⁶² A CIC may not be a charity and is not subject to laws regulating charities but is subject to the provisions of UK company law, and its directors have the same duties as corporate directors.⁶³ If company founders opt to form as a CIC, the company becomes subject to a government regulator, to whom the CIC must report concerning its compliance with the community purpose.⁶⁴ Yet, in addition to providing by legislation for a specific legal form for social enterprises, the UK government permits a variety of forms that are not exclusive to social enterprise objectives. According to the UK government, "If you want to set up a business that has social, charitable or community-based objectives, you can set up as a: limited company, charity, or from 2013, a charitable incorporated organization (CIO), co-operative, community interest company (CIC), sole trader or business partnership."⁶⁵ This list includes traditional company forms of for-profit businesses (such as a limited company) and purely charitable forms. According to B Lab, limited companies in the UK can change their status by amending their articles of

⁵⁷ For example, Pennsylvania and Oregon enacted laws authorizing benefit corporations and benefit limited liability companies. See 15 PA. STAT. AND CONS. STAT. ANN. § 8893(a) (2016); OR. REV. STAT. ANN. § 60.758(2)(a)-(b) (2014); 15 PA. STAT. AND CONS. STAT. ANN. § 3311(a) (2012).

⁵⁸ Those states are Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, D.C., West Virginia, and Wisconsin. States that are considering proposed legislation as of November 2020 are Alaska, Georgia, Iowa, and Mississippi. See <http://benefitcorp.net/policymakers/state-by-state-status>.

⁵⁹ See Burand and Tucker (2019), pp. 33–34. Florida adopted legislation authorizing both social purpose corporations and benefit corporations. See FL. BUS. CORP. ACT, FLA. STAT. ANN. § 607.501(3) (2014); FLA. STAT. ANN. § 607.501.513 (2014).

⁶⁰ See Loewenstein (2017), pp. 381–382; Colombo (2019), p. 78 [Hereinafter Colombo, *Taking Stock*].

⁶¹ See Burand and Tucker (2019), at 76 N112.

⁶² See UK PALMERS COMPANY LAW, Vol. 1, 1.225 (2020).

⁶³ See *Id.*

⁶⁴ See Sukdeo (2015), p. 111.

⁶⁵ <https://www.gov.uk/set-up-a-social-enterprise>.

association to amend their object clause.⁶⁶ According to B Lab’s directory, 297 UK companies have qualified through one method or another as a B-Corp as of November 2020.⁶⁷

Canada’s approach has been similar to the UK in that some jurists have argued that no legislation is necessary as current corporate law permits business corporations to consider social concerns.⁶⁸ Yet, effective as of July 2013, British Columbia’s corporation law provides for a specific form of benefit corporation, a community contribution company.⁶⁹ As of mid-2019, 50 such companies had been incorporated.⁷⁰ As of November 2020, B Lab certified 278 Canadian entities as being benefit companies.⁷¹

3.3 *The Emergence of B Lab*

As noted in Sect. 3.2, an international organization was founded to facilitate the emergence of benefit corporations, B Lab. The organization states that its goal is to “accelerate . . . and make . . . meaningful and lasting” a “culture shift . . . to harness the power of business to help address society’s greatest challenges.”⁷² B Lab “pursues this goal by verifying credible leaders in the business community, creating supportive infrastructure and incentives for others to follow their lead, and engaging the major institutions with the power to transform our economy.”⁷³ The two major contributions of B Lab have been their project to draft Model Legislation to provide for specific company forms of social enterprises and to provide certification that a company is a B-Corp. Requirements to obtain and maintain certification vary depending on the country of organization, but in general B-Corp certification “measures a company’s entire social and environmental performance” and “evaluates how” the company’s “operations and business model impact . . . workers, community, environment, and customers.”⁷⁴ As of November 10, 2020, B Lab claimed to have certified 3,608 B-Corps operating in 150 industries and

⁶⁶ See https://bcorporation.uk/certification/legal-requirements?field_lr_country_tid_selective=28&field_lr_corporate_structure_tid_selective=18&field_lr_state_tid_selective=14&field_lr_publicly_traded_owned_value_selective=1.

⁶⁷ <https://bcorporation.net/directory>.

⁶⁸ See e.g., Sukdeo (2015), p. 89.

⁶⁹ See <https://www.centreforsocialenterprise.com/community-contribution-companies/>.

⁷⁰ See *id.*

⁷¹ <https://bcorporation.net/directory>.

⁷² <https://bcorporation.net/about-b-lab>.

⁷³ *Id.*

⁷⁴ https://bcorporation.eu/certification?_ga=2.94154132.824123640.1604948816-442973657.1600962107.

74 countries.⁷⁵ Depending on the country of organization, certification may involve incorporating as a specific legal form (such as a benefit corporation) or voluntarily adopting commitments to honor the B Lab goals if no special corporate form is available. Finally, B Lab receives grant funding from a “wide range of donors, including foundations, governmental agencies, individuals, and corporations.”⁷⁶

3.4 Increased Scholarly Attention by Common Law Jurists

The work of B Lab combined with the enactment of more statutes authorizing new forms of business enterprise has generated greater scholarly attention to the topic of benefit corporations among common law jurists. A ten-year study of academic literature concluding in 2017 found “growing attention paid by legal scholars to the fields of social entrepreneurship and impact investing.”⁷⁷ The study quantified the literature thus:

Over 100 articles discuss the 5 highest frequency terms: benefit corporations (156), social enterprise (132), L3C (117), social entrepreneurs (103), and hybrid entities (102). Between 50-60 articles discuss more narrow topics such as flexible purpose corporations and Delaware’s public benefit corporations, and double or triple bottom lines (consolidated into one category for reporting purposes).⁷⁸

4 Primary Legal Questions in Common Law Legal Systems Relating to the Creation and Operation of Benefit Corporations

To enable the formation and flourishing of benefit corporations, common law jurisdictions may need to adapt company law in some critical ways. This can take the form of either amendments to corporate law statutes to change their applicability to benefit corporations or the adoption of new legislative frameworks applicable exclusively to benefit corporations. Scott Shackelford, Janine Hiller, and Xiao Ma summarize the key legal issues that must be addressed in common law jurisdictions applicable to benefit corporations: “(1) its purpose must include either a general or specific public benefit; (2) as part of their fiduciary duties, directors must consider broader stakeholder interests as well as profit; and (3) the entity must assess its

⁷⁵<https://bcorporation.net/> (visited on November 10, 2020).

⁷⁶<https://bcorporation.net/about-b-lab/funders-and-finances>.

⁷⁷Burand and Tucker (2019), p. 16.

⁷⁸Burand and Tucker (2019), p. 18.

performance annually, reporting about the benefits delivered, by using a third-party assessment.”⁷⁹

4.1 To Legislate or Not to Legislate

As noted previously, there is a question in some common law jurisdictions as to whether amendments to corporate law statutes are necessary to facilitate benefit corporations. Some jurists would argue that a company committed to social improvement can be established within existing law by carefully crafting corporate purpose or company object clauses and relying on existing law regulating director duties. Yet adopting legislation, and its later effectiveness in encouraging companies to use its provisions, can be affected by the contentiousness of the debate, media interest, the support of legal practitioners, and the level of grassroots support.⁸⁰ Thus, the decision to legislate may be affected by more than legal issues.

Notwithstanding B Lab’s efforts to draft model legislation, no commonly agreed terminology has emerged for benefit corporation legislation. Deborah Burand and Anne Tucker give some examples of confusing and contradictory terminology:

Oregon uses the term “benefit companies” without distinguishing between whether companies are organized as corporations or LLCs; whereas, Pennsylvania uses the term “benefit company” only in reference to a benefit limited liability company and has yet a different statute recognizing “benefit corporations.”⁸² Moreover, “B-Corporations” refers to a brand, not a legal form, and so should not be confused with benefit corporations, although the B Lab promotes both.⁸¹ Thus, there is no standardized vocabulary among common law jurisdictions when legislating.

4.2 Entity Purpose or Objects

The critical difference between a benefit corporation and other corporations is the benefit corporation’s rejection of shareholder wealth maximization as its sole or most significant purpose. Benefit corporations are not nonprofit entities, nor are they pure for-profit businesses. If a founder wants to be a charity, there are ample legal forms and rules to engage in charitable work that in no way seeks profit. Benefit corporations are “a kind of business that lies somewhere between completely profit-driven enterprises and nonprofit organizations.”⁸² In this way, benefit corporations can be seen as an attempt to return to an earlier stage in the history of corporate law in which corporations, although pursuing private profit, had to demonstrate some public

⁷⁹Shackelford et al. (2020), p. 702.

⁸⁰See Ibid., at 726.

⁸¹Burand and Tucker (2019), p. 27.

⁸²Shackelford et al. (2020), p. 699.

purpose or common good as their object. That common good could be education or exploration or the building of public goods, such as railways. Likewise, benefit corporations represent an entity with a dual purpose: serving some public good while realizing a fair return on investment for its owners. Whether utilizing a new statutory form of entity or merely carefully crafting a corporate purpose or object clause, founders must pay careful attention to articulating the social purpose or goals of the benefit corporation. These will be the ends that inform the duties of the directors.

4.3 *Director Obligations*

In common law jurisdictions, the company directors owe duties to act in the best interests of the company and its owners.⁸³ It is this duty to act in the best interests of the company and its owners, as understood through the lens of shareholder wealth maximization, that causes the most significant legal issues for benefit corporations. As evidenced in the Ben & Jerry's case, the directors felt that the fiduciary duties owed to the company's shareholders compelled the company to accept a lucrative takeover bid that conflicted with its social purposes. Thus, by statute or organizational documents, the directors of benefit corporations must know that making decisions that advance the organization's social goals will not be challenged because those decisions did not maximize shareholder wealth. The directors must at a minimum be able to balance the interests of wealth maximization against the social purposes of the entity and ideally should be obligated to do so.

In a certain sense, company law has become constricted over the past few centuries due to the rise of the shareholder wealth maximization norm. For centuries, corporate entities were meant to pursue both private and public goods. As the law of directors' duties developed in the twentieth century, this duty often narrowed to focus exclusively, or primarily, upon increasing the investment of the company's owners. Whether this duty is embodied in a statute or developed by courts, the duty must be clarified so that directors can, consistent with the "best interests" duty, pursue the public or social goals of a benefit corporation, even if doing so will not maximize the value of the owner's shares in the company.

To some extent, constituency statutes adopted in some common law jurisdictions achieve this goal. Yet a rule that merely permits a director to consider the interests of groups other than the shareholders does not really embody the essence of a benefit corporation. Such rules merely protect a director against liability in making such decisions; these statutes often do not require the director to consider these interests.

⁸³The duty to act in the "best interests" of the company and its owners is found in the following laws of the following common law jurisdictions: *COMPANIES ACT* 2006, sec. 172(1) (United Kingdom); *CORPORATIONS ACT* 2001, 181(1)(a) (Australia); *COMPANIES ACT* 1967, sec. 157(1) (Singapore); *BUSINESS CORPORATIONS ACT 1985 (CAN)*, sec. 122(1)(a) and *BUSINESS CORPORATIONS ACT 1990 (ONT)* Sec. 134(1)(a) (Canada). In some common law jurisdictions, such as Hong Kong and the United States, the duty has not been codified by statute but has been developed by the states.

They also focus on the interests of corporate groups, such as employees or creditors, but the goals of a benefit corporation may transcend group interests. A benefit corporation may be founded to advance education or produce products in an environmentally safe manner. Such goals may not be encapsulated in the interests of groups such as employees.

Such rules often do not require directors to make decisions that advance the nonfinancial goals of a company. Constituency laws typically shield against liability for not solely considering shareholder wealth maximization. Yet those who establish or fund a benefit Corporation intend the directors to advance the stated goals of the benefit corporation. Thus, the company law governing benefit corporations needs to enhance the duties of directors to obligate them to act in the interests of the social or public goals pursued by the benefit corporation. How this duty requiring directors to consider and balance social goals against profit is crafted can be quite difficult to formulate.

4.4 Mandated Disclosure and Verification

Addressing how the duties of directors in benefit corporations differ from those of other corporations is only part of the solution. Investors will buy shares in benefit corporations presumably because they want their capital to be used for the social purposes identified as the objects of a particular benefit corporation. These investors want to see the fruits of this investment. Annual company financial accounts, required to be prepared in many common law countries, will not necessarily provide disclosure on how well the directors are meeting their duties to pursue the stated nonfinancial goals of the benefit corporation. Thus, benefit corporations need a system of disclosure and verification. The law governing benefit corporations must require disclosure by the benefit corporation of their compliance with their purpose. In addition, there must be some third-party standard that can verify that an entity is in fact functioning as a benefit corporation and not merely using the name to raise capital. An equivalent to an outside financial auditor may be called upon to report on compliance. B Lab has emerged as one type of certification and verification entity. Perhaps something like the English board of visitors could be established to review the decisions of the directors.

Finally, shareholders must have some meaningful way to intervene to hold benefit corporations and their directors accountable for the social purposes. Common law jurisdictions often rely on private litigation to enforce directors' duties. In the benefit corporation context, the law needs to determine which parties have standing to bring enforcement action for failure to pursue the social goals. Company law needs to determine if only the shareholders of benefit corporations have legal standing to bring claims or if the beneficiaries of a benefit corporation's purpose can hold them accountable for not pursuing the stated ends.

4.5 *Business Combinations*

A final general concern will involve how benefit corporations interact with regular companies. Mergers and business combinations are a part of business life in all common law jurisdictions. It was a merger offer for Ben & Jerry's that gave rise to the new legal form. Can benefit corporations combine with regular corporations? If they do merge, what becomes of the social purpose? Should investors who bought prior to the merger have an appraisal right for their shares? Appraisal rights if exercised require a company to repurchase shares at fair value from shareholders who dissent from a business combination decision.

5 Conclusion

In certain ways, the history of the corporate form in common law countries can be summarized by the adage "the more things change, the more they remain the same." The corporate form may be returning to its origins in the Roman and medieval *universitas*. The dominant shareholder wealth maximization norm has been called into question. All major common law jurisdictions have begun to facilitate at least one form of corporate entity that is not directed exclusively to the shareholder wealth maximization norm. Jurists, legislators, and social activists have developed, since the time of Ben & Jerry's sale to Unilever, a legal framework for a business entity that seeks more than profits. The corporate law of each common law jurisdiction may have begun to address this trend using different legal vocabulary and different legal techniques, but all major common law jurisdictions are beginning to address the issues of articulating a broader corporate purpose, adapting director duties to a new form of entity, requiring disclosure and verification, and addressing the merger of a benefit corporation with other business entities.

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Viability of Non-Recognised Benefit Corporations



José Miguel Embid Irujo

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1 General Overview and Background

The discussion on the legal recognition of so-called benefit companies—which may include a wide range of forms such as B-Corps, BICs or the Italian *società benefit*, among others—is not a particularly longstanding phenomenon. Although the

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problem of their actual incardination within the legal system is relatively recent, the underlying scientific debate is much older and may be traced back to the end of the 19th century and the beginning of the 20th century. Traditionally, the different doctrinal approaches to this issue have sought to identify ways to include the interests of stakeholders or even the general interest into the company's framework. In other words, the debate aims at enabling the for-profit purpose to coexist with other non-profitable objectives, so that the former may not be the sole goal of the entrepreneurial activity undertaken by companies. In this regard, ideal purposes shall be able to stand by profit, either as auxiliary objectives or even on equal terms. Non-profit purposes may range from more specific interests such as the protection of vulnerable collectives or entities to more abstract ones, including collective welfare and other interests which need not be specifically held by or attached to any individual.

Within this general framework, different academic proposals arose. Amongst them, the most widespread ones revolve around the idea of creating a legal entity which, besides being an economic actor, may be capable of including ideal or non-profit interests into its corporate structure and functioning. Most of these efforts take the form of theoretical approaches and have not been implemented by the legislature. However, few of them have had a significant influence and continue to be present in the current academic discussion. This is the case of the *Unternehmen an sich* theory, beckoning towards Walther Rathenau's thought, even if the formula had been previously drawn up.¹

Although it may be less visible, the public function of large enterprises is equally relevant to this debate and is usually considered by contributors. Finally, proposals to adopt pluralist visions of the enterprise by including the specific interest of workers shall not be disregarded. The role of coworker participation (*Mitbestimmung*), due to its well-established regulations under German law, which are predominantly applicable to larger undertakings, is generally acknowledged.

Conversely, at times, the purpose of enhancing other stakeholders' interest, different from the purely economic activity of the company and the distribution of profits among shareholders, is not particularly attached to any institutional or regulatory proposal. In other words, in most cases, there is no formal piece of legislation adapting or altering the company's defining elements. Indeed, the ongoing debate has predominantly revolved around merely theoretical foundations aimed at providing the company with a wider purpose to render their economic activity compatible with the enhancement of other interests. The discussion has developed within the re-emergence of corporate social responsibility (CSR) and this trend has developed to the point of shaping its own legal regime.²

¹See Riechers (1996) and Laux (1998). Lately, exploring the attachment between CSR and the German thinker, Fleischer (2017), pp. 991 ff.

²Embid Irujo and del Val Talens (2016) and, lately, Ruiz Muñoz and de la Vega Justribó (2019). For a relationship between CSR and benefit corporations, Stella Richter Jr (2017).

Yet, the fact that larger undertakings may be more likely to engage in socially responsible practices and are typically subject to more burdensome regulations (for instance, those on non-financial reporting) is not decisive.³ The crucial factor is that the ongoing discussion overflows its purely institutional side. The current academic debate is indeed set to enhance specific non-profit company forms but is also leaning towards a more abstract formulation of the problem, which may be applied on a larger scale.

2 Benefit Corporations and Company Forms

2.1 *Introductory Remarks*

Benefit corporations are rooted in the above-described phenomenon. However, they also present specific features which make them unique. First, benefit corporations combine and integrate profit-seeking purposes with one or several other interests. The latter may be public (general interest) or private in nature and are fostered as to conduct business in a responsible, transparent and sustainable manner.⁴

Regardless of their legal recognition, which may vary from country to country, benefit corporations are legally autonomous subjects, and may even be awarded legal personality in several jurisdictions. In this regard, benefit corporations differ from other attempted approaches to the issue which have failed to assess the institutional side of the problem. The key factor is that benefit corporations seek to balance various interests within one legal subject. These must be advanced simultaneously and are not necessarily subordinated to one another.⁵

To assess benefit corporations from a legal standpoint, one must observe them within an overall process of renewal of company forms. This is a regulatory trend which has developed within the international framework since the end of the 20th century. However, doubts arise as to whether benefit corporations shall be regarded as an actual contribution to this process of renewal. Their specific features and regulations, aimed at simplifying the formation and functioning of an independent legal subject, militate in favour of considering benefit corporations as new company form of their own.⁶

³See Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. See also del Val Talens (2019a), pp. 171–191.

⁴For Italy, *Legge 28 dicembre 2015, n. 208*. For Colombia, cfr. Mujica Filippi (2019); Hernando Cebriá (2016), pp. 349–402.

⁵In this sense, narrowed to the large public company, Tombari (2019), pp. 57 y ss.

⁶This is the case of French law after the creation of the *société par actions simplifiée* in the 90s, which has inspired many other jurisdictions. See Navarro Matamoros (2009); recently Salgado (2017), pp. 347–380.

Strictly speaking, benefit corporations are not merely simplified company forms as the ones enacted in recent times throughout many jurisdictions. However, they truly belong to the aforementioned trend in company law. In this framework, they fulfill the function of enhancing different interests within a single legal entity, which in turn poses doubts on their internal mechanisms and functioning.

Against this background, this paper assesses benefit corporations as a regulatory phenomenon which is closely connected but independent from other current trends, such as the renewal and simplification of company forms. In turn, within this book, this chapter assesses benefit corporations from the perspective of jurisdictions which have not enacted specific regulations to recognise them.

2.2 *Ways to Articulate a Benefit Corporation*

Even after providing a clear definition of what benefit corporations are, it is not possible to automatically adjust existing company forms to their specific features. This applies to both jurisdictions which have already enacted regulations on the issue as well as those who have not introduced reforms in this regard. Here, two alternatives arise. Sometimes, benefit companies are considered a new legal form and, if enacted, they are included in the country's catalogue of available options for undertakers. It is nevertheless more frequent that benefit corporations are not instated as autonomous legal forms but rather result from adapting the existing ones.

The first possibility requires legislative action since, according to the general understanding in company law, freedom of contract does not allow undertakers to create new company forms. Under Spanish law, a literal interpretation of Article 122 of the Commercial Code (hereinafter CC) may suggest otherwise.⁷ In the early years of the 20th century, this provision was relied upon by Notaries to create the private limited liability company (*sociedad de responsabilidad limitada*).

The second possibility, this is, benefit corporations resulting from the amendment of existing legal forms, may be formed without prior legislative intervention. However, as the experience of some countries shows, legislatures may instate adequate rules to facilitate the formation, organisation and functioning of benefit corporations. On a general basis, this is a valuable input although it may create legal uncertainty.

Accordingly, benefit corporations may result from adapting existing corporate forms (for instance, public or private companies). This phenomenon is protected by freedom of contract provided that applicable company law gives sufficient leeway.

⁷The provision states that “[a]s a general rule, companies shall be formed adopting one of the following forms”. The act then provides five company forms recognised under Spanish law. Despite the wording, the provision has not been used as to create alternative company forms other than the private limited liability companies. For a rigorous theoretical analysis, Fernández de la Gándara (1977).

Benefit corporations shall be framed within the discussion on company forms. This not only applies to Spain but also to many jurisdictions which have not enacted them. The so-called typological issue refers to the available choices for undertakers provided by the scope of freedom of contract that each jurisdiction grants.⁸

On these grounds, according to a recent approach to the general understanding of company law, this branch of the law would be shifting from a dialectic based on legal *forms*, which was extensively discussed throughout the past century, to one built around *models*. Company models, as opposed to forms, generally refer to possible adaptations of corporate forms beyond the scope foreseen by legislature, but in full accordance with the applicable legal framework. In this sense, the benefit corporation may qualify as a company model, which may be adopted by undertakers, notwithstanding legislative reform.⁹

The academic discussion on company forms varies widely across jurisdictions. For this reason, each country shall address the issue from their own standpoint. Significant differences on core notions of company law, namely, those affecting the contract from which the company arises, its objects and cause shall be considered. It is not the purpose of this paper to clarify few dogmatically controversial issues in this regard, although this task is still pending within the scientific debate. Among them, we now focus on the viability of inserting benefit corporations into legal systems that have not enacted them neither as an independent legal form nor model.

3 Viability of Benefit Corporations: The Spanish Case As an Example

3.1 Premise

For the purposes of the analysis, to avoid speculation, differences between families of legal systems shall be considered. For this reason, we now assess the issue from the perspective of Spanish company law. Since the Spanish Codification, in line with other Roman-Latin legal systems, companies shall only be formed to pursue profit.¹⁰ Within this family of legal systems, profit belongs to the cause of the contract, as one

⁸Embuid Irujo (2017), pp. 25–61.

⁹Cfr. Montalenti (2017), pp. 61–90, refers to the *società benefit*, as foreseen under Italian law as a transversal model—pp. 82–83. On the Italian regulation, De Donno and Ventura (2018). See, on the search for a safe harbour for company law, Meyer (2018).

¹⁰In these jurisdictions, profit is deemed an essential element of the contract from which the company arises, namely, coinciding with its cause [cfr. *in extenso* Font Galán and Pino Abad (2001), pp. 7–95]. This requirement can be historically explained by the fact that the state would rather trust so-called intermediary bodies pursuing an economic goal. Conversely, the state would distrust that legal entities undertook non-profit activities, as it was the case with associations and foundations. As Marcel Planiol put it “these tend to replace its actions for their own or counter its authority” [see Girón Tena (1976), p. 32, and Olivencia (2011), pp. 12–13].

of its three defining elements, together with consent and a lawful object. In these jurisdictions, the for-profit requirement may be an obstacle against the set-up of benefit corporations.

3.2 *The For-Profit Requirement in the Commercial Code and Its Evolution*

Article 116 CC requires commercial companies to pursue profit as their essential goal. For this reason, the discussion on benefit corporations must develop around this provision. Throughout the second half of the 20th century, Spanish scholarship extensively discussed the concept of company. As a result of this academic discussion, a wide majority of legal scholars today support the view that the for-profit requirement shall be disregarded as an essential element of the contract by means of which a company is created. Instead, a broader notion of company is generally accepted. Accordingly, a company may be formed upon two core elements:¹¹ the will to be bound by contract and a common purpose to all shareholders.¹²

Indeed, the for-profit requirement may be incompatible with other in force provisions that have been enacted by subsequent company law reforms, namely, those regarding the public and private company, as opposed to provisions relating to partnerships. This contradiction can be explained by the fact that the latter, including the original provisions of the Commercial Code, have not been amended. Conversely, rules on public and private companies have evolved significantly due to their importance within the business environment. This process dates to the middle of last century because of the development of public and private companies after the enactment of specific legislation on each of them. In this way, Spanish company law followed the example of other jurisdictions and was able to put in place a comprehensive set of rules.¹³

Both the Public and Private Companies Acts were the result of the works of domestic legislature. The situation shifted after the accession of Spain to the European Union, in the last years of the 20th century. This intensified the evolution of Spanish company law, which has undergone significant reforms up to the enactment of the Companies Act (*Ley de Sociedades de Capital*), which restated provisions on public and private companies. The Spanish Companies Act

¹¹ Larenz (1980), pp. 440 et seq.

¹² In Spain, the broad concept of company was first proposed by Girón Tena (1976), pp. 25 et seq. Other elements such as shareholder contributions and the formation of a common pool of assets, publicity, or a stability requirement, as foreseen by Article 116 CC are not part of this broader concept.

¹³ Garrigues (1976), p. 412. The influence of cooperative societies shall not be neglected [see Garrigues (1976), pp. 393–394; see also Girón Tena (1976), pp. 95–115]. This trend is generalised through the passage of time and has influenced the regulation of Social Economy and non-profit entities [cfr. Embid Irujo (2019), pp. 15–48].

(hereinafter LSC) reflects the current legislative approach to this branch of the law, which combines—sometimes unevenly—the transposition of the EU law (namely, directives and regulations) with purely domestic reforms.

If one takes a closer look, this way of proceeding serves different purposes. First, besides fulfilling the state's obligation to implement the EU law, the enactment of EU secondary law helps overcome incompleteness.¹⁴ Unlike other EU Member States, Spanish company law has not achieved a sufficiently comprehensive system in accordance with its economic importance. The LSC, although an essential piece of legislation, is only an intermediary station within a transition towards a more general regulation, as the Preamble of the act itself indicates.

3.3 *The Erosion of Profit Within the Cause of Commercial Companies*

Up to this point, the analysis has focused on the evolution of Spanish company law from an external perspective. We now turn to the analysis of the core notions of the legal act by means of which a company is formed. Here, one must consider the doctrinal efforts in favour of a broader concept of company, which purported to disregard profit as an essential element.

This scholarly approach not only served the purpose of excluding profit, but also highlighted the dissatisfaction caused by the lack of amendment of the Commercial Code. In turn, this interpretation aimed at bringing Spain together with those legal systems in which profit is not considered an essential element of the company. To our understanding, this approach is not the main factor explaining the erosion of the for-profit requirement under Spanish law.

Article 2 LSC provides that public and private companies shall be deemed commercial in nature regardless their object. The object refers to the activity undertaken by the company, as indicated in the articles of association, to achieve its purpose. The so-called formally commercial principle was enacted back in the 50s and has not been altered ever since. On the grounds of this principle, every company (including private, public and partnerships limited by shares) formed in accordance with the LSC qualifies as a businessperson (*empresario*) and is subject to the provisions applicable to them.¹⁵

Article 2 LSC is only applicable to companies, as opposed to partnerships. However, the provision is key to the current understanding of Spanish company law. It suggests that the commercial nature of the company is independent from the for-profit requirement since companies may undertake any lawful activity. This

¹⁴Embido Irujo (2013), pp. 263–283.

¹⁵Paz Ares (2006), pp. 532–545.

feature shall be considered for the purposes of establishing the definition of company law within the Spanish legal system.¹⁶

Among the reasons that explain why the for-profit requirement may be eroding, one may consider the impact of non-financial reporting. Both non-financial reporting and benefit corporations may be regarded as cornerstones of the ongoing debate on CSR. By imposing non-financial reporting, EU legislation underlines the social dimension of companies and pushes forward their efforts to assess and meet the needs of a wide range of stakeholders, which transcend the economic activity they undertake to obtain profit.

3.4 *The Role of Legal Scholarship Vis-À-Vis the Viability of Benefit Corporations Under Spanish Law*

The coexistence of the traditional definition of *company* under the CC and Article 2 LSC may be assessed in different ways. On the one hand, the fact that these provisions apply simultaneously suggests a contradiction between core principles of company law. They are indeed difficult to reconcile from a dogmatic and systematic perspective, which is detrimental to legal certainty. On the other hand, such an exceptional situation may stimulate conceptual and dogmatic approaches aimed at resolving the conflict.

Legal scholars are therefore required to navigate many dissenting academic opinions and case law interpreting these legal provisions. However, most of the Spanish scholarship aligns with the view that the aforementioned provisions may be interpreted in a broader sense. This approach is strongly influenced by interpretative criteria extracted from other jurisdictions, namely Germany.¹⁷ Accordingly, companies may be created for non-profit purposes and may be used to undertake a wide range of activities, to achieve different kinds of purposes, as long as they are in accordance with the object of the company.

Against this framework, we now turn to the *raison d'être* of commercial companies, which is typically used as a synonym for the cause of the contract.¹⁸ According to scholarly proposals, the cause of the company contract is the shared purpose of shareholders.¹⁹ The term *cause* refers to an essential element of the contract. This wording is generalised among scholars and court decisions,²⁰ although its exact

¹⁶del Val Talens (2019b), pp. 41–63.

¹⁷Paz Ares (1991), pp. 729–753.

¹⁸Font Galán and Pino Abad (2001), *passim*.

¹⁹Girón Tena (1976), p. 38.

²⁰Broseta Pont and Martínez Sanz (2018), pp. 304–306.

meaning is full of nuances.²¹ To assess the issue, we review scholarly opinions while trying to avoid excessive dogmatic considerations.

4 The Cause of the Benefit Corporation

4.1 Premise

Profit, as an essential element of commercial companies, is closely connected to the object of the benefit corporation. Typically, profit has been regarded as the sole purpose a company may pursue and, consistently, every other ideal or non-profit purpose has traditionally been excluded. As for benefit corporations, their object may include the pursuance of an economic activity together with other purposes and activities which are not economic in nature. Both types of interests may be placed at the same level and are not necessarily subordinated to one another.

As a result, the lawfulness of such amendments of the cause of the contract may affect the viability of benefit corporations. To tackle the issue, one should consider the above-described academic debate as well as the so-called erosion of the for-profit requirement. As a result of this process, profit is no longer regarded as the exclusive purpose of the company in the way it was conceived in the past centuries, namely, since the Codification and up until the last century.

4.2 Profit As the Sole Purpose of the Company in the Academic Discussion

However, several scholars strongly oppose the aforementioned proposals and sustain the view that profit shall be the only lawful purpose of a company. According to this second approach, the interpretative criteria relied upon to overcome profit are conceptually and systematically insufficient. Quite to the contrary, they consider that the for-profit requirement provides unity to company law as a whole and shall not be excluded without prior legislative reform. Furthermore, any other legal provision which may support the opposite view, such as Article 2 LSC, exclusively refers to the object of the contract and does not affect its cause.²² Besides, the provision refers exclusively to public and private companies, as well as partnerships limited by shares, but not to other commercial entities such as partnerships. On these grounds, it is not possible to derive a general principle of Spanish company law.

²¹ See on the concept, from an Italian perspective, Galgano (1992), pp. 212–215. In Spain, Girón Tena (1976), p. 38.

²² Font Galán and Pino Abad (2001), pp. 68 et seq.

In line with this approach, authors have considered that non-financial reporting, or even corporate social responsibility as a whole, is of a limited scope and would not restrict the for-profit requirement in any significant way.²³ Accordingly, the duty to report on non-financial aspects shall not be overrated and is not bound to be interpreted in the sense that companies included in the scope of application of such provisions are forced to consider stakeholders' interests. Their board is not obliged to design a social program or to foster non-profitable activities. In turn, this does not mean that directors are not legitimised to implement activities or make decisions which enhance the interests of *stakeholders* beyond profit. This view opens the door for corporate social responsibility within company law.

The conclusion that may be drawn from this line of thought is that benefit corporations may not be formed in legal systems where this legal form is not recognised, namely, whenever profit is an essential element of the company. In other words, freedom of contract shall not insert ideal or non-profitable purposes into commercial companies with a view to create hybrid entities. According to this view and in sight of the comparative framework, benefit corporations would require an express legislative recognition.

4.3 Viability of Benefit Corporations Without Prior Legislative Recognition

4.3.1 General Remarks

However, in our opinion, such conclusions cannot be sustained. This does not mean, of course, that the results are entirely biased. It is to be acknowledged that the Spanish Commercial Code does foresee profit as an essential element of the company. We believe that the previous opinion may be nuanced in sight of the comparative framework, including those legal systems where benefit corporations have not been expressly foreseen. What we refer as the erosion of the for-profit requirement highlights a dissatisfaction towards the current legal framework. Regulations have not been adapted to the complexity of contemporary markets as to embrace the larger number of interests at stake.

Such dissatisfaction explains the favourable approach to a broader concept of company, which focuses on the existence of a shared interest by all shareholders, instead of narrowing it down to profit. This conclusion is reinforced by Article 2 LSC, which sustains the view that only the will to be bound by the contract and the pursuance of a common objective are essential elements of a company. Besides, the principle according to which companies qualify as commercial entities regardless their object is generally accepted across many jurisdictions, including Spanish law.

²³Tombari (2019), pp. 77–80.

The fact that Article 2 LSC is only applicable to public and private companies, as opposed to partnerships, does not militate against a more extensive understanding of this provision. First, public, and private companies are the most widespread legal form within the business environment in many jurisdictions. Second, in Spain, the modernisation of provisions applicable to companies has only focused on public and private companies. As a result, any possible shift on the part of policymakers has only been reflected in the Companies Act and not in the Commercial Code. These are not merely quantitative or technical nuances, but indeed provide an argument in favour of a non-restrictive approach to the cause of the contract. We believe that the problem must be assessed from a broader perspective by considering the heterogeneity of contemporary company law. This is the only possible way to channel all the interests that are affected by the formation and functioning of a company.

4.3.2 The Benefit Corporation: A Legal Entity with a Hybrid Cause

Traditionally, companies have been regarded as having one single cause or purpose (profit). However, this idea has already been overcome in Private Law, where scholarship accepts that a contract may be entered into as to pursue more than one cause or purpose. Doubts arise as to whether this idea shall apply by analogy to companies, but a few elements for the discussion may be drawn from it. Under general Private Law, contracts with pluralistic or hybrid cause are admissible.²⁴ This outlook is deeply rooted in the dogmatics of the Law of Contracts and is indeed generally accepted in Roman-Latin jurisdictions, such as Spain.²⁵

Contracts having more than one cause may be distinguished from so-called colligated contracts. The hybrid cause refers to a unitary contract with two causal drivers. The coexistence of two causes poses questions on their compatibility and balance within the formation and execution of the contract.

Indeed, a hybrid cause is better aligned with the will of the founders of a benefit corporation or, in jurisdictions that do not foresee them, the one of the founders who try to adapt an existing legal form to the features of a benefit corporation. Here, the company arises from one legal act with a two-fold cause: the pursuance of profit, on the one hand, and the benefit purpose, on the other hand. The result is a hybrid cause, that will then reflect in the organisational framework throughout the company's life. This will affect the implementation of the company's activities.²⁶

This proposal is consistent with the general understanding of company law in the comparative framework. In turn, it shows how companies may adapt to a more complex model to form a benefit corporation, an entity with a hybrid cause. The

²⁴ Galgano (1992), p. 114.

²⁵ Embid Irujo (1986).

²⁶ From an Italian perspective, Marasà (2018), pp. 49–58. The articles of association shall be drafted carefully as to balance the different interest at stake, including adequate protection mechanisms for shareholders. For Italy, Angelici (2018), pp. 26–28 and Stella Richter Jr (2018), pp. 66–70.

implementation of such a hybrid entity must consider the contractual nature of companies, namely, their organisational and institutional side.

Founders shall make a responsible use of freedom of contract. The implementation of a benefit corporation without specific legal recognition may confront technical obstacles, namely, concerning the registration of the company. For this reason, sufficient leeway shall be granted to undertakers. Particularly, each jurisdiction foresees different preventive mechanisms as to ensure that the company fulfills the legal requirements for registration. In the case of Spain, this is the task of notaries and commercial registrars. They may play a significant role vis-à-vis benefit corporations in a manner similar to the way notaries supported the creation of private limited liability companies.²⁷

5 Concluding Remarks

The analysis contains a limited number of reflections on the viability of benefit corporations which affect core concepts of company law. Benefit corporations are at the cross-roads of two fundamental issues: the catalogue of available company forms and freedom of contract. As we have seen, the traditional understanding of the problem refers to the contractual side of benefit corporations. However, one may also place them within the debate regarding the renewal of available company forms. This process usually requires legislative action, even if this action is merely symbolic and only intends to clarify doubts as to the admissibility of a new company form. Conversely, at times, the creation of new forms relies entirely on contractual freedom, namely, when it comes to adjusting an existing form or model.

The renewal of available company forms is not a goal in itself, but rather seeks to provide adequate solutions to actual business demands and new market circumstances. As the analysis has shown, within this process, it may also foster a more ambitious goal: allowing for entrepreneurial activity to be undertaken in a way that renders transparency, social concerns, and sustainability compatible with the pursuance of distributable profits. As a result, the uprising of corporate social responsibility shall include the perspective benefit corporations. However, the regulatory trend of enacting them is asymmetric. While few jurisdictions have not addressed the issue yet, others confront serious obstacles to regulate them.

The latter include those countries where profit qualifies as an essential element of the company. By assessing them throughout this chapter, we have argued in favour of their viability within this type of legal systems. The answer is, of course, the result of multiple factors affecting contemporary company law. This branch of the law is a

²⁷ See *supra* II, 2. Founders and directors shall play a significant role in drafting the articles of association. On the role of directors vis-à-vis CSR activities, see Amesti Mendizábal (2019), pp. 63–93 and Vizcaíno Garrido (2019), pp. 311–332.

heterogeneous arena where, as the Spanish example has shown, profit, as an essential element of the company, must be reconciled with other in force provisions.

Beyond more traditional arguments, it is arguable that a company, as any other kind of contract, even those lacking an organisational nature, may present a pluralistic or hybrid cause. This shall be the case whenever the founders aim at blending the pursuance of profit with other interests of a more general nature. The articles of association will play a significant role to describe such a hybrid cause. We believe this result is possible under Spanish company law although founders may confront difficulties when drafting the articles of association.

Finally, benefit corporations are only one example reflecting radical changes within the social and political organisation of states, which go all the way back from the Codification to our days. Throughout the 20th century, the state had the power to channel profitable purposes through commercial companies, while displacing other non-profitable goals to the scope of non-profit entities. Today, the situation is different because of multiple factors well beyond benefit corporations.²⁸

It is true, indeed, that benefit corporations transcend such a narrow framework. In line with other corporate social responsibility phenomena, they serve the purpose of channeling non-profitable interests through company law mechanisms. It is debatable whether such an option shall be granted to business actors by means of a legislative reform, but the number of jurisdictions that have taken this approach is increasing. The implications of such a policy strategy with regard to legal certainty are outside the scope of this paper. Our results focus on jurisdictions presenting a “regulatory vacuum” vis-à-vis benefit corporations.

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²⁸On the issue, Stella Richter Jr (2018), pp. 954–955. Authors highlight the similarities between benefit corporations and non-profit entities, such as foundations, namely, whenever the latter undertake an economic activity, either directly or indirectly. See lately Zoppini (2018), pp. 71–80.

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Real-World Lessons on Stakeholder Capitalism: How B Lab and B Corp Movement Catalyze Change in Society



Jonathan Normand and Veronica Devenin

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1 Introduction

Business activities have been an important a major cause of environmental degradation and social inequalities. Although these concerns were progressively included in business operations through corporate sustainability, complex social and ecological problems are increasing, not decreasing (Whiteman et al. 2013). Because of their negative environmental impacts, such as pollution, green house gas emissions, resource extraction, and also social negative impacts, such as social injustice and inequalities, businesses have increasingly suffered a legitimacy crisis, i.e., losing support and approval. The same happened to other institutions, such as global governance organizations, that were supposed to deliver solutions to major global threats such as climate change. This lack of legitimacy, have turned into a political opportunity (Kurzman 1996; van der Heijden 1997) that allowed institutional entrepreneurs, such as B Lab, to act as brokers for new forms of relations (Hoffman and Jennings 2021).

B Lab is a nonprofit organization dedicated to redefining business as a competition among entities to be not only the “best in the world, but best *for* the world. Cofounded in 2006 by Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy, B Lab’s strategy was to drive systemic change through firms, markets, and institutions, building a community of certified B corporations; creating new tools, such as the Impact Reporting and Investment Standards (IRIS) and the Global Impact Investing Rating System (GIIRS), to accelerate the growth of impact investing; and promoting new legislation that recognizes and a new corporate form that meets higher standards of purpose, accountability, and transparency (Cao et al. 2017; Marquis 2021).

Although we are used to witnessing social movements pressuring for solutions to our current social and environmental crises, such as Fridays for Future, it is less common to see private actors exerting pressure from within to reshape the business domain and initiate institutional change, infusing new beliefs, norms, and values into social structures. This is the case of B Lab and the B Corp movement (Edwards et al. 2018). B Lab has framed “purpose” as an identity formation approach that enables collective action (Edwards et al. 2018) and resignified the existing business frame with new meanings, for example, “Using business as a force for Good,” “Companies not just best in the world but also best for the world,” “Redefining the role of business in society,” “New way to do business,” and “A new social contract between business and society” (Ordonez-Ponce and Devenin 2020). Instead of exerting pressure through grievance and protest, B Lab relies on enhancing private actors’ agency and corporate activism, identifying social and environmental problems as market opportunities, making customers change agents, and influencing local agendas and public policies (Ordonez-Ponce and Devenin 2020; Tabares 2021).

The internal pressure the B Corp movement creates in the business arena is not conflictive but an invitation for business to evolve. Through strategy and tactics that reshape discourse, norms, and structures to guide organizational action and beliefs (Hoffman and Jennings 2021), change may be easily absorbed by a broader scope of people who see an opportunity to integrate their environmental or social concerns with their main economic activity.

Evidence shows that the B Corp movement is growing and succeeding. Since the creation of B Lab in 2006 (Marquis 2021), there have been more than 4500 certified companies in 77 countries, including highly recognized sustainable brands, such as Patagonia, Ben & Jerry's, Natura, and Danone.¹ The B Lab organization has grown, creating regional hubs, such as Sistema B² in Latin America (2012), B Lab Europe³ (2013), B Lab Australia and New Zealand⁴ (2014), and local chapters as well at a country level. Additional B Corps coalitions have emerged that aim to tackle specific challenges, such as engaging large companies (Movement Builders), taking action on the climate emergency (Net Zero 2030), and promoting urban sustainability (Cities can B). Alliances are also part of the B Corp movement agenda. A remarkable example is the cocreation of the SDG Action Manager with the United Nations Global Compact (UNGC).

2 B Lab and the B Corp Movement as Actors in the Purpose Ecosystem

Organizational change agents form collective movements, using shared and accumulated resources and power to overcome historical inertia (Hoffman and Jennings 2021). Aligned with this view, Dahlmann et al. (2020) claim that a “purpose ecosystem” with the potential to support system transformations for achieving the UN SDGs is emerging. The purpose ecosystem, which includes actors such as Impact Investors, Sustainability Target Initiatives, and Business Purpose Change Agents, aims to create favorable framings, systems, and infrastructures to support the development of purpose-driven businesses (Dahlmann et al. 2020). B Lab and the B Corp movement are part of this emergent ecosystem. As a Business Purpose Change Agent, B Lab contributes by setting principles, guidelines, and assessment and certification tools, as well as creating a community around purpose-driven companies (Dahlmann et al. 2020).

The efforts of B Lab go far beyond the improvement of businesses' social and environmental performance. Its objective is to redefine the nature and purpose of business, promoting a wider systemic change, i.e., *the result of actions that lead to a significant alteration within a system, potentially leading to substantial impacts* (Clarke and Crane 2018, p. 308). Clarke and Crane (2018) state that the system can be at any scale. In the case of B Lab, the scale of the system is the global economic system, advocating for a stakeholders' economy, also called “stakeholderism,” which tries to rebalance the asymmetric power of shareholders vis-à-vis other stakeholders and to revitalize the legitimacy of business.

¹<https://www.bcorporation.net>.

²<https://www.sistemab.org/>.

³<https://bcorporation.eu/>.

⁴<https://bcorporation.com.au/>.

A sizable share of corporations already practices some form of stakeholderism in response to pressure from value-conscious investors, consumers, and others. More than 90% of large corporations, for example, claim to explicitly contribute to the Sustainable Development Goals. Environment, social, and governance (ESG) investing—a class of value-based investments that target corporations that meet minimum ESG criteria—has been growing rapidly, with an estimated total value of \$50 trillion in assets under management by 2025.^{5, 6}

But stakeholderism has had mixed success. While some companies have managed to create environmental and social value, many engage in “greenwashing,” “impact washing,” and even “SDG washing” to mask their unsustainable performances. This is in part due to a mismatch between a renewed corporate purpose that emphasizes stakeholder value and corporate governance principles and incentive structures that are primarily designed to maximize shareholder returns. Even as corporations make commitments to take greater societal and environmental roles, they often fail to change their governance guidelines and board structures to reflect these intentions. This has resulted in a dissonance between what they aspire to achieve and what they can show for it—a process that can also undo the legitimacy of the emerging stakeholder economy.

This lack of consensus on how corporate governance should adapt to help build a stakeholder economy is due in part to a lack of clarity on who qualifies as a stakeholder as well as what stakeholder value entails. Therefore, redefining values is a core part of the emerging needs of the stakeholder economy. Without specificity on what value a company creates, for which stakeholders, and how, a generic commitment to advance stakeholder interests has little practical meaning. The integration of social and environmental performance indicators in company success metrics, creating investment conditions dependent on impact reports and enforcing fiduciary duties that go beyond profit maximization are currently private ones that individual businesses are alone responsible for.

Acknowledging that revisiting public indicators for measuring contribution in the system change and the need for appropriate regulatory frameworks both constitute strong public levers for change, B Lab created its own “theory of change.” B Lab’s theory of change is a framework collectively built inside the movement to create a common understanding of how a business coalition can address global economic systemic change and, based on that framework, identify the role of B Lab and give direction to its objectives and global strategies.

B Lab’s theory of change considers business as a key actor within the economic system, controlling significant resources and holding direct relationships with people, communities, and the environment. As the current effects of business on human development are insufficient and unsustainable, redefining the purpose of business is

⁵<https://www.investmentweek.co.uk/news/4034755/esg-assets-track-exceed-usd50trn-2025>. Accessed: Nov 23, 2022.

⁶<https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/>. Accessed: Nov 23, 2022.

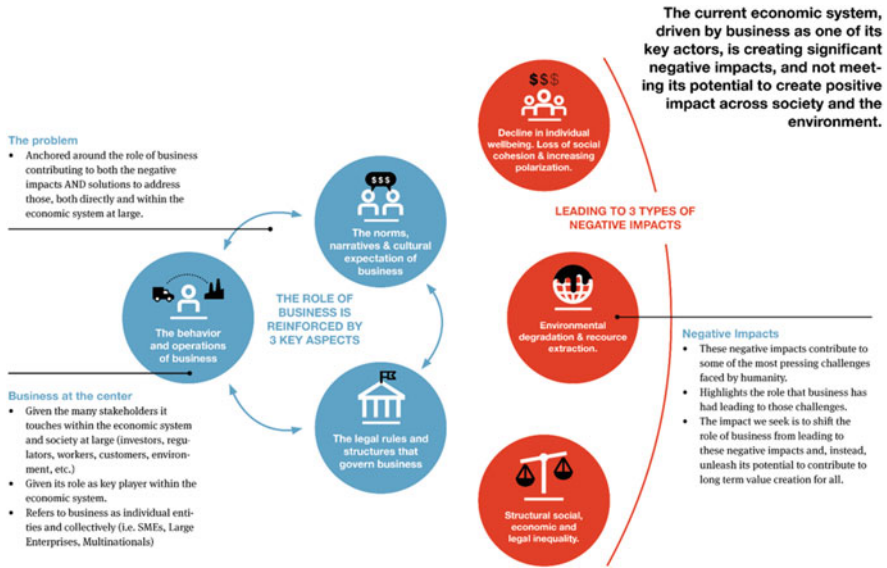


Fig. 1 B Lab’s analysis of the current economic system

critical so that we can achieve an inclusive, equitable, and regenerative economic system for all people and the planet. The challenge is that the dominant culture and practice of business is about profit maximization at the expense of all stakeholders (workers, consumers, communities, environment, etc.). The way legal and economic systems, including capital markets, are designed reinforces a narrow focus on business. Figure 1 shows B Lab’s analysis of the current economic system, which is the basis of B Lab’s theory of change proposal.

Elaborating its own theory of change, B Lab wanted to tackle two fundamental root causes that, according to its diagnosis, underlie why the global economic system creates negative outcomes; the purpose, function, and structure of the system; and the consciousness of the actors within the system. B Lab’s vision of change implies a multigenerational inclusive, equitable, and regenerative economic system for all people and the planet. The system change includes the recognition of planetary boundaries and their impact not only on current generations but also on future ones.

B Lab’s theory of change can be summarized into three main drivers:

- Businesses are at the center of the theory of change, given their direct relationship to multiple stakeholders within the economic system and society at large.
- B Lab, a business-based movement, expects to be able to engage with and influence the remaining system’s stakeholders, acting as catalyzers for change in the broader ecosystem.
- System change is a result of cross-sector collaborative work with other movements and organizations.

B Lab, as part of the “purpose ecosystem,” aims to work with other organizations and movements (allies) to collectively build an ecosystem for system change by

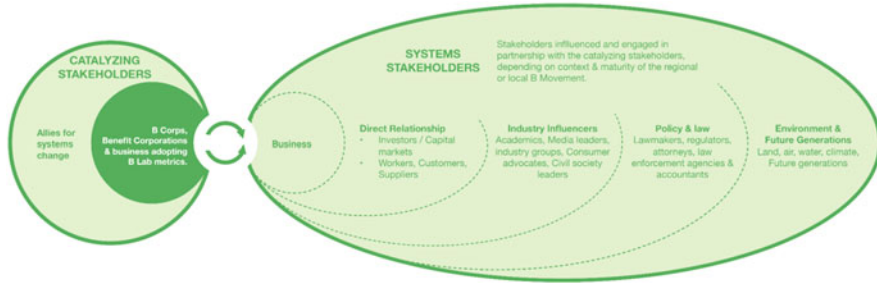


Fig. 2 Relationship with stakeholders within B Lab's theory of change

engaging different stakeholders, either directly or indirectly, within the economic system and society at large. Figure 2 shows the relationship with stakeholders.

3 B Lab's Theory of Change in Action

The shortcomings of the individual sectors and the systemic nature of sustainability challenges require collaborative action by organizations across industries, sectors, and geographies (Pedersen et al. 2021). However, collaborative action presents several challenges (see, for example, Ansell and Gash 2007). B Lab is a recognized actor in the purpose ecosystem, setting principles, guidelines, and assessment and certification tools, as well as creating a community around purpose-driven companies (Dahlmann et al. 2020), but it also acts in practice as a convener, i.e., an organization with specific experience and capacity in instigating and driving this kind of partnership, mitigating challenges, navigating tensions in the collaboration process, and driving the partnership process forward (van Hille et al. 2019).

Through its global network, B Lab's global strategy is to drive the adoption of B Lab's equity-driven standards, which manage the impact of business, guide accountability, and empower credible leadership. This enables and catalyzes secondary strategies to be implemented directly or in partnership, depending on the context and maturity of the regional or local B movement. Figure 3 shows B Lab's global strategies. Figure 4 shows some examples of global strategies in action. Next, we present how these strategies are developed in practice.

3.1 *Global Strategy 1: Standard Development and Evolution, Impact Measurement Tools*

3.1.1 B Lab Is the Certifying Body of B Corporation Certification

B Corp certification is a designation that a business is meeting high standards of verified performance, accountability, and transparency on factors ranging from



Fig. 3 B Lab's global strategies



Fig. 4 B Lab's global strategies in action

employee benefits and charitable giving to supply chain practices, resource consumption and waste management, as well as input materials. In order to achieve certification, a company must:

- **B Impact Assessment:** Demonstrate high social and environmental performance by achieving a B Impact Assessment score of 80 or above. The assessment

includes more than 200 criterias from governance practices, workers, community, environment and clients consumers. Additional criteria, known as impact business models, can be activated to capture a company's extraordinary, positive impact. Overall, companies pass a robust risks review, and in the case of multinational corporations, they must also meet baseline requirement standards.

- **Legal commitment:** Change the company's corporate governance structure to be accountable to all stakeholders, not just shareholders. Companies can also achieve benefit corporation status if available in their jurisdiction.
- **Transparency:** Allow information about the company's performance measured against B Lab's standards to be publicly available on their B Corp profile on B Lab's website.

B Corp certification is holistic, not exclusively focused on a single social or environmental issue. The process to achieve and maintain certification is rigorous and requires engaging teams and departments across the company, alongside senior management. The verification process differs for small and medium-sized enterprises (SMEs) and multinationals. But in both cases, it takes into account the company's size and industry and involves documentation of the company's business model and operations, structure, and various work processes, as well as a review of potential public complaints and possible site visits. Large companies and multinationals experience additional steps: they undergo an in-depth risk review process as a preliminary phase, which can trigger eligibility review due to controversial practices they may have or have had or operations in a controversial industry (for more, see below). A scoping exercise helps to account for the complexity of their structure and to identify their certification pathway across countries and continents. And performance thresholds push the company to align best practices within its entities.

Companies operating in controversial industries and/or undergoing controversial practices must abide by additional, higher standards on performance and transparency. Companies willing to certify as B Corps and operating in controversial industries for which such higher standards are not already set trigger so-called industry reviews. Industry reviews are designed to define mandatory performance thresholds and requirements for companies based on industry best practices, expert consultation, and company engagement. Companies unable to meet the resulting stringent standards are deemed ineligible for certification.

Aside from higher standards and scrutiny for controversial industries and practices, multinationals must prove their alignment with baseline requirement standards. Typically, these include mandatory reporting, materiality assessment and material issue management, tax and government affairs disclosure, and human rights policy.

As leaders in the movement for economic system change, B Corps reap remarkable benefits. They build trust with consumers, communities, and suppliers; attract and retain employees; benefit from operational efficiencies as they manage their environmental footprint; and draw mission-aligned investors. As they are required to undergo the verification process every three years in order to recertify, B Corps are by definition also focused on continuous improvement, leading to their long-term resiliency.

3.1.2 The B Impact Assessment

The B Impact Assessment (BIA) was released in 2007. Based on standards developed by B Lab, the BIA is an impact management tool and framework that helps companies assess their impact on various stakeholders, including their workers, community, customers, and the environment, aside from their governance practices. Organizations can use the free standardized tool to compare their performance with other businesses and to identify and track opportunities for improvement, enabling them to measure, manage, and improve their impact by addressing a series of elements about business practices and outputs. High verified performance on the B Impact Assessment is one of the three requirements for a company to be eligible to earn certification as a B Corp. The B Impact Assessment is already used by more than 150,000 businesses.

3.1.3 SDG Action Manager

Developed by B Lab and the United Nations Global Compact, the SDG Action Manager is a free self-assessment that helps all businesses understand their contribution toward facilitating the United Nations Sustainable Development Goals (SDGs) and plan for improvement. Any business, whether its size, with an ambition to understand and manage their performance on the SDGs can use it. There is no need to be a B corporation.

3.1.4 Impact Management Partnership

Created in 2021, the Impact Management Platform is the result of a collaboration among standards organizations in the Impact Management Project, including B Lab, the Global Impact Investing Network (GIIN), the Organisation for Economic Co-operation and Development (OECD), UNGC, World Benchmarking Alliance, and others.

Acknowledging that there has been significant growth in resources to support companies across different impact management actions, there is still a lot of confusion around the different standards that exist and how they can be used on their own and with other tools. This platform aims to support practitioners to manage their sustainability impacts, including the impacts of their investments; to explain how standards can be used to address the Sustainable Development Goals; and to offer concrete actions for businesses to improve their impact. It is a performance framework that allows to track businesses' progress, benchmark them against others, and assist their implementation with supplemental resources.⁷

⁷<https://www.unglobalcompact.org/take-action/sdg-action-manager>.

3.2 *Global Strategy 2: B Corp Certification and Multinational Engagement*

3.2.1 **The Case of the B Movement Builders Program**

B corporations are predominant smaller companies. More than half have less than ten employees, and more than 80% have less than 50 employees (Fonseca et al. 2021). The vast majority of +4500 certified B Corps are small with less than \$1 million in annual revenue.⁸ However, in the last few years, a high number of requests from multinationals created a need to certify them.

Recognizing the challenges of B Corp certification for multinationals, B Lab cocreated the program B Movement Builders with the most committed multinationals that have made certification work. They created the multinationals advisory council to think about what would have to change to serve multinationals in terms of achieving the B Corp certification, which is recognized as a long-term goal and guidance to help multinationals go through the huge and complex shift from shareholder governance to stakeholder governance.⁹ This program requires large multinational corporations (MNCs) to follow B Corp principles without requiring parent group company to certify himself, due to complexity, but also governing independence of entities or business unit who cannot meet the certification requirement (independent governance, profit and loss (PNL) statement, legal entities for bylaw changes, etc.)

The B Movement Builders program was launched in 2020 with an initial cohort of six pioneering companies: Danone, Natura & Co, Magalu, Gerda, Bonduelle, and Givaudan, representing \$60B in combined revenue and 250,000 employees in more than 120 companies across five industries. These companies make credible commitments, identify opportunities for scalable collaboration, and work internally to affect impactful transformation that accelerates a global system change of business and culture. Danone and Natura & Co serve as B Movement Builders mentors.¹⁰ B Movement Builders, as of June 2021, is also a prerequisite for parent companies of subsidiaries that apply for B Corp certification when they have +5bn of revenue. In January 2022, 22 applications were received. At least eight of them will start the program this year.

⁸ <https://bthechange.com/b-movement-builders-offers-a-tangible-path-toward-stakeholder-capitalism-d035505dda01>. Accessed: Nov 23, 2022.

⁹ <https://www.forbes.com/sites/christophermarquis/2021/12/07/how-multinationals-navigate-to-a-stakeholder-economy-b-movement-builders-share-progress-and-challenges%2D%2Dpart-one/?sh=4aae73799fa9>. Accessed: Nov 23, 2022.

¹⁰ <https://www.bcorporation.net/en-us/programs-and-tools/b-movement-builders>.



Fig. 5 Imperatives of economic change

3.3 Global Strategy 3: New Business Narratives and Related Global Marketing and Communications

3.3.1 The Case of Imperative 21

The Imperative 21 coalition is a co-led B Lab initiative that is advancing the ambitious goal of shared and durable prosperity. It comprises 72,000 SMEs and multinational enterprises (MNEs) worldwide, representing 18M employees and more than €6,6T revenues among 150 industries and 80 countries, probably the most significant purpose-driven business movement.

Imperative 21 advocated for an economic system change that requires leaders to accelerate their transition to stakeholder capitalism, shifting the cultural narrative about the role of business and finance in society, realigning incentives, and facilitating a supportive public policy environment. Figure 5 shows the imperatives for economic change. This coalition is refusing the dogma of infinite economic growth on a planet with finite resources. They are advocating for an overhaul of public and private policies around the imperative principle of creating long-term shared value for all stakeholders. A concrete expected action is the revision of public indicators for measuring success and the need for appropriate regulatory frameworks.

Imperative 21 launched a global marketing campaign called RESET. It is a long-term campaign that aims to raise awareness around the necessity of, and opportunity for, economic system change. The campaign was launched on September 13, 2020, the 50th anniversary of Milton Friedman’s seminal essay on shareholder primacy. The RESET campaign calls to overcome shareholder primacy and restart the economic system based on stakeholder capitalism. The campaign started with a full-



Fig. 6 Reset campaign

page ad in the New York Times on September 13, and the next day, at 9:50 am, the Nasdaq Tower, in Times Square, New York City, showcased the campaign for 10 min. Figure 6 shows this historic moment. This campaign continued to occupy public spaces in different countries and was supported by a social media campaign.

3.4 Global Strategy 4: Proposing, Mobilizing, and Articulating Policy Change

3.4.1 Promoting the Benefit Corporation Legal Framework

B Lab promotes a model law—the Model Benefit Corporation Legislation—that may adopt the establishment of a new form of corporation structured to pursue social and environmental interests in addition to profit. The Model Legislation, introduced in 2013, rapidly gained success in many US states. To date, more than 7704 benefit corporations have been established in the United States, such as in Oregon, New York, Nevada, Delaware, and Colorado, and it has expanded to other countries, such as Italy, Colombia, and Canada.

Benefit corporations should not be confused with certified B corporations, which do not necessarily qualify as benefit corporations in jurisdictions recognizing this corporate form. B Corps are certified by private nonprofit organization B Lab, after achieving a minimum verified score on the B Impact Assessment, defined by B Lab itself.

Benefit corporations were originally intended to soften shareholder primacy, and they differ from standard corporations through their main legal requirements. First, a company can be incorporated as a benefit corporation or become one by amending its articles of incorporation so as to specify that it is a benefit corporation. Second, benefit corporations should pursue the general public benefit purpose but may also elect one or more specific public benefit purposes. Third, the board of directors of a benefit corporation should act in the best interest of the company and also consider the effects of any action or inaction of the company on a wide range of stakeholders in connection with the general public benefit and/or the specific public benefit purpose elected. Fourth, the benefit corporation should have an independent “benefit director,” who shall submit an annual benefit compliance report to the board of directors. Fifth, the benefit corporation should issue an annual report in which it assesses, among other things, the ways in which it has pursued the general/specific public benefits against a third-party standard.

3.4.2 Initiatives at the Country Level

The UK Better Business is a coalition of leaders from across all sectors and all regions of the UK that aims to amend Section 172 of the Companies Act, ensuring businesses are legally responsible for benefiting workers, customers, communities, and the environment while delivering profit. More than 900 companies have joined the coalition. The campaign concept and strategy were initiated by B Lab UK, which acts as Secretariat of the coalition.

B Lab Spain launched a campaign in 2021 to promote the development of a legal framework for benefit corporations adapted to the Spanish reality (Sociedades de Beneficio e Interés Común (SBIC)). The campaign started with an online presentation of the “Green Book of Purpose-Driven Companies,” coordinated by B Lab Spain and Gabeiras y Asociados. This was considered the first step toward promoting recognition of the purpose-driven business model in Spain. Additionally, they presented the “Manifiesto to promote a new inclusive and sustainable economic and business model in Spain,” which was signed by more than 50 well-known personalities in Spain, to ask the Spanish government to create this legal figure. They also launched an ambitious communicational and activist campaign using diverse channels such as the platform [EmpresasConProposito.net](https://empresasconproposito.net) so that nonprofit organizations, institutions, and Spanish companies can support and join the cause; started a [Change.org](https://change.org) campaign to involve society in this claim and achieve greater visibility and impact; initiated a guerrilla marketing campaign called #EmpresasConPropósito; and mobilized hundreds of people and organizations in different cities in Spain. As a result, more than 400 organizations committed to this campaign, and more than 30,000 people signed to support this cause.

With the support of B Lab Switzerland and SDSN Switzerland, in November 2021, parliamentarians from all sides joined forces in the parliamentary intergroup on the 2030 Sustainable Development Goals (SDGs). The new parliamentary

intergroup aims to initiate a solution-oriented exchange on the way to a more sustainable Switzerland, for a pleasant life and a flourishing economy while respecting planetary limits. B Lab Switzerland is driving the economy and sustainable finance topics alongside SDSN Switzerland, which will provide its scientific expertise. The parliamentary intergroup is focusing on three strategic levers to promote sustainable development: a sustainable economy with projects around enhancing fiduciary duties under the law, a commercial and financial system to support alignment with international standards and accounting norms, and the transformation of the food system and governance in the sense of political leadership for sustainable development. In order for these levers to be activated effectively, it will be necessary to seize all opportunities with determination and to deal constructively with conflicting objectives upstream, beyond the boundaries of groups and committees. In the future, the great challenges of our time will have to be approached in a more strategic and integrated way.

3.4.3 Initiatives at the Regional Level: The Case of the Interdependence Coalition

The Interdependence Coalition, the first significant pan-European campaign by the B Corp community, brought together more than 100 companies calling for an EU-wide change in company law to make stakeholder governance mandatory. The Coalition aimed to put pressure on the EU Commission to consider the change as part of its Sustainable Corporate Governance initiative. The Sustainable Corporate Governance initiative's goal was to improve the EU regulatory framework on company law and corporate governance to help companies focus on long-term sustainable value creation rather than short-term benefits.

The Coalition's core proposal was that all companies registered within the EU should be required (and not just allowed) to consider the interests of all of the company's stakeholders when making business decisions. This requirement should be aligned with the obligations of investors to consider how their capital will be used to impact society and the environment. The coalition called for a change in EU-wide company legislation, meaning all the member states would have to abide by it. It also asked the Commission to embed in the directive the legal obligation to consider the environment as a stakeholder. This regulation challenges the status quo; therefore, it is uncertain whether the Commission will be able to finally instill this mandate or not.

3.5 Global Strategy 5: Community and Movement Building, Collective Action

This global strategy has the potential to create or promote the development of several subgroups that may tackle different topics or objectives, such as the B Corp Climate Collective and NetZero 2030, Climate Justice for Business, Covid-19 Best Practices, Regional and Partners Resources for Business Impact, and Anti-Racism Resources, among others. Next, we present the case of NetZero 2030.

3.5.1 The Case of Net Zero 2030

B corporations are positioning themselves as climate action leaders in the business community. Leaders of the B Corp Climate Collective, a volunteer-led global community of B Corp leaders, and the B Global Climate Task Force, a strategy council made up of staff members throughout the B Lab and Sistema B Global network, share how B Corps are mobilizing globally to address the climate emergency and pursue a zero-carbon economy while centering that work in climate justice.

In 2019, more than 500 B Corps committed to net zero by 2030, publicly promising to accelerate the reduction of their greenhouse gas (GHG) emissions. One thousand five hundred more have since joined them, both within and outside the B Corp community. This is the largest business network engaged in the net zero race, with an ambitious agenda by 2030.

An increasing number of large companies, including some in industries with a history of negative environmental impact, are announcing efforts to pursue net zero status for carbon emissions. This had some climate advocates questioning the credibility of these claims and asking companies to pursue net zero through long-term changes that measure and reduce GHG emissions rather than solely relying on the purchase of carbon offsets.

B Corps that have committed to net zero by 2030 are pursuing strategies that, first and foremost, reduce emissions wherever possible. Only then do they use verified offsets that emphasize carbon removal projects to balance emissions that cannot be eliminated. Through the transparent pursuit of these goals and the use of science-based targets, B Corps can ensure they are creating meaningful GHG reduction strategies. Some of the climate actions are declaring a climate emergency, accelerating carbon reduction, developing a net zero plan, climate advocacy, and continuous standard update.

4 Theory of Change: Global Outcomes

B Lab’s intended outcomes help the global network to guide their strategy and objectives, determine the way in which they deploy their different strategies (global programs), and evaluate their success. It is recognized that individual organizations may have organizational outcomes that, individually, may not be directly contributing to global outcomes but will be when rolled up with the outcomes of the collective network. Figure 7 shows these intermediary outcomes at the business level.

The expected final outcomes seek to address the negative impacts that were identified as part of the problem. The collective achievement of all of these outcomes (intermediary and final) aims to contribute to B Lab’s vision of systemic change. Figure 8 shows the expected final outcomes of B Lab’s theory of change in action.

5 Conclusions

The past two years proved that we can change faster than we ever imagined. The climate crisis requires immense change, and like COVID-19, it is a global problem that will affect us all. As businesses, we need to work together to tackle the biggest



Fig. 7 Intermediate outcomes



Fig. 8 Final outcomes

challenge of our lifetime. We need radical responsibility to address the surviving plan of humanity, the so-called UN AGENDA 2030, and a recognition that everyone has a part to play in finding solutions for us all.

The needed leadership at the scale required a profound transformation in the current mainstream exclusive and extractive mindset to build to an inclusive and regenerative one. Who is going to lead the beat? Governments and policy makers? Consumers? Citizens? We believe business players are playing a major role in redefining success in society and addressing grand society challenges and that their social and environmental impact will dictate their future license to operate. Taking responsibility for all stakeholders, human and natural capital as main drivers will allow conducting the impact required based on reflection and action—for many, that means radical change.

Change is an important part of our future. Our social fabric will need to adapt and pivot to future-proof businesses and aligned policy or mention incentives to accelerate the transformative process. The most critical questions challenge business models. And answers require creative solutions to open doors to untold opportunities. Such challenges can be driven by a movement with the right imperatives as guiding stars. B Lab thrives to align the standard and develop the future B Corp certification framework to achieve universal outcomes—which all certified companies should act on—while tailoring the specific requirements to companies’ contexts when needed (using “Targeted Universalism”¹¹).

If responsibility leads to action ahead of regulation by strengthening relationships with stakeholders to speed up change, it could unleash the learning from others and build partnerships in a collaborative and respectful approach among peers, setting the bar for others and opportunities with other leaders. The mass power would then increase, like with employee engagement and retention, as values align within companies. Are we capable of moving from experiments to a mainstream approach, and is it worth trying? Today, 4600 B Corps around the world are sending a signal—business can be a force for good at various scales but can be powerful when unified by a simple principle: we are interdependent!

Accountability is a journey that is stressed out by planet boundaries and social crises. To embrace radical responsibility, B Lab designed a robust framework for transparency with all stakeholders. This is a marked shift from the leadership of yesterday. It is an important but hard transition. A future-ready business does not have all the answers. Instead, it is fueled by candor. We live in a world where social media prevents cover-ups and secrets from being contained. Build trust with honesty. Mistakes are inevitable in such a complex world, but our world will understand and respond to a business that owns and learns from errors. The decade to come will be the litmus test for society and our global economy. B Lab and other leading organizations are powering up the inclusive market infrastructure to encourage business to take responsibility and act with humility to meet the challenge set by our planet and our children.

¹¹ See Powell et al. (2019).

Text Box 1

What Is a B Corporation”

B corporation is the name given to a company that, as a for-profit business, is meeting high standards of verified performance, accountability, and transparency on factors ranging from employee benefits and charitable giving to supply chain practices and input materials.

As leaders in the movement for economic system change, B Corps reap remarkable benefits. They build trust with consumers, communities, and suppliers; attract and retain employees; and draw mission-aligned investors. As they are required to undergo the verification process every three years in order to recertify, B Corps are by definition also focused on continuous improvement, leading to their long-term resiliency.

B Corps have a particular business model: the social and environmental dimensions are integrated into the mission; moreover, profitability is an objective to the extent necessary to achieve social and environmental results. They balance long-term goals and remain profitable in the short and medium terms. Their focus is on impact, increasing positive social and environmental impacts instead of just reducing negative impacts. The relationship with stakeholders is mutually beneficial, including nature, which is considered by its intrinsic value. Beyond their commercial activity, they aim to influence the sustainability agenda through interaction with stakeholders and the socioeconomic system (Stubbs 2017).

Text Box 2

Examples of B Corporations Around the World

Africa

Sama is a large Kenyan company that has expanded its operations over the years to include operations in the United States, India, Canada, and Uganda, where it provides artificial intelligence and data training programs for a variety of industries. The company also focuses on an impact sourcing project, giving programs to low-income people and marginalized communities, allowing them to better access the digital economy in an industry traditionally dominated by males and occidental countries. For its B Corp certification, it activated several IBMs relevant to its activities, such as Workforce Development and Designed to Give.

Olivelink Healthcare, a small Kenyan organization based in Nairobi, focuses on primary care for people living in informal settlements. They have a specific goal of using a patient-centered approach to humanize care for people in need. With the activation of Impact Business Models items in their B Impact Assessment, the

company has a special impact on their customers, improving Health & Wellness and Serving in Need Populations.

Europe

Fairphone is a continuously growing phone company based in the Netherlands. The company succeeds in proving that an ethical phone model is possible, with its interchangeable parts model that avoids the waste of phones with most parts still working. With a B Impact score of 122, the company also makes specific efforts regarding workers and the environment with the IBMs Supply Chain Poverty Alleviation and Resource Conservation activated.

Watalux: the Swiss company Watalux produces water treatment devices and employs workers who are excluded from the traditional labor market. The produced devices are targeted to be sent to isolated areas, allowing the production of chlorine with only little material and thus treating water locally. The work of the small company is particularly promising, permitting impacts on their direct workers and customers' communities. They provide Basic Services for the Underserved and Serving in Need Populations, which were IBMs activities for their B Corp certification.

South and Central America

Caravela coffee: based in Colombia, Caravela coffee exports and imports coffee from family, small-scale farmers, with a key focus on transparency. Caravela coffee is an example that a more horizontal functioning is possible, even for industries that often depend on prices set by buyers with commodity and financial rates. Certified in 2014 with a B Impact score of 152 and ranked in the Best of the World Top-Performing B-corps list for 5 years in a row, the company shows its commitment via the activation of IBMs such as Workforce Development, Supply Chain Poverty Alleviation or Land/Wildlife Conservation, and Toxin Reduction/Remediation.

Grameen de la Frontera is a small Mexican microfinance company, targeted toward the rural communities in the country. The company provides microcredit services as well as financial education for communities, including women and indigenous people. With a B Impact score of 154, and activated IBMs such as Portfolio Management and Leadership & Outreach, the local work of the company has a wide influence in making communities more self-sufficient and helping them improve their independence.

North America

Cotopaxi is a US-based large company selling sustainable clothing on different continents. Cotopaxi produces outdoor gear, with a sustainability holistic mindset by

using recycled materials, giving back to communities, and also implicating workers in creation processes. With a global goal to reduce poverty, the company activated IBMs related to Communities, including Designed to Give and to the Environment, Environment Products & Services, and Resource Conservation.

Green Retirement is a retirement plan company based in Oakland, United States, steered toward sustainable investments and community building. The company represents a shift in comparison to the classic pension plans, for which customers have no power over the use of their money invested. Certified as early as 2007, the company now owns a B Impact score of 162 and has activated IBMs such as Investment Criteria and Leadership & Outreach.

Asie/Océanie

Kiwibank is a large New Zealander bank, focused on local functioning. The bank acknowledges the role of national traffic and local investments in supporting the national economy. Representing an alternative to traditional banking, Kiwibank activated several IBMs, along with their 90 B Impact score, such as Governance Mission Locked, Green Lending, and Investment Criteria.

SmartAir: the Beijing-based Chinese company SmartAir offers low-cost air filtration solutions. In addition to making air pollution protection more affordable, the company also provides education on pollution protection. To achieve its B Corp certification, SmartAir activated several IBMs related to their purpose, for instance, Health & Wellness Improvement and also Serving in Need Populations.

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Part III
Purpose-Driven Companies:
An International Overview

Social Enterprises and Benefit Corporations in Argentina



Dante Cracogna

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1 Social Enterprises and B Corporations in Argentina

To date, social enterprises and benefit corporations have not been specifically legislated in Argentina. However, Section 148 of the Civil and Commercial Code provides for several types of private legal persons, three of which may be assimilated to social enterprises due to some shared characteristics. These types are associations, cooperatives, and mutual companies, which are all independently regulated.¹

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¹See Cracogna (2009, pp. 157 *et seq.*), in which the legal provisions for each of these types of companies are individually analyzed.

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Associations, which are included in the Civil and Commercial Code proper, have a common purpose for good and are not for profit. The contributions made by their members do not constitute individual capital accounts but make up the equity of the company. Furthermore, any surplus arising from their operations is not distributed but made part of the association's capital equity. In the case of liquidation, any remaining balance must have an altruistic end and may not be distributed among the members.

Cooperatives, which are specifically regulated by Law No. 20,337, provide services mainly to their members, and any surplus arising therefrom is returned to the members in proportion with their business with the cooperative. The capital contributions made by the members are only subject to limited compensation. Any surplus deriving from services rendered to nonmember third parties is allocated to reserves, which may not be distributed, and in the case of the company's dissolution, it must be surrendered to the local authority to contribute to the promotion of cooperatives.

Finally, mutual companies share characteristics with associations. The contributions made by their members do not constitute individual capital accounts, and any surplus arising from the services rendered by the company is not distributed but, instead, increases its equity. In the case of liquidation, all remaining assets have an altruistic end and are not distributed among the members. These companies are regulated by Law No. 20,321.

Meanwhile, the activities of B corporations (B Corps) began in Latin America in 2012. Since then, initiatives have emerged in different countries in the region, mainly in Chile, Brazil, and Argentina.² By 2020, 128 B corporations (B Corps) in Argentina had been certified following international standards.³

Concurrently with promoting the certification through which companies can become B Corps, an intense outreach campaign was conducted by *Sistema B*, an *ONG that promotes triple impact enterprises*. This campaign included not only information on the B Corp business's modality but also extensive advisory and advocacy work that aimed at achieving the enactment of a law that would expressly recognize B Corps.⁴ Nevertheless, B Corps still lack their own legal status despite the fact that, as will be seen later, Argentina's National Congress has given preliminary approval to the draft bill on Benefit and Collective Interest Companies (BIC Companies).⁵

²It must be noted that companies with B Certification, originally certified by B Lab in the US and later by *Sistema B* in Latin America, may exist even if there is no legislation regarding benefit corporations (Connolly and Coniglio 2021).

³Sistema B, Reporte de impacto 2020.

⁴Illustrative of this phenomenon is the information presented by Alcalde Silva (2018).

⁵It should be highlighted that the topic of BIC Companies was subject to special consideration at the XIV Argentine Conference on Corporate Law held in Rosario on September 4/6, 2019, under the motto "Towards a new corporate law." On that occasion, a committee chaired by the author specifically addressed this issue. A noteworthy number of participants held an animated debate

Currently, existing B Corps are for the most part public limited companies, although a few are limited liability companies; that is to say, they correspond to the corporate types regulated by the General Corporations Law, whose profit motive is paramount. Therefore, it is not possible to speak about other legal forms of business organizations that have adopted this modality since associations, cooperatives, mutual companies or, even less, foundations cannot be qualified as such because—by definition—they are not for profit.

At present, the vast majority of B Corps are small and medium sized. Large companies are likely not in a good position to become B Corps since there is no legal regulation that protects them and, especially, since the liability of administrators for the pursuit of a social and environmental impact has not been defined. Regarding B Corps' activity, about 40% of them work in goods production, while the rest generally focus on commerce and services.

2 The Evolution of Argentine Corporate Law

In recent years, Argentine corporate law has undergone significant changes. This followed a relatively stable period, which began in 1972 with the enactment of Law 19,550 on Commercial Companies (Cracogna 2018, p. 83). The same Law 26,994, which approved the new Civil and Commercial Code, in force since 2015, introduced important reforms to the aforementioned Law 19,550, which was later renamed the General Corporations Law. Among other modifications, the requirement of a legal type, which was previously rigidly formulated, was practically abolished. The reformed law recognized the so-called limited partnerships and added sole proprietorship. In addition, it eliminated civil (noncommercial)-partnerships.⁶ Shortly thereafter, Law 27,349 was enacted to create simplified joint-stock companies (SAS), with profound innovations in the corporate field.⁷ Within this line of renewal sits the draft bill for the creation of BIC companies,

on the 15 papers that were submitted on the topic, thus evidencing the interest it arouses within both the professional and academic fields.

⁶The unification of the civil and commercial codes in the new Code led to the disappearance of the civil companies that had been legislated in the Civil Code since its enactment in 1869. For their part, the commercial companies that had been governed by Law 19,550 since 1972 continued within that legal framework, although it is now named the General Corporations Law. In sum, the unification resulted in the suppression of the distinction between both types of companies, which induced an extensive debate about what the fate of civil (non-commercial) societies should be, given that the new Code established nothing in this regard.

⁷It is worth mentioning that after a period of remarkable development, these companies have recently been questioned by a part of the doctrine, translated into restrictive resolutions established by the General Inspectorate of Justice (Res. IGJ Number 3/20, 9/20, 17/20, 22/20 and 23/20) body responsible for registering companies in the City of Buenos Aires. Additionally, a bill has even been presented in the Senate of the Nation in which limitations are foreseen to its constitution and action (Bill S-0350/220).

referred to below, and the projects for the creation of the so-called simplified social enterprises (SESS).⁸ Finally, it is worth mentioning the recent comprehensive reform project of the General Corporations Law presented in the Argentine Senate on July 5, 2019, which postulates a broad and profound modification of the corporate legal structure.⁹

3 The Draft Bill of BIC Companies: Background

In November 2016, the Executive Branch submitted a bill to the National Congress “that aims to create a new form of business organization: the Collective Benefit and Interest Companies (BIC Companies).”¹⁰ It should be mentioned that the presentation of the draft bill was not a spontaneous initiative of the Executive Branch but, as happened in other countries, was preceded by a high level of preparation and subsequent advocacy carried out by members of Argentina’s *Sistema B* and a group of professionals with a vested interest, organized as the *Legal B Group*.¹¹

The message that accompanied the bill notes that it intends to promote an ecosystem of sustainable companies aimed at caring for the environment and designing solutions for social problems that public policies and the traditional market have not been able to solve. At the same time, it offers entrepreneurs the possibility of implementing innovative solutions to address these matters.

The message of the Executive also specifically proposes this new legal form with the purpose of “protecting the administrators of commercial companies, who have a social interest in mind—understood as creating value for shareholders, and generating a social and environmental impact—in the face of actions or claims that could suffer from decisions that may generate a benefit to the community, even when they

⁸Bill 3837/18 by Senator Bullrich, who created the “Simplified joint-stock company,” and Bill 7162-D-20 by deputies Carrizo and others, who established limited partnerships. With only minor differences, both were presented in 2018 in their respective chambers to be agreed on the same terms by both parliamentary assemblies. These original initiatives aim to create a corporate figure specially conceived to promote economic improvement through associated activity for people with fewer resources, in other words, a kind of simplified cooperative or small cooperative.

⁹This project was prepared by a qualified group of specialists and presented by Senators Pinedo and Iturrez de Cappellini (Bill S-726/19). It is currently under consideration in the Senate’s General Legislation Committee. Critical studies of the bill can be found in Calcaterra and Lencova Besheba (2020). Project of reforms to the General Law of Companies, Argentine Jurisprudence, Special Issue, Fascicle 12.

¹⁰Message 139 entered the Chamber of Deputies on November 9, 2016.

¹¹It is interesting to note that the so-called *Sistema B* has a presence in numerous Latin American countries, namely Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and the countries of Central America. In all of these countries, it has conducted an intense campaign aimed at promoting the creation of these companies—generally called *Empresas BIC*—and the enactment of laws that facilitate their development (<https://sistemab.org/espanol/el-Movimiento-global/>).

do not necessarily seek to maximize the profits of its shareholders as its sole and ultimate purpose.”¹²

The Executive Branch highlights that the bill considers the following fundamental aspects: (a) the expansion of the company’s purpose, going beyond mere economic benefit for the partners; (b) the obligation to precisely specify in the charter what social and environmental impact the company intends to generate; (c) providing protection to administrators regarding their responsibility for the pursuit of the company’s objectives; (d) granting the right of withdrawal to the partners of an existing company when it decides to adopt the status of a BIC company; and (e) establishing a control and transparency framework based on an annual report audited by a specialized independent professional.

While a history of comparative law will not be explored here, the influence of the North American legislation on B Corps is evident, as well as that of the Italian law on *Società Benefit* and the recent Colombian law on BIC companies. All this is actively and effectively conveyed by the actions of *Sistema B* and its legal group.

The bill received a favorable report from the General Legislation Commission and was included in the Order of the Day N° 1352 of 2017 of the Chamber of Deputies. However, it was not discussed within the respective legislative period, thus losing its parliamentary status.

Subsequently, a bill modifying the General Corporations Law was presented that introduced the so-called beneficial companies¹³ and another for the creation of “BIC companies.”¹⁴ These bills were treated as a unified bill by the General Legislation Commission, which approved it on October 30, 2018.¹⁵ In turn, the Chamber of Deputies approved the bill on December 6, 2018, and, consequently, it was passed to the Senate.

3.1 General Features

The bill comprises only nine articles. Article 1 states that BIC companies can be all those that are constituted according to any of the types provided in the General Corporations Law 19,550, as well as those that are incorporated or are created

¹²Message 139 entered the Chamber of Deputies on November 9th, 2016.

¹³Draft bill 2216-D-2017 presented by Deputy Cornelia Schmidt Liermann. This project proposes the modification of the General Law of Companies, incorporating its Article 1, which establishes the concept of society in a new paragraph that states that companies will also be “those that, meeting the aforementioned requirements, prioritize social and environmental responsibility in their corporate decisions over profit, thus establishing it in their corporate purpose.” The modification also proposes that the Public Registry issue a biannual duration certificate that accredits conditions and controls to ensure that the companies fulfill the planned tasks.

¹⁴Draft bill 2498-D-2018 presented by Deputy Astrid Hummel and others.

¹⁵Chamber of Deputies, Order of the Day N° 567 of February 11, 2018.

independently in the future.¹⁶ The article clarifies that a new type of company does not need to be created; however, it envisages that only a special modality or condition can be adopted by companies in general.¹⁷

However, reference to the company types provided in the General Corporations Law (general partnership, limited partnership, labor and capital partnership, public limited company, majority government-owned company, and partnership limited by shares) raises doubt about whether companies that are not classified in this Act—as is the case with simplified joint-stock companies, which are regulated by a special law—may become BIC companies. Likewise, a question remains regarding whether limited partnerships are included in Chapter IV of the General Corporations Law since they do not adhere to a specific type¹⁸ and Article 1 of the bill refers to companies “constituted according to any of the types provided” in the aforementioned law. As for simplified public joint-stock companies, there seems to be no problem—regardless of the discussion about whether or not they constitute a type of company under Law 19,550—since the bill also mentions “those which are created independently” from it. Yet with respect to limited partnerships, due to the breadth with which the subject is treated, one may assume that they could be considered included, although the wording of the legal text does not explicitly stipulate this.

On the other hand, the project demands that the partners of BIC companies, “in addition to being required to make contributions geared to the production or exchange of goods or services, participating in the benefits and bearing the losses,” must also commit to generating a positive social and environmental impact (Article 1).¹⁹ Therefore, it uses, verbatim, the General Corporations Law’s definition of partnership, which involves aspects such as the partners’ contributions and the business organization. However, strictly speaking, the only relevant aspect is that

¹⁶A comparison between the Argentine project and the model legislation of the United States has been made by Mujica (2019), who summarizes that the Argentine legislation is conceived in a more restrictive manner than in the United States.

¹⁷It should be noted that the comprehensive Reform Project of the General Companies Law presented by Senators Pinedo and Iturrez de Cappellini adds a paragraph to Article 1 entitled “Companies with another purpose,” which states, “The social contract or statute may foresee any destination for the benefits of the activity or the way to take advantage of them. They can also foresee the non-distribution of profits among the partners.” The paragraph adds that in order to introduce these provisions into the contract or statute, a unanimous vote by the partners is necessary. Thus, the partners can foresee different purposes for the companies—which are to be constituted or are already constituted—complying with the requirement of unanimity. By virtue of this provision, any discussion about the final nature of the companies would seem to be settled: It will depend on the will of the partners, through which the BIC Companies could be subsumed. See Cracogna (2020a, pp. 55 *et seq.*).

¹⁸The companies of Chapter IV of the General Law of Companies have been called “residual companies” by some authors because they do not meet the requirements of any of the types established by law, despite which they are recognized as legal persons.

¹⁹The opinion of the minority of the General Legislation Commission that dispatched the project emphasizes that quantitative parameters are not detailed on how the benefit that the companies are mandated to generate should be weighed or through which specific mechanisms such positive impacts will be verified (Chamber of Deputies, Order of the Day N° 567 of February 11, 2018).

the objective of BIC company projects, beyond seeking profit (benefits or earnings)²⁰ for shareholders, should also be to produce a positive social and environmental impact. To avoid confusion, it would have been clearer to directly say that, in addition to maximizing shareholders' value, such companies should act in a manner that benefits society and the environment.²¹

Finally, the description of BIC companies is concluded by stipulating that the obligation to generate a positive social and environmental impact must be met "in such a manner and on such terms as established by the regulations": once the law is approved, it will be necessary to await the issuance of the regulations to understand the precise scope of the obligations assumed by companies in this matter. This reference to the regulations, unlike the laws of other countries, leaves open to interpretation what an infra-legal level regulation could provide in this context, which does not seem to contribute to legal certainty. Although the law requires greater precision, it is obvious that a legal text cannot become an extensive listing of specific circumstances.²²

The company name is required to add the expression "collective benefit and interest," its abbreviation (although it is not indicated what this abbreviation is), or the acronym BIC (Article 2). Despite the fact that this provision was contested, it contributes both to informing potential contractors of the type of company with which they are engaging and to demonstrating the company's commitment to the public to observe such terms.

²⁰It is clear that companies' objective is to obtain profit to be distributed among the partners (to maximize the value of their contribution), for which the activity they conduct through a company constitutes a means of an instrumental nature. Richard and Muiño (2004, p. 145) argue that "it could be accepted that the profit-making purpose—that is, obtaining profits—was the mediate cause of the constitution of the new entity, with the corporate purpose acting as an immediate cause."

²¹It is appropriate to remember that Article 3 of the General Law of Companies contains a curious provision that reads: "Associations, whatever their purpose, that adopt the form of a company under any of the types provided, are subject to its provisions." This led some companies to take advantage of this rule in order to develop an industrial or commercial economic activity under non-profit principles, typical of associations. However, the theoretical and practical problems that this hybrid figure raises have shown that it is not suitable to adequately fulfill its purpose. See Coniglio and Connolly (2019) and Cracogna (2019).

²²The opinion of the minority of the General Legislation Commission that dispatched the project was that "other inescapable obligations could be envisaged for the figure, such as participation in the profits of the workers; equitable remuneration for all employees; training subsidies; population employment [for the] structurally unemployed, such as youth at risk, homeless individuals, people who have been released from prison, etc.; job vacancies for trans and disabled people; gender equality in the workforce; among others." (Chamber of Deputies, Order of the Day N° 567 of 2/11/16). Although the enumeration is biased toward personnel, it constitutes an example of possible concrete measures of social impact.

3.2 *Formation of BIC Companies*

BIC companies may add this term in its original formation or acquire it by amending their statute or social contract, duly registered in the respective public registry. In both cases, the positive and verifiable social and environmental impact that they are committed to generating must be specified precisely. The statutes of BIC companies must require a favorable vote of 75% of the partners in order to introduce any modification in the object of the company. This requirement regarding the constancy of “social and environmental, positive and verifiable impact” in the relevant instrument seems to contradict the requirement that the social and environmental impact must be conducted “in such a manner and on such terms as established by the regulations,” which we criticized in the previous paragraph.

The requisite of the qualified majority to vary the company’s objective seems an adequate measure to ensure that the company complies with the assumed obligations. However, in the case of companies already constituted, the adoption of BIC company status grants the right of withdrawal to the partners, who may vote against it, and to those absent who proved their status as shareholders at the time of the meeting. The projected rule refers to Article 245 of the General Corporations Law, which regulates the right of withdrawal of the partners of public limited companies and limited liability companies.

3.3 *Responsibility of Administrators*

One aspect of special interest is the administrators’ obligations—and resulting responsibilities—given that companies’ primary task is to maximize profit or benefit for their shareholders, as prescribed by Article 1 of the General Corporations Law.²³ Simultaneously, the article tries to broaden companies’ business purpose while also seeking to correlate administrators’ responsibilities with the execution of such a broadened purpose.²⁴

²³This is how the doctrine generally understands it. Nissen (2000, p. 24) expresses it in the following way: “The cause of the partnership contract is the purpose that the founders have had for the constitution of the same and it is none other than obtaining the profits that will be obtained from carrying out the activities provided for in the social contract.” For his part, Etcheverry (2013, p. 109) argues, “In our countries, the legal definition of society always includes the objective of obtaining distributable profits.” Meanwhile, Olivera García (2019, p. 11) highlights the importance of the issue of corporate administrators’ responsibility in general, stating, “The legal regulation of the responsibility of administrators represents one of the essential pillars of the regulations of the commercial companies. Through it, the aim is not only to achieve the reparation of the damages that the improper action of the administrators may cause in the assets of the company, but also to induce and align their conduct with the social interest.”

²⁴The message from the Executive Branch that accompanied the original bill stated, “The objective of this regulation is to protect decision-making that, in addition to the economic factor, takes into

Hence, the project establishes that administrators must take into account “the effects of their actions or omissions” with respect to shareholders, employees, the communities with which they are linked, the local and global environment, and the long-term expectations of shareholders and the company. In this way, the interests of the different stakeholders are included, as well as the prospects of the company, thereby limiting or excluding the consideration of short-term benefits for everyone involved. This vision notably broadens the horizon of company activities, exceeding the narrow limit of shareholder primacy.²⁵

However, this greater breadth and diversity of obligations that administrators must meet generates a responsibility that can only be demanded by the partners and the company itself. In other words, the remaining stakeholders do not acquire the authority to demand that administrators are responsible for the obligations imposed on them by the statute or the social contract of the BIC company. This limitation, which has provoked some criticism in the case of other countries inasmuch as it restricts the possibility of prosecuting the nonfulfillment of the administrators’ duties, seems, however, to be well founded.²⁶

3.4 Information and Transparency

Regarding information and transparency, Article 6 of the bill requires administrators to prepare an annual report in which they specify the actions completed to comply with the social and environmental impact provided for in the statute or social contract. This report must be audited by “a registered independent professional specialized in the areas in which it is intended to achieve positive social and environmental impact.” It is difficult to determine who that professional will be since the areas of social and environmental impact are very diverse. It is also unclear where the annual report should be registered. Accordingly, conducting this kind of audit will be challenging.

Here, again, the project refers to the regulations regarding the information requirements and the guidelines for conducting the audit. The report must be submitted to the public registry within six months of the close of the annual fiscal year and must be published on the company’s website.²⁷ Nevertheless, the regulation must also establish the mechanisms for the publication of the reports.

account others, so that the administrators of these companies can carry out actions aimed at achieving benefits for the group, without thereby unloading responsibilities on them.”

²⁵Refer to Zavala Ortiz de la Torre (2013, pp. 123 *et seq.*) for the meaning of the relatively new stakeholder theory compared with shareholder primacy or shareholder value, which for a long time were considered exclusive in societies.

²⁶Likewise, one must consider the difficulties encountered by “D & O” insurance when the administrators’ obligations reach an extensive or imprecise breadth and diversity.

²⁷It is important to remember that the requirement that companies have a website is foreseen in the aforementioned Reform Project of the General Law of Companies of 2019 and is in line with the

The bill envisages a control and sanctions procedure that goes beyond the obligations of information and transparency (Article 7). Failure to comply with the obligations assumed by application of the law will mean the loss of BIC company status. Again, on this issue, the project refers to the regulations regarding the terms and conditions for the application of this approval and may not be sanctioned in case of noncompliance due to unforeseeable circumstances or *force majeure*. From the text of Article 7, it seems that the obligations referred to are both informative (preparing and presenting the annual report) and substantive, that is, actions aimed at generating social and environmental benefits; thus, the enforcement authority will have a significant range of discretion.

One aspect that raises doubts is the mechanism by which the noncompliant company will lose its BIC company status since this condition is acquired by decision of the partners, either in the act of incorporation or, later, by means of a statute or contract reform. The revocation of this condition by decision of the enforcement authority must, therefore, undergo some special procedure that the law does not establish.

Alternatively, the Executive Branch is charged with determining which will be the law enforcement authority.²⁸ This leads to the assumption that it will not be the proper authority of each local jurisdiction in charge of the public registry, that is, the General Inspection of Justice in the federal capital and similar agencies in each province. However, it should be noted that, by its nature, corporate control could not be centralized in the national government by virtue of the provisions of Article 75, Paragraph 12, of the National Constitution. At this point, the government's federal organization presents a problem that does not seem to have been duly recognized since the application of the substantive laws—precisely this case—is constitutionally reserved for the provincial jurisdictions, while the bill entrusts the national Executive Branch to determine the enforcement authority. Therefore, a question of unconstitutionality could be raised that would impact the validity of the law precisely on the point of significant importance to ensure its compliance. The issue is complicated since the monitoring of compliance with activities as diverse as those involving social and environmental objectives is complex in nature, unlike the control usually exercised by the public registries of companies.

trend of comparative law. Meanwhile, in terms of reports on social and environmental performance, there are already several experiences such as the social balance, the social report, and others that have been increasingly used.

²⁸In the original project of the Executive Power, it was foreseen that the enforcement authority would be the Ministry of Production, which had been the promoter of the initiative.

3.5 *Governing Rules*

Regarding the order of priority of the rules applicable to BIC companies, the bill is not sufficiently precise since it determines that they will be governed by “the provisions of this law, the General Corporations Law 19,550, amended text 1984, and its modifications, of the regulations of the present and, in particular, by the norms that are applicable according to the type of corporation that they adopt and the activity that they carry out” (Article 1, last paragraph). The enumeration is confusing as it mentions the norms of the type of corporation after the regulation of the law and after having alluded to the General Corporations Law, which regulates the different types of corporations. On the other hand, the detailing of the rules that govern the activity is unclear since the proposed law deals with the corporate legal structure. This circumstance leads us to believe that conflicts could arise in this area.

The bill does not establish promotional measures, except for the authorization granted to the enforcement authority of Law 27,437 to include BIC companies in the National Supplier Development Program (Article 8).²⁹ On this matter, encouraging the creation of such companies has been identified as an appropriate promotion measure that induces new business behaviors more in tune with social and environmental needs. However, it has also been highlighted by authors such as Pereyra (2019) and Vítolo (2019) that this project basically aims to identify and acknowledge BIC companies, thus providing a platform for the subsequent adoption of promotional measures in tax, financing, and labor cost reduction matters, among others.

4 The New Bills

As previously stated, the legal requirement to reintroduce the bill passed by the Chamber of Representatives in Congress triggered the presentation of two other bills (one in each chamber of Congress and addressed to the General Legislation Commissions, with no progress up to the moment) that reproduce the content of the original project, with the addition of some innovations that address certain criticisms and contributions the bill had later received. All in all, these changes do not alter the nature of the original bill, and the proposed amendments are, generally speaking, for the better.

²⁹Article 24 of Law 27,437 created the National Supplier Development Program in which it is specified: “Its main objective will be to develop national suppliers in strategic sectors, in order to contribute to the promotion of the industry, the diversification of the national productive matrix and the promotion of competitiveness and productive transformation. This program will favor the articulation between the offer of products and services, existing and potential, with the demand of the National Public Sector and legal entities operating in strategic sectors demanding these goods, with the purpose of channeling demands and developing suppliers capable of supplying them.”

The first of the new bills was submitted to the Chamber of Representatives.³⁰ It introduces the following main innovations: more specifications regarding the meaning of positive social and environmental impact for purposes of the law; conformity of the annual report to an independent standard, widely known and used for the definition and assessment of corporate business in relation to the community and the environment; stronger control by the applicable enforcement agency in terms of compliance with companies' social and environmental purposes; and power vested in the applicable enforcement agency to promote the inclusion of triple impact companies in support programs for the development thereof.

The bill that was introduced in the Senate³¹ takes into account the innovations included in the bill submitted to the Chamber of Representatives, such as the definition of positive social and environmental impact and further specifications regarding the power of control vested in the applicable enforcement agency. It also adds some other provisions, among which we should foreground those aimed at promoting the inclusion of micro, small and medium-sized enterprises (MSMEs) in the regulation of BIC companies and the minimum requirements to be complied with by triple impact companies in order to obtain legal recognition. The rationale of the bill highlights the importance of these companies in the scenario created by the COVID-19 pandemic and the damaging effects of climate change.

5 Conclusion

Corporate law is undergoing a period of profound change on a global scale, albeit with uneven intensity across different countries, depending on their particular individual conditions (Cracogna 2020b, Vol. 1, p. 213). Generally, it could be said that these changes are concomitant, or in solidarity, with those occurring in society as a whole: they deal not only with the narrow margins of law, as such, but also with the conditions of society overall, where current values undergo mutations that, like successive shock waves, are projected onto the universe of social culture.

The change is significant. For a long time, it could be argued that since their appearance on the Western economic horizon, corporations had the exclusive task of producing profits for those who contributed capital. They were constituted for this purpose, and their performance was evaluated according to the profit they earned.³²

³⁰Named 0737-D-2021 and signed by congresswoman Camila Crescimbeni et al. (See status: www.diputados.gov.ar/proyectos).

³¹Bill S-1840-2021, submitted by senator Gladys E. González et al. (See status: www.senado.gov.ar/parlamentario).

³²However, Olivera García (2016, p. 24) notes, "The imperative force of the adoption of social responsibility policies does not arise from any specific legal norm. Its binding force comes from the intimate social conviction that failure to comply with these principles constitutes an infringement of a cultural norm. It is a social imperative, with an ethical content, that imposes certain behavior on companies."

The new orientation was, and continues to be, opposed.³³ However, it has made its way to many countries, including the United States, the champion of liberalism, where the legislation of several states, including Delaware, gradually made room for it. It should be noted that, as often happens, it was the companies themselves that incorporated care for other stakeholders (workers, clients, creditors, local community, and the environment) spontaneously and without the existence of a specific legal framework. Subsequently, and in many cases due to the advocacy activities of the entrepreneurs themselves, governments began to echo the new trend, giving it a place in their respective legislation.³⁴

The issue seems clear, in principle, since it is a question of society serving the needs of the human, social, and environmental conditions in which it operates and to which, obviously, it must correspond since it depends on these conditions to carry out its activities, beyond the fulfillment of its strictly legal obligations. However, some aspects that may conflict with the legal implementation of the new trend remain to be resolved. Initially, it must be specified how it is possible and convenient for the law to deal with issues that, ultimately, have a moral foundation.³⁵

In this regard, it is appropriate to consider whether a company that assumes the collective benefit commitment must adhere to a particular type or be any company that qualifies its corporate purpose through such obligation. On the other hand, it must be determined whether it is necessary to establish obligations for administrators regarding compliance with the company's social and environmental objectives and, where appropriate, who will be entitled to demand such responsibilities and to what extent. The issue of compliance is of paramount importance in avoiding the use of names that have no practical impact or actions that constitute mere social cosmetics, in keeping with only a passing fad.

No less important is the issue of information and transparency about the objectives of collective benefit and interest that the company must satisfy, starting with the eventual obligation to denounce them not only in its statute but also in the company name itself. The requirements and contents of the report, the social balance that the company must meet, and its advertising procedure must be determined. Additionally, a question arises about the eventual requirement to submit these reports to a specialized audit, with the consequent problem of defining which audits these are and their accreditation as such.

Finally, a matter that is controversial yet worth considering is whether these companies should be subject to a special state comptroller regime because of their objectives or if they should only be subject to the requirements common to other

³³The work of Hadad (2016, p. 366) is enlightening and argues that “from a purely legal point of view to the extent that the CSR programs carried out by the board of directors do not generate value for society, this may entail responsibility for the administration.”

³⁴In the 1970s, Galgano (1990, p. 193) stated, “The private company, therefore, can only be affirmed that it is ‘functionalized’ for social utility if laws exist and only to the extent that those laws functionalize it.”

³⁵Some have questioned the need to establish a specific legal regime for triple impact companies, considering that they may exist within the current corporate system (see Basualdo 2019).

companies. In conjunction with this consideration is the question of the existence of a specific sanctioning body for when the previous obligations are not fulfilled, be they substantive or informative.

All these issues are complex and must be properly weighed when legislating for these companies because, if not adequately resolved, they can frustrate their performance and their very existence, regardless of the good intentions that inspire their legal purpose.

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The Failed Attempt to Enact Benefit Company Legislation in Australia and the Rise of B Corps



Ian Ramsay and Mihika Upadhyaya

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1 Introduction

A majority of United States ('US') states have enacted benefit corporation legislation, as have the Canadian province of British Columbia, the US territory of Puerto Rico, and Columbia, Ecuador and Italy.¹ Over 5,000 US companies have incorporated or re-incorporated as benefit corporations under the US legislation.²

Although the benefit corporation legislation is not uniform across all the US states in which it has been enacted, the 'model' legislation, which is the version enacted in most US states, requires benefit corporations to pursue a 'general public benefit' purpose, defined as 'a material positive impact on society and the environment, taken as a whole. . . assessed . . . against a third-party standard'.³ Benefit corporations may, if they choose, also pursue a 'specific public benefit' purpose, which can include any of the following: providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; protecting or restoring the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; increasing the flow of capital to entities with a purpose to benefit society or the environment; and conferring any other particular benefit on society or the environment.⁴

In addition, under the model legislation, the directors of a benefit corporation must consider the effects of any action or inaction on: the shareholders; the employees and workforce, its subsidiaries, and its suppliers; the interests of customers as beneficiaries of the general public benefit or specific public benefit; the community and societal factors; the local and global environment; the short-term and long-term interests of the benefit corporation; and the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.⁵

The directors may also consider other pertinent factors or the interests of any other group they deem appropriate.⁶ However, the directors need not give priority to a particular interest or factor unless this is stated in the corporation's articles of incorporation.⁷

¹Benefit Corporation (2022b, c).

²Yale Environmental Law Association et al. (2018), p. 29. The full text of the Model Benefit Corporation Legislation, with explanatory comments, is available at Benefit Corporation (2017).

³Benefit Corporation (2017), p. 3, Sec. 102, definition of 'general public benefit'.

⁴Benefit Corporation (2017), pp. 4–5, Sec. 102, definition of 'specific public benefit'.

⁵Benefit Corporation (2017), p. 12, Sec. 301(a)(1). The obligation to consider these interests and factors is also imposed on each officer of a benefit corporation provided that the officer has discretion to act with respect to a matter and it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the articles of incorporation: Sec. 303(a).

⁶Benefit Corporation (2017), p. 12, Sec. 301(a)(2).

⁷Benefit Corporation (2017), p. 12, Sec. 301(a)(3).

The model legislation requires benefit corporations to produce an annual benefit report that includes: (1) a description of the ways in which the benefit corporation pursued a general public benefit (and any specific public benefit if applicable) during the year and the extent to which a general public benefit (and specific public benefit if applicable) was created; and (2) an assessment of the overall social and environmental performance of the benefit corporation.⁸

Benefit corporations incorporated under the benefit corporation legislation are different to Certified B Corporations, also known as ‘B Corps’. A benefit corporation is a specific type of company whereas a B Corp is a corporation that has been certified by B Lab as achieving a minimum verified score on the B Impact Assessment – an assessment of the company’s impact on its workers, customers, community and environment. Certified B Corps amend their legal governing documents (for example, their articles of association or constitution) to require the board of directors to balance profit and purpose.⁹ There are over 4400 certified B Corps in more than 70 countries.¹⁰

Given this history, there is understandable interest in countries that are or have considered enacting benefit corporation legislation. One of these countries is Australia. However, the attempt to introduce legislation in Australia was unsuccessful. We explore the reasons for the unsuccessful attempt to introduce benefit corporation legislation. We also explore the parallel increase in the number of B Corps in Australia.

The introduction of benefit company legislation in Australia was strongly advocated by B Lab Australia and New Zealand (‘B Lab ANZ’), a subsidiary of B Lab.¹¹ B Lab ANZ’s main activities in Australia consist of the provision of the B Impact Assessment and the provision of the B Corp certification program.¹² The advocacy by B Lab ANZ extended to it establishing a working group to draft legislation to introduce benefit companies in Australia.¹³ However, B Lab ANZ ceased this advocacy in 2020.¹⁴

The benefit company legislation proposed by B Lab ANZ, if it had been enacted, would have created a new status of benefit company, rather than a new type of company.¹⁵ In this respect, the draft Australian legislation is different to the model US benefit corporation legislation. However, in other respects, there are close similarities between the draft Australian legislation and the model US legislation. A new or existing company could gain benefit company status under the draft Australian legislation if it satisfied certain requirements, the key being that its

⁸Benefit Corporation (2017), pp. 20–21, Sec. 401.

⁹B Lab (2022a).

¹⁰B Lab (2022c).

¹¹B Lab Australia and New Zealand (‘B Lab ANZ’) (2017b).

¹²B Lab ANZ (2021a).

¹³B Lab ANZ (2017b), para 23.

¹⁴Khisty (2020).

¹⁵B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1).

constitution contain a ‘general public benefit’ purpose.¹⁶ In addition, a benefit company could choose to enact one or more ‘specific public benefit’ purposes in its constitution.¹⁷ Once a company had gained benefit company status, its directors and other officers were required, when discharging their legal duties, to consider the interests of a broad range of stakeholders.¹⁸ The draft legislation also provided that the benefit company was required to produce an ‘annual benefit report’ outlining its success and failure in pursuing and creating public benefit.¹⁹ Finally, the draft legislation created a new type of proceeding, ‘benefit enforcement proceedings’, intended to ensure that benefit companies complied with their obligations.²⁰

This chapter proceeds as follows. Section 2 discusses the reasons it was believed that legislation to introduce a benefit company model was needed in Australia, and the arguments put forward as to why existing law was insufficient to enable for-profit companies to pursue socially beneficial outcomes. Section 3 summarises the benefit company legislation drafted by the working group convened by B Lab ANZ, and the policy reasons behind the various proposed amendments. Section 4 explores why the draft legislation was not enacted, outlining how the proposal was received by the Australian community, from the response of the government and other political parties, to the response of the business and academic communities. It also details how B Lab ANZ eventually decided to abandon the goal of law reform in favour of an alternative approach. Section 5 discusses B Corps in Australia, including the growth in B Corp certification, the types of companies that have gained certification, and the academic literature on B Corps in Australia. Section 6 concludes.

2 Why It Was Thought That Benefit Company Legislation Was Needed in Australia

B Lab ANZ began advocating for the introduction of benefit company legislation in Australia in 2013.²¹ It had earlier obtained legal advice that an amendment to the Corporations Act 2001 (Cth) (‘Corporations Act’) would be the best way to achieve B Lab ANZ’s desired outcomes as this would provide most certainty to directors and clarify the applicable law. In early 2015, B Lab ANZ convened a working group of academics, lawyers, business leaders and governance experts to draft an amendment to the Corporations Act to introduce a benefit company model.²²

¹⁶B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1).

¹⁷B Lab ANZ (2017b), Attachment B, para 2.2, Sec. 125A(1).

¹⁸B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(1).

¹⁹B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C.

²⁰B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F.

²¹Khisty (2020).

²²Morrissy (2016), p. 26, and B Lab ANZ (2017b), para 23. One of the co-authors of this chapter, Professor Ian Ramsay, was a member of the working group.

B Lab ANZ lobbied for the introduction of this amendment on several grounds. The primary argument it put forward was legal need: B Lab ANZ contended that the Australian legal system created uncertainty for the directors of for-profit companies who wished to favour the interests of non-shareholder stakeholders.²³ B Lab ANZ argued that the Australian duty of directors to act in the best interests of the company had been interpreted to mean the financial well-being of shareholders as a general body (with the exception that in the case of a company that is insolvent or near insolvency, directors are also obliged to consider the financial interests of creditors).²⁴ B Lab ANZ noted that there was no obligation imposed by corporate law on directors to consider the interests of non-shareholder stakeholders, such as employees, customers, contractors and the community, when making decisions for the company.²⁵ B Lab ANZ argued that if directors chose to do so, they faced legal uncertainty as to whether they were properly discharging their duties.²⁶ B Lab ANZ acknowledged that it was possible under the existing law for an Australian company to modify its constitution and include, for example, a general or specific public benefit purpose, but noted there was little guidance in statute or at common law for directors who wished to do so, and argued that in practice directors would not stray far from the norm of shareholder primacy.²⁷ B Lab ANZ also argued that were directors to incorporate such a purpose in the company's constitution, they faced the risk of claims by non-shareholder stakeholders under Sec. 1324 of the Corporations Act for failing to pursue or create a general or specific public benefit purpose.²⁸

A report prepared for B Lab ANZ by the Social Impact Hub made similar points in relation to the legal need for benefit company legislation.²⁹ As the report was prepared in 2014, it is a useful reference for some of the arguments made in support of law reform in the early years of B Lab ANZ's campaign. The report specifically noted that there was no legal protection for directors seeking to create public benefit, and that such directors were therefore vulnerable to personal liability and accusations of breach of duty by regulators.³⁰ It argued that directors only considered public benefit to the extent needed to operate in the market whilst remaining competitive, and that this was due to the level of scrutiny placed by shareholders and the media on companies.³¹ It emphasised the lack of any case law that might 'reassure' directors

²³ B Lab ANZ (2017b), para 9.

²⁴ B Lab ANZ (2017b), para 10.

²⁵ B Lab ANZ (2017b), para 11.

²⁶ B Lab ANZ (2017b), para 11.

²⁷ B Lab ANZ (2017b), para 12.

²⁸ B Lab ANZ (2017b), para 13. Section 1324 allows any person whose interests are affected by the conduct of another person, where that conduct constitutes a contravention of the Corporations Act, to apply for an injunction restraining the second person. This could potentially include a claim for an injunction brought against the directors of a company.

²⁹ Social Impact Hub (2014).

³⁰ Social Impact Hub (2014), p. 32.

³¹ Social Impact Hub (2014), p. 32.

who wished to consider public benefit, arguing that without law reform it was unlikely directors would consider public benefit as part of their core business.³² The report warned that, given the risk of litigation, legal advisers would be unlikely to endorse decisions of directors that considered stakeholder interests.³³ Finally, the report expressed scepticism that the ability of companies to modify their constitutions to permit directors to consider stakeholder interests could be an adequate solution, pointing to the lack of any case law on the interpretation of such clauses in constitutions.³⁴

One scenario that B Lab ANZ pointed to in order to illustrate the legal need for law reform was the case of a change of control or other major corporate transaction, such as a capital raising, substantial divestment, merger or acquisition.³⁵ B Lab ANZ noted that in such transactions the interests of shareholders are customarily the sole concern of directors, even where the transaction can negatively impact other stakeholders.³⁶ B Lab ANZ used the example that in the case of an acquisition, there would be no protection for a founder director who wished to reject the offer of a higher price per share from a buyer who would break up the company and move its operations offshore, in favour of the offer of a lower price from a buyer who would keep the company entire, retain all employees and stay 'on mission'.³⁷ B Lab ANZ maintained that such protection was desirable and necessary.³⁸

B Lab ANZ contended that the introduction of its proposed benefit company legislation would not only create legal certainty for directors, in that it would protect directors who wished to favour non-shareholder stakeholders, but have a number of additional benefits.³⁹ The first of these was 'mission alignment': that the legislation would enable a company's mission to be incorporated in its constitution, and create a framework giving directors legal protection to stay on mission through corporate succession, capital raising and changes in ownership.⁴⁰ The second was that the benefit company legislation would help grow the movement of business people striving for business to create social and environmental benefits.⁴¹ The third was to attract 'impact investment', impact investing being the growing field of investment that aims to achieve positive social and environmental impact alongside financial returns.⁴² Benefit company status, B Lab ANZ reasoned, would make a company more attractive to impact investors, as impact investors would have the

³²Social Impact Hub (2014), p. 32.

³³Social Impact Hub (2014), p. 33.

³⁴Social Impact Hub (2014), p. 33.

³⁵B Lab ANZ (2017b), para 14.

³⁶B Lab ANZ (2017b), para 14.

³⁷Bailey (2015).

³⁸Bailey (2015).

³⁹B Lab ANZ (2017b), paras 17–22.

⁴⁰B Lab ANZ (2017b), para 18.

⁴¹B Lab ANZ (2017b), para 19.

⁴²B Lab ANZ (2017b), para 20.

assurance that the company would remain accountable to its mission in the future before committing funds to it, as well as the additional comfort provided by the requirement that benefit companies produce an annual benefit report outlining their success or failure in creating public benefit.⁴³ B Lab ANZ cited evidence from the United States that the benefit corporation structure offered discounted capital and a ‘home’ for the growing pool of ethical investment funds, as well as marketing and goodwill advantages.⁴⁴ The fourth benefit B Lab ANZ identified was that the introduction of benefit companies would help to build an ‘engaged workforce for the future’, drawing on a 2015 study that found half of millennials surveyed wanted to work for businesses with ethical practices.⁴⁵ The fifth benefit identified was that the proposed legislation created minimal additional regulatory burden, as compliance requirements would be assumed by companies choosing benefit company status.⁴⁶ Finally, B Lab ANZ argued that the benefit company model could assist to shift some of the growing burden of externalities from the public to the private sector.⁴⁷

3 Summary of the Draft Legislation

This section summarises B Lab ANZ’s draft legislation and the policy reasons behind the draft legislation. The draft legislation, together with an explanatory memorandum and an introductory briefing paper outlining the need for the draft legislation, formed part of a ‘briefing pack’ of documents that B Lab ANZ circulated to a wide group of organisations and individuals as part of its lobbying campaign to have the draft legislation enacted.⁴⁸ The draft legislation proposed a series of amendments to the Corporations Act, which is the Act that provides for the incorporation and dissolution of companies, imposes a series of duties on company directors, provides for shareholder remedies, and also regulates certain activities of companies including the raising of capital and takeovers. The B Lab ANZ amendments can be categorised as follows: requirements a company must satisfy to gain benefit company status; the obligation on directors and other officers of benefit companies to consider non-shareholder stakeholder interests; the introduction of a

⁴³B Lab ANZ (2017b), para 20.

⁴⁴Morrissy (2016), p. 26.

⁴⁵B Lab ANZ (2017b), para 21.

⁴⁶B Lab ANZ (2017b), para 22.

⁴⁷Morrissy (2016), p. 26.

⁴⁸The draft legislation and accompanying explanatory memorandum are available on the Department of the Treasury website as they formed part of a 2018–2019 pre-budget submission (dated December 2017) from B Lab ANZ to the Treasury recommending the introduction of the benefit company legislation to ‘create an enabling regulatory and policy environment that encourages the growth of both the for-profit, for-purpose business sector and the impact investment market’: B Lab ANZ (2017a).

new type of proceeding to enforce compliance by benefit companies; the requirement for a benefit company to produce an annual benefit report; and the development of third party benefit standards. The draft legislation is based on the US model benefit corporation legislation,⁴⁹ but with some distinguishing characteristics.

3.1 Eligibility Requirements

The draft legislation prescribes the actions a company must take to gain benefit company status, whether the company is new or existing.⁵⁰ It does not create a separate category of company. The draft explanatory memorandum explains that creating an additional type of company would require significant amendments to the Corporations Act and could reduce the appeal of the benefit company structure for Australian businesses.⁵¹

The draft legislation provides that a company is a benefit company if it satisfies all of the following four criteria.⁵² First, it must be a proprietary company limited by shares, or a public company limited by shares, or a public company limited by guarantee that is not registered with the Australian Charities and Not-For-Profits Commission.⁵³ The types of companies that may elect to gain benefit company status is limited in this way because of a fundamental characteristic of the benefit company, namely, it exists to make a profit.⁵⁴ Second, the company cannot be a deductible gift recipient,⁵⁵ as such entities are usually charitable institutions rather than entities seeking to make a profit.⁵⁶ Third, the company must have a constitution.⁵⁷ This means a proprietary company cannot choose to rely on the replaceable rules in the Corporations Act rather than implement its own constitution.⁵⁸ The explanatory memorandum justifies this requirement by citing the importance of the constitution to a benefit company.⁵⁹ The fourth and final criterion is that the

⁴⁹B Lab ANZ (2017b), para 23.

⁵⁰B Lab ANZ (2017b), Attachment C, para 3.1.

⁵¹B Lab ANZ (2017b), Attachment C, para 3.2.

⁵²B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1).

⁵³B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1)(a).

⁵⁴B Lab ANZ (2017b), Attachment C, para 3.2.

⁵⁵B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1)(d).

⁵⁶B Lab ANZ (2017b), Attachment C, para 3.3.

⁵⁷B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1)(b).

⁵⁸B Lab ANZ (2017b), Attachment C, para 3.4. The Corporations Act contains various rules relating to the internal management of companies; some of these are known as 'replaceable rules'. A company does not need to have a constitution, but can instead rely on the rules in the Corporations Act. A company only needs a constitution if it wishes to displace, modify or add to the replaceable rules. See Corporations Act, Sec. 135.

⁵⁹B Lab ANZ (2017b), Attachment C, para 3.4.

company's constitution contain a general public benefit purpose.⁶⁰ This last criterion is one of the core features of the model introduced in the draft legislation.⁶¹

The draft legislation defines 'general public benefit' as a material positive impact on society and the environment, taken as a whole, assessed against a third party benefit standard, resulting from the business affairs of the company.⁶² 'Third party benefit standard' is in turn defined as a standard for defining, reporting and assessing a benefit company's social and environmental performance that is developed by an entity prescribed by the Corporations Regulations 2001 (Cth) ('Corporations Regulations').⁶³

A benefit company may also choose to have a purpose of creating one or more specific public benefits in its constitution.⁶⁴ However, this is not mandated, in contrast to the requirement to have a general public benefit purpose in the constitution. 'Specific public benefit' is defined as the conferring of a particular benefit on society or the environment but excludes general public benefit.⁶⁵ The draft explanatory memorandum provides some examples of specific public benefit purposes, including: providing low-income earners or disadvantaged communities with beneficial services; conserving or restoring the environment; improving the health or wellbeing of individuals or communities; and promoting the arts or sciences.⁶⁶

The draft legislation clarifies that a benefit company has all the rights and obligations of companies under the Corporations Act, except so far as a contrary intention appears.⁶⁷ The draft legislation also provides that an act of a benefit company is not invalid merely because it is contrary to or beyond the general public benefit purpose or a specific public benefit purpose in the constitution.⁶⁸

A company that becomes a benefit company following registration (i.e., incorporation) or is a benefit company upon registration must notify the Australian Securities and Investments Commission ('ASIC') that it is a benefit company.⁶⁹

3.2 *Directors' Consideration of Stakeholder Interests*

Under the draft legislation, directors and other officers of a benefit company remain subject to all the duties imposed on them by statute and general law. The change introduced by the draft legislation is that in discharging their duties, the directors and

⁶⁰B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(1)(c).

⁶¹B Lab ANZ (2017b), Attachment C, para 3.4.

⁶²B Lab ANZ (2017b), Attachment B, para 1.3.

⁶³B Lab ANZ (2017b), Attachment B, para 1.5.

⁶⁴B Lab ANZ (2017b), Attachment B, para 2.2, Sec. 125A(1).

⁶⁵B Lab ANZ (2017b), Attachment B, para 1.4.

⁶⁶B Lab ANZ (2017b), Attachment C, para 3.9.

⁶⁷B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(3).

⁶⁸B Lab ANZ (2017b), Attachment B, para 2.2, Sec. 125A(2).

⁶⁹B Lab ANZ (2017b), Attachment B, para 2.1, Sec. 45C(2).

other officers of a benefit company *must* consider the matters listed in Sec. 190C(1) (a) of the draft legislation. These matters are: the likely consequences of any decision or act in the long term;⁷⁰ the interests of the company's employees;⁷¹ the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; the interests of the members of the company; and the ability of the company to create its general public benefit and any specific public benefit purpose in its constitution.⁷² However, the directors and other officers need not give priority to any one of these matters unless the benefit company's constitution states that they must prioritise certain matters related to the accomplishment of the general public benefit purpose or any specific public benefit purpose in the constitution.⁷³ The explanatory memorandum states that the list of matters is not exhaustive and directors and other officers may properly consider other matters in discharging their duties.⁷⁴

The explanatory memorandum states that Sec. 190C protects directors and other officers who make a decision that fails to maximise shareholder returns but results in benefits to non-shareholder stakeholders.⁷⁵ The explanatory memorandum notes that Sec. 190C is deliberately similar to Sec. 172 of the Companies Act 2006 (UK);⁷⁶ the intention is to provide benefit companies with greater certainty when applying and interpreting Sec. 190C.⁷⁷

The explanatory memorandum states that the draft legislation is not intended to expand the scope of existing shareholders' rights and remedies under the Corporations Act.⁷⁸ Accordingly, the consideration by directors and other officers of the matters in Sec. 190C(1) does not of itself constitute a breach of the duties contained in Secs. 180-184 of the Corporations Act,⁷⁹ or prevent directors and other officers from relying on Sec. 180(2) (the business judgment rule);⁸⁰ nor does it authorise a

⁷⁰ B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(1)(a)(i).

⁷¹ B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(1)(a)(ii).

⁷² B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(1)(a).

⁷³ B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(1)(b).

⁷⁴ B Lab ANZ (2017b), Attachment C, para 4.4.

⁷⁵ B Lab ANZ (2017b), Attachment C, para 4.3.

⁷⁶ B Lab ANZ (2017b), Attachment C, para 4.4.

⁷⁷ B Lab ANZ (2017b), Attachment C, para 4.4.

⁷⁸ B Lab ANZ (2017b), Attachment C, para 4.7.

⁷⁹ These are: the duty of care and diligence (s 180(1)), the duties to act in good faith in the best interests of the corporation and for a proper purpose (s 181), the duty not to misuse position (s 182), the duty not to misuse information (s 183), and criminal offences relating to the duties in Secs. 181-183 (s 184).

⁸⁰ Section 180(2) provides that a director or other officer of a corporation who makes a business judgment is taken to meet their statutory duty of care and diligence (contained in Sec. 180(1)), and equivalent duties at common law and in equity, in respect of the judgment if they: make the judgment in good faith for a proper purpose; do not have a material personal interest in the subject matter of the judgment; inform themselves about the subject matter of the judgment to the extent

person to do an act which would be inconsistent with any law requiring them to act in the interests of the company's creditors, entitle a person other than ASIC to seek an injunction under Sec. 1324 of the Corporations Act,⁸¹ entitle a Court to make an order under Part 2F.1 of the Corporations Act,⁸² or entitle a person to bring or intervene in proceedings under Part 2F.1A of the Corporations Act.⁸³ The intention is that compliance with Sec. 190C(1) be enforced indirectly via the new benefit enforcement proceeding.⁸⁴

The draft legislation further provides that a director or other officer of a benefit company cannot be made liable under the Corporations Act or general law for the failure of a benefit company to pursue or create general public benefit or any specific public benefit.⁸⁵ As long as the directors have complied with their directors' duties, a remedy can only be sought against the benefit company itself under a benefit enforcement proceeding.

3.3 *Benefit Enforcement Proceedings*

The draft legislation creates a new category of proceeding called benefit enforcement proceedings. These are any proceedings for the failure of a benefit company to pursue or create the general public benefit purpose or any specific public benefit purpose in its constitution, or to comply with the requirement to produce an annual benefit report under draft Sec. 300C.⁸⁶ Benefit enforcement proceedings that are brought on behalf of a benefit company must be brought in the benefit company's name.⁸⁷

Standing to bring enforcement proceedings on behalf of a benefit company is granted to an officer of the benefit company (officer is defined in the Corporations Act to include a director or company secretary),⁸⁸ and to a shareholder or group of shareholders with at least 5% of the votes that may be cast at a general meeting of the benefit company.⁸⁹ The threshold is capped at 5% because this is consistent with the

they reasonably believe to be appropriate; and rationally believe that the judgment is in the best interests of the corporation. The subsection further provides that a director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

⁸¹ Section 1324 prescribes when a court may grant an injunction for contraventions of the Corporations Act.

⁸² Part 2F.1 of the Corporations Act contains remedies for oppression.

⁸³ B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(2). Part 2F.1A of the Corporations Act prescribes when proceedings may be brought on behalf of a company by members and officers.

⁸⁴ B Lab ANZ (2017b), Attachment C, para 4.7.

⁸⁵ B Lab ANZ (2017b), Attachment B, para 2.3, Sec. 190C(3).

⁸⁶ B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(1).

⁸⁷ B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(3).

⁸⁸ Corporations Act, Sec. 9.

⁸⁹ B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(2).

threshold for shareholders seeking to call a general meeting of the company.⁹⁰ Such persons may also intervene in any benefit enforcement proceedings to which the benefit company is a party for the purpose of taking responsibility on behalf of the benefit company for those proceedings or a step in them, e.g. compromise or settlement.⁹¹ In addition, ASIC may bring benefit enforcement proceedings on behalf of a benefit company.⁹²

Section 237 of the Corporations Act, which addresses when a person may apply for leave to bring proceedings on behalf of a company, or intervene in proceedings to which the company is a party, and when a court may grant that leave, applies to benefit enforcement proceedings.⁹³ This means that a person wanting to bring benefit enforcement proceedings must satisfy the court of the matters in Sec. 237(2), including that they are acting in good faith, it is in the best interests of the company that leave be granted, and it is probable that the company will not itself bring the proceedings, or properly take responsibility for them.

The court has the power to make the following orders in relation to benefit enforcement proceedings: an order that the company's constitution be modified or repealed, including to remove the general public benefit purpose and any specific public benefit purpose (the removal of the former would strip the company of its benefit company status); an order requiring the company to comply with draft Sec. 300C (the requirement to produce the annual benefit report); an order that an officer of the benefit company do an act specified in draft Sec. 190C(1)(a), which provides for the mandatory consideration of stakeholder interests; and an order requiring the company to notify ASIC that it is no longer a benefit company.⁹⁴

If the court makes an order repealing or modifying a benefit company's constitution, or requiring the benefit company to adopt a constitution, the company does not have the power to change or repeal the constitution inconsistently with that order, unless the order states the company does have the power to make such a change or repeal, or the company first obtains the leave of the court.⁹⁵

3.4 Annual Benefit Report

Section 300C of the draft legislation provides that a benefit company is required to publish an annual benefit report on its website, or, if it does not have a website, to send a physical copy of its annual benefit report to its members.⁹⁶

⁹⁰B Lab ANZ (2017b), Attachment C, para 5.3; Corporations Act, Sec. 249D.

⁹¹B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(2).

⁹²B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(2).

⁹³B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247F(4).

⁹⁴B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247G(1).

⁹⁵B Lab ANZ (2017b), Attachment B, para 2.4, Sec. 247G(2).

⁹⁶B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(1).

The annual benefit report for a financial year must contain two components. First, it must contain a narrative description of the following matters: the ways in which the benefit company pursued its general public benefit during the year and the extent to which the general public benefit was created; the ways in which the benefit company pursued each specific public benefit in its constitution during the year and the extent to which a specific public benefit was created; details of any matter that significantly affected the creation by the benefit company of the general and each specific public benefit in its constitution; and likely developments in the benefit company's operations in the future and the expected impact of those developments on the general and each specific public benefit purpose in the constitution.⁹⁷

Second, the annual benefit report must contain an assessment of the overall social and environmental performance of the benefit company against a third party benefit standard,⁹⁸ defined as a standard for defining, reporting and assessing the social and environmental performance of a benefit company that assesses the effects of the business affairs of the company upon the matters listed in draft Sec. 190C(1), and is developed by an entity that is not a related entity of the benefit company and is prescribed by the Corporations Regulations.⁹⁹ This requirement allows stakeholders to judge whether the benefit company is creating public benefit, and to ensure independence and objectivity in the application of the standard.¹⁰⁰ The standard must be applied consistently with any application in a prior annual benefit report, or be accompanied by an explanation of the reasons for inconsistency between the application of that standard compared with the immediately prior annual benefit report.¹⁰¹ The requirement ensures that stakeholders are not misled about the changes in the creation of public benefit from year to year.¹⁰²

The annual benefit report of a public or large proprietary company¹⁰³ must be published within four months after the end of the company's financial year.¹⁰⁴ This is consistent with the existing deadline for lodgement of financial statements.¹⁰⁵ If the benefit company is a small proprietary company,¹⁰⁶ it must be published within

⁹⁷ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(2)(a).

⁹⁸ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(2)(b).

⁹⁹ B Lab ANZ (2017b), Attachment B, para 1.5.

¹⁰⁰ B Lab ANZ (2017b), Attachment C, para 6.3.

¹⁰¹ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(2)(b).

¹⁰² B Lab ANZ (2017b), Attachment C, para 6.4.

¹⁰³ Under Sec. 45A(3) of the Corporations Act, for financial years commencing on or after 1 July 2019, a proprietary company is a large proprietary company if it satisfies at least two of the following three criteria: the consolidated revenue for the financial year of the company and any entities it controls is AUD 50 million or more; the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is AUD 25 million or more; and the company and any entities it controls have 100 or more employees at the end of the financial year. These thresholds are double those that applied in financial years commencing before 1 July 2019.

¹⁰⁴ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(3)(a).

¹⁰⁵ Corporations Act, Secs. 315, 319.

¹⁰⁶ The definition of a small proprietary company is essentially the inverse of the definition of a large proprietary company: Corporations Act, Sec. 45A(2); see above note 103.

six months after the anniversary of the company's registration.¹⁰⁷ This is to alleviate the compliance burden on small proprietary companies, which are not required to lodge financial statements with ASIC or their members.¹⁰⁸ A benefit company is not required to publish an annual benefit report until the end of the second full financial year or second full calendar year after its registration.¹⁰⁹ This is to alleviate the compliance burden on start-up companies.¹¹⁰

3.5 Development of Third Party Benefit Standards

The proposed amendments to the Corporations Act also contain an amendment to the Corporations Regulations. This proposed amendment relates to third party benefit standards. The draft regulation provides that an entity which develops a third party benefit standard must meet certain requirements and also be prescribed in the regulation.¹¹¹

There are three requirements, apart from the requirement to be prescribed. First, the entity is required to have access to the necessary expertise to assess the overall social and environmental performance of a business.¹¹² Second, the entity is required to make the following information publicly available on its website: the criteria considered when measuring the overall social and environmental performance of a business; the relative weightings, if any, of those criteria; the identity of the officers and members of the entity that developed and control revisions to the third party benefit standard; the process by which revisions to the third party benefit standard are made; and the revenue and sources of funding for the entity, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.¹¹³ Third, not more than one-third of the officers and members of the governing body of the entity can be officers, members or employees of any of the following: an association of businesses operating in a specific industry, the performance of whose members is assessed against the standard; businesses from a specific industry or an association of businesses in that industry; or a business whose performance is assessed against the standard.¹¹⁴

The list of prescribed entities was not drafted, but was to be inserted following public consultation.¹¹⁵

¹⁰⁷ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(3)(b).

¹⁰⁸ B Lab ANZ (2017b), Attachment C, para 6.1.

¹⁰⁹ B Lab ANZ (2017b), Attachment B, para 2.5, Sec. 300C(4).

¹¹⁰ B Lab ANZ (2017b), Attachment C, para 6.1.

¹¹¹ B Lab ANZ (2017b), Attachment B, p. 6, reg 1.0.02B(1).

¹¹² B Lab ANZ (2017b), Attachment B, p. 6, reg 1.0.02B(2)(a).

¹¹³ B Lab ANZ (2017b), Attachment B, p. 6, reg 1.0.02B(2)(b).

¹¹⁴ B Lab ANZ (2017b), Attachment B, p. 6, reg 1.0.02B(2)(c).

¹¹⁵ B Lab ANZ (2017b), Attachment B, p. 6, reg 1.0.02B(3).

4 Why the Draft Legislation Has Not Been Enacted

B Lab ANZ began advocating for the introduction of the benefit company model in Australia in 2013,¹¹⁶ and by 2016, the working group convened by B Lab ANZ in 2015 to draft the legislation had completed this work. However, by 2020 B Lab ANZ had discontinued this advocacy.¹¹⁷ The draft legislation was not enacted, nor indeed introduced into Parliament as a bill because of B Lab ANZ's lack of success in convincing the government to enact the model,¹¹⁸ and the opposing views on the merits of the model in the Australian community, particularly some influential parts of the business community.

4.1 Political Response to Draft Legislation

B Lab ANZ engaged in lengthy consultations as part of its advocacy for the introduction of the draft benefit company legislation. This included consultations with the Department of the Treasury and some politicians and their advisors. However, support from the government and the Department of the Treasury was not forthcoming.

Although B Lab ANZ was unable to persuade the Coalition government, in power between 2013 and 2022, to enact benefit company legislation, both the Australian Labor Party ('ALP') and Greens indicated either support for the purposes behind the draft legislation or specific support for this type of legislation. In its 2018 policy platform, the ALP promised to re-establish the Corporations and Markets Advisory Committee¹¹⁹ and task it with considering and reporting on whether the Corporations Act required amendment to clarify the extent to which directors could consider the interests of non-shareholder stakeholders or the broader community when making corporate decisions, and whether companies should be required to report on the social and environmental impact of their activities.¹²⁰ The Greens expressed even clearer support for the type of amendment proposed by B Lab ANZ in a 2016 policy document, which promised to amend the Corporations Act to create the category of 'Benefit Corporations'. The policy stated this would give company

¹¹⁶ Khisty (2020).

¹¹⁷ Khisty (2020).

¹¹⁸ Morgan (2018), p. 185 noted in 2018 that there was limited interest in the benefit company model at the federal level of government.

¹¹⁹ Australian Labor Party (2019), para 102. This was a committee established by the ALP government in 1989 to advise the government on issues in corporations and financial services law and practice: Corporations and Markets Advisory Committee (undated). It was abolished in 2018 by the Coalition government: The Treasury, Australian Government (undated). See Ramsay (2019).

¹²⁰ Australian Labor Party (2019), para 102.

directors legal protection when considering the social and environmental impact of their decisions, and that companies would be required to report on their social and environmental performance using an independent third party standard.¹²¹

4.2 Business Community Response to Draft Legislation

Despite garnering support from the ALP and Greens, the model failed to win widespread support in the Australian business community. Strong support came from the Responsible Investment Association of Australasia and Impact Investing Australia.¹²² In addition, some companies that had already gained B Corp certification also expressed support for the law reform.¹²³ Governance Institute, an association of governance and risk management professionals,¹²⁴ was more cautious, expressing ‘in principle’ support to the benefit company amendment on the basis that it would not interfere with other provisions of the Corporations Act or the ability of directors and officers to rely on the business judgment rule.¹²⁵ On the other hand, the view of the Australian Institute of Company Directors was that the objects of the benefit company amendment were able to be achieved under existing law and that changes were therefore unnecessary.¹²⁶

4.3 Academic Community Response to Draft Legislation

The academic community also expressed different views on the merits of the proposal. Some academics, when discussing the possible introduction of the benefit company model into Australian law, expressed the view that law reform was unnecessary, or at least not essential, as existing Australian corporate law allowed companies to adopt purposes other than profit. For instance, Baumfield noted there was no case law explicitly requiring directors to maximise shareholder wealth to the exclusion of other corporate objectives,¹²⁷ and that two government reviews had found that directors could legitimately consider social factors in their decision-making without the need for express statutory or shareholder authorisation.¹²⁸ Klettner, while supportive of law reform, accepted that existing legal structures

¹²¹ Australian Greens (2016), p. 2.

¹²² B Lab ANZ (2017b), Testimonials.

¹²³ Rankin (2019), p. 414, and B Lab ANZ (2017b), Testimonials from US benefit corporations.

¹²⁴ Governance Institute (2022).

¹²⁵ Burrell (2017), p. 187.

¹²⁶ Hooper (2017), p. 12.

¹²⁷ Baumfield (2018), p. 208.

¹²⁸ Baumfield (2018), p. 210.

were well suited to achieving the aims of social enterprises.¹²⁹ Klettner was of the view that Australia was still at the stage where it was best to wait and see how the social enterprise sector developed before deciding whether new legal structures were necessary. Langford also considered that existing Australian law allows companies to adopt purposes in addition to or other than shareholder profit in their constitutions,¹³⁰ and argued that directors would not be exposed to liability for breach of duty if they did not achieve those purposes.¹³¹ However, Langford added that, given the uncertainty around the issue, it could be worthwhile to introduce a provision similar to Sec. 172(2) of the Companies Act 2006 (UK) to signal the permissibility of incorporation for purposes other than profit.¹³² Morrissy, a member of the B Lab ANZ working group that drafted the proposed amendments to the Corporations Act, and a practising lawyer rather than an academic, described the objective of maximising shareholder profit to be a ‘practical’ duty of directors that was ‘arguably more perception than legal obligation in Australia’.¹³³

One Australian academic argued that the introduction of the proposed reforms could be regressive by giving non-benefit companies licence to operate poorly. Baumfield argued that such reform could inadvertently ‘ghettoise’ expectations for sustainable corporate behaviour, by reducing pressure on ‘traditional’ corporations to operate in a socially beneficial manner.¹³⁴ However, Morgan countered that while the legitimacy endowed via a specific model could be ‘double-edged’ in this respect, in that it could entrench social enterprise in the fringe or alternative economy, such a possibility was inevitable for all ‘oppositional’ social movements that gain partial acceptance.¹³⁵ Morgan argued that, furthermore, the introduction of a new legal model would likely have the important benefit of encouraging the creation of a professional community to support the new model, comprising, for example, lawyers, accountants, business planners, and tax agents.¹³⁶

Some contributors to the academic literature proposed that the main advantage of the benefit company model related to signalling, branding and marketing. Morgan, for example, described the existence of the model as providing companies with a particularly efficient signalling mechanism when compared to governance design. She cited qualitative survey data that companies relying on customised legal models to signal commitments beyond profit were frustrated with the time it took to explain these customised models to stakeholders, especially potential financiers.¹³⁷ Indeed, Morgan viewed the benefits of a specific legal model as going beyond ‘mere’

¹²⁹ Klettner (2019), p. 347.

¹³⁰ Langford (2020a), pp. 973–974. See also Langford (2020b).

¹³¹ Langford (2020a), p. 974.

¹³² Langford (2020a) p. 975.

¹³³ Morrissy (2016), p. 25.

¹³⁴ Baumfield (2018), pp. 188–189, 212.

¹³⁵ Morgan (2018), p. 190.

¹³⁶ Morgan (2018), pp. 190–191.

¹³⁷ Morgan (2018), p. 190.

branding and marketing, arguing a distinctive legal model served to ‘legitimise’ a socially oriented new economy.¹³⁸ Even Baumfield, otherwise sceptical of the proposed reform, accepted that the introduction of the benefit company model could be useful from a branding perspective and potentially facilitate better reporting about social impact.¹³⁹ However, Klettner did not see a pressing need to introduce the model for its signalling benefits despite being supportive of law reform, viewing existing certification schemes (such as B Corp certification) as helpful enablers.¹⁴⁰ Langford expressed support for this view.¹⁴¹ Morrissy, on the other hand, disagreed, arguing that the uptake in B Corp certification in Australia did not overcome the legal and practical difficulties for companies that wanted to pursue both profit and social good.¹⁴² Klettner suggested an alternative: that certification schemes be encouraged by Australian authorities, and given some legal backing to provide remedies for failure to adhere to certification requirements, for example through consumer or competition law.¹⁴³

The other advantage of introducing a new model identified in the literature was that it could reassure risk-averse company officers who wished to consider non-shareholder stakeholders in their decision-making. While Baumfield considered any advantages of the model would not outweigh the risk of the reform reducing pressure on traditional companies to operate sustainably,¹⁴⁴ she accepted that the new model would serve to appease risk-averse directors concerned about the risk of litigation from pursuing socially responsible strategies.¹⁴⁵ In Baumfield’s view, however, this risk was low to non-existent. Klettner, too, was of the view that directors faced ‘no real fear’ of being sued if they considered social and environmental factors in their decision-making.¹⁴⁶ On the other hand, Morrissy viewed this advantage as critical to the rationale for the law reform, saying that directors were uncomfortable to stray too far from the profit-maximisation norm, and that removal of the risk of liability for considering non-shareholder interests, as well as the obligation to consider public benefit, was a ‘fundamental part’ of why the reform had potential to effect change in corporate behaviour.¹⁴⁷

¹³⁸ Morgan (2018), p. 190.

¹³⁹ Baumfield (2018), p. 212.

¹⁴⁰ Klettner (2019), pp. 347–348.

¹⁴¹ Langford (2020b), p. 1004.

¹⁴² Morrissy (2016), p. 26.

¹⁴³ Klettner (2019), p. 348.

¹⁴⁴ Baumfield (2018), p. 212.

¹⁴⁵ Baumfield (2018), p. 212.

¹⁴⁶ Klettner (2019), p. 348.

¹⁴⁷ Morrissy (2016), p. 26.

4.4 B Lab ANZ's Abandonment of the Draft Legislation and Introduction of the 'B Corp Legal Requirement'

In September 2020, B Lab ANZ announced that it had decided to abandon its goal of legislative change. In a blog post on its website, B Lab ANZ explained that in 2019 it conducted over 100 consultations with members of Parliament, lawyers, business leaders, academics, governance experts and public servants to gain support for benefit company legislation.¹⁴⁸ B Lab ANZ stated that from these consultations, it learned two common reasons the reform was believed to be unnecessary. First, it was thought that existing law was sufficiently flexible to allow companies to adopt elements of the benefit company model. Second, directors already believed they were expected to consider non-shareholder stakeholders in their decision-making.¹⁴⁹ Furthermore, B Lab ANZ noted concerns that the reform could give traditional companies licence to operate poorly.¹⁵⁰

B Lab ANZ stated that all these opinions were very different from those expressed when it first began pursuing law reform in 2013.¹⁵¹ B Lab ANZ noted that at the time it was felt that although it was legal for a company to adopt the elements of the benefit company model, doing so would increase directors' risk of liability.¹⁵² B Lab ANZ stated that since that time there had been a shift in expectations of corporate practice and culture.¹⁵³ Particularly, it noted that there had been an increased regulatory focus on non-financial risk; increased use of sustainability reporting frameworks; pressure from investors and the community in relation to non-financial risk; and increased risk of litigation against companies that failed to address non-financial risk, particularly the impact of climate change.¹⁵⁴

B Lab ANZ credited at least some of this evolution to the rise in B Corp certification both internationally and in Australia.¹⁵⁵ This is likely justified: during the time that B Lab ANZ lobbied for the enactment of benefit company legislation, the number of B Corps in Australia increased exponentially, from 12 in 2013¹⁵⁶ to 257 in January 2021.¹⁵⁷ It is possible that this significant increase in the number of Australian B Corps reduced the perceived need for B Lab ANZ's proposed benefit company legislation in that some participants in the debate about the proposed

¹⁴⁸ Khisty (2020).

¹⁴⁹ Khisty (2020).

¹⁵⁰ Khisty (2020).

¹⁵¹ Khisty (2020).

¹⁵² Khisty (2020).

¹⁵³ Khisty (2020).

¹⁵⁴ Khisty (2020).

¹⁵⁵ Khisty (2020).

¹⁵⁶ Waters (2018).

¹⁵⁷ B Lab ANZ (2021c). By January 2022, there were 371 B Corps in Australia. See B Lab ANZ (2021d) for the current B Corp directory. The rise in B Corp certification in Australia is discussed in more detail in section 5 of this chapter.

legislation may have thought that the increase in the numbers of B Corps possibly showed that many of the objectives of the proposed legislation could be achieved by undertaking the B Corp certification process. As a related point, the perceived need for the proposed legislation has not dampened the uptake in B Corp certification; that is, the perceived uncertainty surrounding B Corp directors' duties has not lessened the attractiveness of B Corp certification.

Interestingly, in 2016, one Australian social enterprise company (which does not have B Corp certification) proposed a new legal model to facilitate social enterprise: a 'social benefit company structure'.¹⁵⁸ Essentially, the company aimed to circumvent the perceived uncertainty around directors' duties by incorporating three clauses into its constitution: a public benefit purpose, a mandate for directors to consider the interests of a broad range of stakeholders when making decisions, and a requirement that any amendment to the first two clauses be agreed to by 100% of shareholders.¹⁵⁹ The company stated that it did not believe legislative change as proposed by B Lab ANZ was necessary, although the company did state that it thought it would be helpful, and it encouraged other social enterprises to consider adopting the model it proposed.¹⁶⁰ It is unclear whether any other companies followed suit. However, the company's proposal is noteworthy as it shows how one company believed it was able to more or less achieve the objectives of the draft legislation by constitutional amendment only, and because it foreshadowed the approach B Lab ANZ ultimately took in 2020.

B Lab ANZ introduced its new approach, called the 'B Corp legal requirement', in September 2020, positioning it as a replacement for the abandoned goal of legislative reform.¹⁶¹ The 'B Corp legal requirement' requires B Corps to amend their constitutions to include two clauses. The first stipulates that the company's purpose is to 'deliver returns to shareholders whilst having an overall positive impact on society and the environment'.¹⁶² The second clause essentially implements the provision in the draft legislation that required directors and other officers to have regard to non-shareholder stakeholder interests when discharging their duties, stipulating that:

In discharging their duties under this constitution, the Corporations Act and the general law, the directors or other officers of the Company:

- (a) will include in their consideration the following factors:
 - (i) the likely consequences of any decision or act of the company in the long term; and
 - (ii) the interests of the company's employees; and
 - (iii) the need to foster the company's business relationships with suppliers, customers and others; and

¹⁵⁸Paramanathan (2016).

¹⁵⁹Paramanathan (2016).

¹⁶⁰Paramanathan (2016).

¹⁶¹Khisty (2020).

¹⁶²Available under 'How to meet the legal requirement', 'The purpose statement' in B Lab ANZ (2021g).

- (iv) the impact of the company's operations on the community and the environment; and
 - (v) the desirability of the company maintaining a reputation for high standards of business conduct; and
 - (vi) the interests of the members of the company; and
 - (vii) the ability of the company to create an overall positive impact on society and the environment; and
- (b) Need not give priority to a particular matter referred to in paragraph (a) over any other factor (included in paragraph (a) or otherwise).¹⁶³

B Corps are not permitted to remove language from the two clauses, but are permitted to add additional language or clauses to suit their needs or mission.¹⁶⁴ This means that a B Corp can have an additional clause in its constitution that, in effect, contains a 'specific public benefit' as defined in B Lab ANZ's draft benefit company legislation.

Previously, B Lab ANZ did not require B Corps to amend their constitution as part of the certification process, as it was thought that law reform was required to clarify the duties of directors of Australian B Corps.¹⁶⁵ Instead, companies seeking certification were only required to sign a contract with B Lab ANZ providing that the company would, 'to the extent permissible under Australian law, consider the impact of its decisions not only on shareholders, but also on its employees, customers, suppliers, the community, and the environment'.¹⁶⁶

B Corps that submitted their 'B Impact Assessment'¹⁶⁷ before 1 September 2020 had until their next recertification or March 2022, whichever was the later, to amend their constitutions to satisfy the new B Corp legal requirement, while aspiring B Corps may need to do so prior to finalising certification or they may have up to 12 months from certification to make the amendment.¹⁶⁸

If the requirements of the draft benefit company legislation and B Corp certification are compared, it is evident there are clear similarities—most notably with respect to the B Corp certification process requiring that the company's constitution be amended to stipulate that the company's purpose is to 'deliver returns to shareholders whilst having an overall positive impact on society and the environment' and

¹⁶³ Available under 'How to meet the legal requirement', 'The stakeholder clause' in B Lab ANZ (2021g). The wording of the stakeholder clause has been modified slightly since it was introduced in September 2020: B Lab ANZ (2020).

¹⁶⁴ See 'FAQs about the legal requirement' in B Lab ANZ (2021g).

¹⁶⁵ Klettner (2019), p. 339.

¹⁶⁶ Klettner (2019), p. 339.

¹⁶⁷ B Lab ANZ (2021e), and B Impact Assessment (B Lab) (2022).

¹⁶⁸ See 'Timelines for meeting the legal requirement' in B Lab ANZ (2021g) for current timelines. Companies with 0-49 workers must comply with the legal requirement before finalising certification and companies with at least 50 workers must amend their constitution within 12 months of certification. Most companies can secure additional points in the B Impact Assessment for completing the legal requirement.

that the company's directors and other officers have regard to non-shareholder stakeholder interests when discharging their duties.

However, there are some notable differences. First, the draft legislation requires a benefit company to publish an annual benefit report on its website that, among other things (1) describes the ways in which the benefit company pursued its general public benefit purpose (and any specific public benefit) and the extent to which the benefit was created, and (2) contains an assessment of the overall social and environmental performance of the benefit company measured against a third party benefit standard.¹⁶⁹ B Corps are not subject to the same level of public disclosure. B Corps must undertake the B Lab 'B Impact Assessment',¹⁷⁰ but what is disclosed on the B Corp directory website about each B Corp is much more limited than what is required by the draft legislation. For each B Corp, the B Corp directory discloses a brief profile of the company, an 'Overall B Impact Score' (which must be a score of at least 80 for the company to be certified), the individual 'Impact Area Scores' that make up the overall score (these are divided into the areas of governance, workers, community, environment and customer), and 'Previous Overall B Impact Scores' (for older B Corps that have re-certified).¹⁷¹ There is no narrative description of the type required by the draft legislation and in fact no annual reporting requirement of the type required by the draft legislation.

Second, as a means of accountability, the draft legislation contains the concept of 'benefit company proceedings' allowing a member or members of the benefit company with 5% of the votes, an officer of the benefit company, or ASIC, to bring proceedings for the failure of the company to (1) pursue or create a general public benefit purpose or any specific public benefit purpose in its constitution, or (2) publish an annual benefit report that complies with the requirements of the draft legislation. B Corps are not subject to 'benefit company proceedings'.

In these two respects, benefit companies subject to the benefit company legislation would, had the legislation been enacted, have greater transparency and accountability requirements applying to them than the requirements currently applying to B Corps.

5 B-Corps in Australia

Although the draft legislation is no longer being pursued, there are a growing number of B Corps in Australia. Indeed, in 2019 B Lab ANZ reported that Australia and New Zealand was the fastest-growing region per capita for B Corps

¹⁶⁹For examples of annual benefit reports published by US benefit corporations, see Benefit Corporation (2022a).

¹⁷⁰See note 167.

¹⁷¹The B Corp company profiles are available via the global B Corp directory maintained by B Lab. See below note 188 regarding searching for Australian B Corps.

in the world, at a time when B Corps existed in 64 countries.¹⁷² The first B Corp in Australia was certified in June 2012.¹⁷³ By 2013, 12 Australian companies had gained certification;¹⁷⁴ by 2014, this had grown to 32 Australian companies,¹⁷⁵ and B Lab ANZ reported that it was speaking with 20-30 interested companies a week.¹⁷⁶ By 2015, the number of certified Australian companies had increased to 65;¹⁷⁷ by 2016, to 123;¹⁷⁸ and by 2017 to 184,¹⁷⁹ with B Lab ANZ reporting in November 2017 that nearly 2000 companies had taken the B Impact Assessment, the main tool used to screen candidates for certification, since 2014.¹⁸⁰ By 2018, 230 Australian companies had gained certification,¹⁸¹ and it was reported that B Corps in Australia and New Zealand were collectively employing over 4000 people and turning over more than AUD 1bn in revenue.¹⁸² By June 2019, the number of Australian B Corps had increased to 247.¹⁸³ By January 2021, the number of Australian B Corps had grown to 257,¹⁸⁴ and as at January 2022 there were 371.¹⁸⁵ In addition, there are a number of global B Corps that are not headquartered in Australia but operate in it.¹⁸⁶ Most B Corps in Australia are privately-held small and medium-sized companies with up to 250 employees.¹⁸⁷

In January 2021, the B Lab ANZ website contained a directory of Australian B Corps.¹⁸⁸ The directory categorised B Corps in one of two categories: business products and services, and consumer products and services. B Lab ANZ listed 186 companies under business products and services and 121 under consumer products and services. B Lab ANZ divided each category further into sub-categories according to sector. Table 1 depicts the number of companies in each sector for business products and services and Table 2 depicts the number of

¹⁷² B Lab ANZ (2019), p. 2.

¹⁷³ Bice (2013).

¹⁷⁴ Waters (2018).

¹⁷⁵ B Lab ANZ (2019), p. 41.

¹⁷⁶ White (2014).

¹⁷⁷ B Lab ANZ (2019), p. 41.

¹⁷⁸ B Lab ANZ (2019), p. 41.

¹⁷⁹ B Lab ANZ (2019), p. 41.

¹⁸⁰ Hooper (2017).

¹⁸¹ B Lab ANZ (2019), p. 41.

¹⁸² Waters (2018).

¹⁸³ B Lab ANZ (2019), p. 41.

¹⁸⁴ B Lab ANZ (2021c).

¹⁸⁵ B Lab ANZ (2021d).

¹⁸⁶ Callaghan (2019).

¹⁸⁷ B Lab ANZ (2019), p. 10.

¹⁸⁸ B Lab ANZ (2021c). The B Lab ANZ website currently links to the global B Lab directory, which can be searched by clicking 'Explore more' then using the 'Filter by country' function: B Lab ANZ (2021d) and B Lab (2022b).

Table 1 B Corps - Business products and services^a

Sector	Number
Accounting services	2
Agriculture	4
Building	12
Catering & Meeting/Event Management	2
Education & Training Services	9
Energy & Environmental Services	11
Financial Services	27
HR Consulting & Recruiting	6
IT Software & Services/Web Design	20
Industrial Manufacturing	0
Legal	4
Machinery & Equipment	0
Management and Financial Consulting	15
Marketing & Communications Services	25
Media	4
Merchant Services	2
Nonprofit Consulting & Fundraising	5
Research & Design	11
Sustainability Consulting	13
Transportation & Logistics	1
Other	13

^aBased on data gathered on 20 January 2021 from B Lab ANZ (2021c)

companies in each sector for consumer products and services. Some B Corps are counted in both Tables 1 and 2 because they operate in both two main categories.

Tables 1 and 2 demonstrate that the sectors with the most B Corps are: Financial Services, Marketing & Communications Services, IT Software & Services/Web Design, and Food & Beverage (in descending order).

To gain B Corp certification, companies must complete B Lab's B Impact Assessment and score a minimum of 80 points out of a possible 200.¹⁸⁹ If a company is unable to score above 80 points and wishes to seek additional help, it is able to join 'Become a B Corp' online workshops or book a one-on-one consultation with B Lab ANZ.¹⁹⁰ B Lab ANZ has reported that most businesses make changes to become certified.¹⁹¹ As of 2020, a key component of the certification process is that the company meet the legal requirement in its constitution.¹⁹² Once the company has completed its assessment and scored at least 80 points, it must submit it along with a

¹⁸⁹ B Lab ANZ (2021e).

¹⁹⁰ See 'We're here to help' in B Lab ANZ (2021a).

¹⁹¹ See, eg, B Lab ANZ (2019), pp. 16–17, 24, 26–27, 33, 35–36.

¹⁹² B Lab ANZ (2021e).

Table 2 B Corps - Consumer products and services^a

Sector	Number
Accounting	2
Apparel, Footwear & Accessories	10
Books & Media	1
Building	11
Education & Training Services	11
Electronics	2
Financial Services	20
Fine Arts	1
Food & Beverage	19
Health & Human Services	12
Home & Personal Care	6
Housewares, Home Furnishings, & Accessories	6
Legal	3
Product Ratings	1
Restaurant, Hospitality & Travel	5
Retail	6
Sports Equipment, Toys & Accessories	1
Other	4

^aB Lab ANZ (2021c)

submission fee of AUD 250.¹⁹³ There is now typically an eight-month wait before the application is assigned an Evaluation Analyst by the B Lab global standards team.¹⁹⁴ The evaluation and verification process also generally takes several months.¹⁹⁵ This step requires that the company verify its answers, for example, by submitting documents.¹⁹⁶ Once the score of at least 80 is verified, the company is required to sign the B Corp Agreement, pay the certification fee, and publish its profile on the B Corp directory.¹⁹⁷ Certification fees are calculated on a sliding scale depending on the company's annual sales in AUD, starting at a fee of AUD 1000 for a company with annual sales of up to AUD 150,000, increasing to a fee of AUD 50,000 for a company with sales over AUD 1bn.¹⁹⁸ B Corps must recertify every three years.¹⁹⁹

In contrast to the mixed response to B Lab ANZ's proposal to introduce benefit company legislation, the reception of the B Corp certification program has been very positive.²⁰⁰ One corporate lawyer predicted that consumers, where they had a

¹⁹³ B Lab ANZ (2021e), and B Lab ANZ (2021b).

¹⁹⁴ B Lab ANZ (2021e, 2021f).

¹⁹⁵ B Lab ANZ (2021f).

¹⁹⁶ B Lab ANZ (2021f).

¹⁹⁷ B Lab ANZ (2021f).

¹⁹⁸ B Lab ANZ (2021e).

¹⁹⁹ B Lab ANZ (2021e).

²⁰⁰ Murray (2014), Heaney (2014), and Waters (2018).

choice, would choose certified B Corps over other companies, and so market forces would result in an increasing number of companies seeking B Corp (or equivalent) certification.²⁰¹ The director of one Australian B Corp predicted that B Corp certification would eventually become as recognisable as Fairtrade certification.²⁰² Several B Corps were also quoted in the media as saying that one of the key benefits of certification was that they were able to attract more engaged and talented employees.²⁰³ Another B Corp reported that certification allowed it to increase its visibility for the work it was doing to benefit indigenous communities.²⁰⁴ Observers noted the breadth of industries represented by companies seeking B Corp certification,²⁰⁵ including financial services, human resources consulting and recruitment, film and music production, consumer products and services, media and print publications, marketing and communication services, and IT software and services.²⁰⁶ There was also interest from property developers who believed that the B Corp movement could improve standards and be used in marketing to buyers and investors.²⁰⁷ There was even interest in certification from the legal industry, although it was noted that it would be important, given the professional obligations of lawyers, for law firms with B Corp certification to make it clear that there was a hierarchy of obligations to the court, clients and the pursuit of social and environmental good.²⁰⁸

The academic literature examining B Corps in Australia is limited. The literature includes three exploratory studies on the business models of B Corps conducted by Stubbs. Stubbs' first study, published in 2017, was a qualitative exploratory study of 14 Australian B Corps that investigated how B Corps integrate social and environmental goals into the core of their business activities and goals.²⁰⁹ Stubbs conducted in-depth interviews in early 2014 with the founder or director of each participating B Corp. Stubbs' research revealed several tentative findings. First, the research suggested that B Corps view profit not as an end in itself, but as a means to achieve social purpose ends, described as 'profit with purpose'.²¹⁰ Second, participants' main motivation for seeking certification was alignment of values, with the B Corp certification providing a 'common collective identity' for participants that validated and explained their business approach to stakeholders.²¹¹ Third, half of the participants had not made significant changes to their business practices since adopting the B Corp model, as their practices were already aligned, but all

²⁰¹ Finnane (2018).

²⁰² White (2014).

²⁰³ Callaghan (2019), White (2014), and Hughes (2014). See also Stubbs (2017b), p. 340.

²⁰⁴ Waters (2018).

²⁰⁵ Hooper (2017), and Stubbs (2017b), p. 334.

²⁰⁶ Stubbs (2017b), p. 334.

²⁰⁷ Hughes (2014).

²⁰⁸ Heindl (2015), p. 13.

²⁰⁹ Stubbs (2017b), pp. 332, 336.

²¹⁰ Stubbs (2017b), p. 337.

²¹¹ Stubbs (2017b), pp. 338–339.

participants noted that certification had prompted them to review their policies and practices.²¹² Fourth, while all participants agreed that profits were a key measure of success of the business, none stated their aim was to maximise profit.²¹³ Some focused on breaking even, others on making small profits rather than great or super profits.²¹⁴ Participants viewed profits as allowing them to invest in the business, so the business could grow and increase its positive impact.²¹⁵ However, one B Corp that was experiencing financial trouble in an intensely price-competitive market felt it was ‘compromising the B Corp values’.²¹⁶ Finally, Stubbs found that while B Lab ANZ and B Corps had engaged in lobbying to introduce benefit company legislation, the main focus of the B Corps surveyed had been on grass roots campaigning to educate and recruit other companies to the B Corp movement.²¹⁷

Stubbs’ second paper investigated the B Corp model as a new form of sustainable business model, based on interviews with the same 14 Australian B Corps in early 2014.²¹⁸ This study revealed broadly similar findings to the first, albeit evaluated against a ‘sustainability business model’ analytical framework derived from the literature. Stubbs’ third paper investigated how a single Australian B Corp reconciled economic and social imperatives in its structure, strategy and business practices.²¹⁹ It found that the company had needed to implement several strategies to address tensions between its pursuit of profit and social impact.²²⁰

6 Conclusion

B Lab ANZ advocated for legislative reform to introduce a benefit company model in Australia until 2020. The draft legislation proposed by B Lab ANZ comprised a voluntary status of benefit company that new or existing companies could opt in to, which obliged them to amend their constitutions to introduce a public benefit purpose, and mandated that their directors and other officers consider the interests of a broad range of stakeholders when discharging their duties. Benefit companies were to be subject to an additional reporting requirement, the annual benefit report, in which they reported on their success or failure in pursuing and creating public

²¹²Stubbs (2017b), p. 339.

²¹³Stubbs (2017b), p. 341.

²¹⁴Stubbs (2017b), p. 341.

²¹⁵Stubbs (2017b), p. 341.

²¹⁶Stubbs (2017b), p. 341.

²¹⁷Stubbs (2017b), p. 342.

²¹⁸Stubbs (2017a).

²¹⁹Stubbs (2019).

²²⁰Stubbs (2019), p. 1070.

benefit. A new type of legal proceeding was proposed, the benefit enforcement proceeding, to ensure that benefit companies complied with these new obligations.

The proposal failed to gain the support of the government, and attracted a mixed response from Australian businesses and academics. The most common reason put forward by those who did not support the B Lab ANZ proposed law reform was that they believed existing Australian law already allowed companies to pursue public benefit purposes alongside profit. They saw the main advantage of the law reform as the signalling value to companies that opted for benefit company status, but some did not view this benefit as creating any urgency for law reform, in part because of the existence of certification programs such as the B Corp certification. B Lab ANZ decided ultimately to abandon the law reform project in favour of introducing a requirement that B Corps amend their constitutions to mandate that the company's purpose is to 'deliver returns to shareholders whilst having an overall positive impact on society and the environment' and that the company's directors and other officers consider a broad range of stakeholder interests when discharging their duties.

While the law reform project did not succeed in the way it was hoped it would, B Lab ANZ's B Corp certification program has enjoyed significant success in Australia. Australia and New Zealand are together the fastest growing region per capita worldwide for B Corp certification, and companies from a broad range of industries are represented in B Lab ANZ's Australian B Corp directory. However, while B Lab ANZ's B Corp legal requirement achieves, in some important respects, some of what is contained in the draft legislation, had it been enacted the draft legislation would have ensured greater transparency and accountability for those companies electing to become benefit companies than is currently the case for B Corps.

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Social Enterprises and Benefit Corporations in Brazil: Projects for Corporate Qualification and Capital Market Regulation



Calixto Salomão Filho and Rachel Avellar Sotomaioir Karam

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1 Introduction

The Davos 2020 Manifesto on the expanded purpose of a company in the Fourth Industrial Revolution,¹ the Business Roundtable² announcement that a company should serve everyone, the “Capitalism. Time for a Reset” Financial Times³ agenda, the cover of The Economist with the headline “What are companies for? Big business, shareholder and society,”⁴ among other publications, are symptomatic of a global movement for reassessing economic activity through the lens of multiple stakeholders and the active participation of businesses in the promotion of social and environmental solutions for the common good.

This article reviews this movement from the viewpoint of Brazilian jurisdiction, exploring the subjects of legal and economic concepts underpinning the impact of economic activities (Sect. 2); principles of economic activity in Brazil (Sect. 3); ways in which social enterprises have organized themselves under the existing legal formats available (Sect. 4); and alternatives being discussed in the regulatory arena (Sect. 5) by means of a draft bill for the establishment of the legal qualification of *Sociedades de Benefício* (Sect. 5.1) and proposals for self-regulation (Sect. 5.2), which could be implemented within the framework of the capital market. Lastly, a brief conclusion is presented (Sect. 6).

2 Legal-Economic Concepts

Historically, economic activity is carried out by organizations that put together individuals and resources converging toward a for-profit productive activity, such as industry, trade, or services.

However, the organization of individuals and capital for productive activities is subject to market failure identified by economists as “externalities.” Externalities are considered negative when they represent unintentional “losses” caused to other individuals or the collective, such as the use of natural resources, generation of waste, pollution, among other things, and are considered positive when the economic activity generates a common good to be enjoyed by all.

For some scholars, negative externality must be corrected by public policies that induce its producer to consider the harmful effects of the productive activity, in such a way as to carry it out by optimizing a balance between profit and the so-called marginal private costs, without exacerbating this impact on social costs.⁵

¹Full manifesto available online at: <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

²Full text available online at: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

³Full text available online at: <https://aboutus.ft.com/en-gb/new-agenda/>.

⁴Available online at: <https://www.economist.com/leaders/2019/08/22/what-companies-are-for>.

⁵Cooter and Ulen (2011), pp. 39–40.

Others, such as Ronald Coase, pondering between the benefits of economic activity and its unintended collective effects, defended in his article entitled “The Problem of Social Cost”⁶ an approach based on the “total effect” of each action, believing in the power of the market and of negotiation to mitigate such externalities.

This article presupposes that both market (or business) solutions and public policies are insufficient. It is imperative that companies undergo structural transformations. These initiatives take on myriad forms and intensities.⁷ We will address only a relatively light instrument of structural intervention. It entails looking at business law as a way to ensure that a company’s purpose also includes promoting a positive impact on the surrounding society while at the same time providing effectiveness to these stated purposes (the latter being the hardest task, obviously).

This does not mean merely internalizing negative externalities of a company’s activities but rather proactively searching along its production chain or business model for ways to promote solutions to social and environmental problems while measuring and reporting its capacity to generate positive externalities.

3 Principles of Economic Activity in Brazil

Brazil’s constitutional law, civil law, and corporate law contain principles and obligations that combine the exercise of economic activity with collective interests.

Article 170 of Brazil’s 1988 Federal Constitution sets forth the General Principles of Economic Activity, among which are the social function of property (item III), the protection of the environment (item VI), and the reduction of regional and social inequities (item VII).⁸

⁶Coase (1960), p. 44.

⁷For some theoretical possibilities of structural intervention in companies see Salomão Filho (2015).

⁸Constitution of the Federal Republic of Brazil 1988, article 170: “*The economic order, based on the valuation of human labor and on free initiative, aims at ensuring a dignified life for everyone, considering the dictates of Social Justice, complying with the following principles:*

- I - National sovereignty;*
- II - Private property;*
- III - Social role of ownership;*
- IV - Free competition;*
- V - Consumer protection;*
- VI - Protection of the environment, even through differentiated treatment depending on the environmental impact of the products and services and their fabrication and delivery processes;*
- VII - Reduction of regional and social inequalities;*
- VIII - Pursuit of full employment;*
- IX - Favored treatment for small companies incorporated under Brazilian Laws and that have their Headquarters and Administration in the country.”*

The Civil Code⁹ points to the contract's social function as the boundary for the parties' freedom.¹⁰

In addition, Law n. 6,404/1976, which governs corporations, sets forth that the shareholders' controlling power must be used *in order to make the corporation accomplish its purpose and perform its social role*" with the controller having *"duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed."*¹¹

Likewise, in addressing management's attributions, article 154 of Law n. 6,404/1976 states that these must be exercised *to achieve the corporation's purposes and to support its best interests, including those of the public at large and of the social role of the corporation.*¹²

The explanation of the legal grounds supporting the corporation bill expressly mentioned the social function and responsibilities of the controlling shareholder, stating that *the exercise of the controlling power can only be legitimate if it helps the company carry out its business purpose and accomplish its social function, while respecting and tending to the rights and the interests of all those connected to the company and those working for it, the minority shareholders, market investors, and members of the community in which it operates.*¹³

The Bankruptcy and Recovery Law,¹⁴ by substantiating the relevance of promoting an institutional, judicial, and extrajudicial effort for the recovery of the economic feasibility of a productive entity, indicated that the preservation of the company also entailed maintaining its social role and the stimulus to economic activity.¹⁵

⁹The Brazilian Civil Code is Law n.10,406 published on January 10th, 2002.

¹⁰Civil Code, Art. 421. "*Contractual freedom shall be exercised within the boundaries of the social role of the contract.*"

¹¹The Corporation's Act is Law n. 6,404 published on December 15, 1976, article 116, single paragraph: "*A controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.*"

¹²Corporation's Act, article 154: "*An officer shall use the powers conferred upon him by law and by the bylaws to achieve the corporation's corporate purposes and to support its best interests, including the requirements of the public at large and of the social role of the corporation.*"

¹³Corporation's Act Explanatory Memorandum No. 196 of June 24th, 1976, from the Ministry of Finance. Available at: <http://www.cvm.gov.br/export/sites/cvm/legislacao/leis-decretos/anexos/EM196-Lei6404.pdf>.

¹⁴Law n. 11,101 of February 9th, 2005.

¹⁵Law n. 11,101, "Article 47. *Judicial recovery aims at making it possible to overcome a situation of economic or financial crisis of the debtor, in order to allow maintaining the source of production, the employment of workers, and the interests of creditors, thus promoting the preservation of the company, its social role, and the stimulation of economic activity.*"

Therefore, there are express provisions in the Brazilian legal system binding the right of property, contractual freedom, controlling power, corporate management, and the preservation of the company to its social role.

Nevertheless, it is not entirely clear how these general principles are applied.

The social role, construed and applied according to the principle of preservation of the economic entity, does not fully encompass the promotion of the common good, insofar as it is restricted to mitigating damages that could otherwise be caused to workers, consumers, and the environment. In a new economy, directly engaged in effecting positive change, the focus must be directed toward creating tools to determine commitments, measuring results, and periodic reports. To that end, the principle of the social role of companies, as interpreted today by the jurisprudence, is insufficient.

4 Social Enterprises in Brazil

Brazil is a country marked by severe economic inequality and a high concentration of income. It is often ranked in studies and statistics among the ten countries with the largest economic gap in the world. The 2019 Gini index published by the World Bank¹⁶ computes a coefficient of 0.534 for Brazil, which in general terms indicates that less than half of the population holds all the country's wealth. This was before the pandemic crisis of 2020, so the number is expected to be higher, showing an even greater disparity among the citizens in the next Gini.

Putting the data in perspective, Brazil has 213.3 million inhabitants, according to a 2021 survey¹⁷ led by the Brazilian Institute of Geography and Statistics (IBGE), and an economy of around USD 1.9 trillion, as per the International Monetary Fund's World Economic Outlook Database¹⁸ of October 2021 (occupying the post of 12th largest economy in the world). Thus, economic inequality means poverty on a very large scale, with all its inherent challenges, most of which governments and philanthropy initiatives fall short to address.

These large-scale social needs permeate society as a whole and affect the way micro and small companies are organized. The lack of quality education, like basic mathematics and grammar; difficult access to specialized services of accountants and lawyers; and restricted availability of credit drive many businesses to exist informally, with no document or official registration at all.

Companies that do incorporate formally are organized as entities under the Civil Code or the Corporations Act, respectively. The map of enterprises in Brazil

¹⁶World Bank Gini index available at: <https://data.worldbank.org/indicator/SI.POV.GINI>.

¹⁷Brazilian Institute of Geography and Statistics population data available at: https://www.ibge.gov.br/apps/populacao/projecao/index.html?utm_source=portal&utm_medium=popclock.

¹⁸International Monetary Fund's 2021 World Economic Outlook Database available at: <https://www.imf.org/en/Publications/WEO/weo-database/2021/October>.

published by the Ministry of Economy shows a total of nearly 19 million active companies in the country,¹⁹ the vast majority of which are organized as limited liability companies or single-person entities, with the Civil Code as its main applicable law. They are often formed by people (mostly family owned) with highly concentrated controlling powers.

There is no specific corporate format to identify “social enterprises” in Brazilian corporate law. The enterprises that wish to expressly insert positive impact in their social object, connecting it with the fiduciary duties of the administrator and/or using an impact measurement tool, must do so by inserting the provisions in its bylaws.²⁰ In the absence of legal parameters, some companies organize themselves using a hybrid format where the activity is carried out simultaneously by for-profit and not-for-profit entities.

The concept of a social enterprise itself is still the source of much debate. The term most widely used is “impact business,” to which the ecosystem agreed on a definition that has no legal repercussions as *enterprise that has the clear intention of addressing a socio-environmental problem through its main activity (either the product/service and/or the form of operation). It acts according to the logic of the market, with a business model that seeks financial returns, and is committed to measuring the impact generated.*²¹ This concept identifies four criteria of a business to be considered of a positive impact, regardless of the legal format adopted by the enterprise: (i) intentionality of solving a social and/or environmental problem; (ii) impact solution being the main activity of the business; (iii) search for financial return, operating according to market logic; and (iv) commitment to monitoring the impact generated.

As the impact investment and business field started to grow and attract attention from multiple interests, the federal government introduced a 10-year strategy through Decree n. 9,977/2019, which provides for the National Strategy for Impact Investments and Businesses (ENIMPACTO). In this legislative decree, impact businesses are identified as *enterprises with the objective of generating socio-environmental impact and positive financial results in a sustainable way.*²² It is a broad concept, applicable to multiple different legal types, of both for-profit and not-for-profit structures, as well as to companies with an impact business model in their core and those that create positive socio-environmental impact through their value chain.

¹⁹Ministry of Finance. Enterprises Map available at: <https://www.gov.br/governodigital/pt-br/mapa-de-empresas>.

²⁰This is not so regarding *Sociedade Anônimas* (corporations). Although there is no mechanism yet to include the social purposes in the object of the society articles 116 and 154 are sufficient to bind controlling shareholders and managers to the social purposes of companies and to the protection of all interests mentioned in these provisions (including workers and communities).

²¹“What are impact businesses” (2019) available at <https://aliancapeloimpacto.org.br/wp-content/uploads/2020/03/ice-estudo-negocios-de-impacto-2019-web.pdf>.

²²Decree n. 9,977 published on August 19th, 2019 available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9977.htm.

The existing definitions neither create nor qualify the nature of legal entities in the country. There are, however, bills and draft bills that seek to qualify legal entities that assume this impact commitment, as is the case with the qualification of *Sociedade de Benefício*, as further explored in this article.

4.1 Certified B Corps and the B Movement

Long before the discussion on the concept of impact business or even legislative proposals on the subject, certified B corporations reached Brazil. In 2012, the B Corp global movement created in the United States by B Lab arrived in South America under the name of Sistema B. *Sistema B was born simultaneously in Chile, Argentina and Colombia in 2012, and it quickly expanded into Uruguay and Brazil.*²³

Currently, there are more than 4000 certified B corporations globally,²⁴ 792 of which are in Latin America²⁵ and 231 of them in Brazil.²⁶

Sistema B brought to Brazil the B movement's goal to redefine the concept of success in the economy by certifying companies that have their actions and impact measured by the tool of the B Impact Assessment,²⁷ so that not only financial success is considered but also the well-being of humanity and the planet.

Understanding the broad role of a business in society and giving new meaning to its products and services in favor of the development of the economy and society should be a path with no return. Contributing to this scenario, Sistema B leads several initiatives in Brazil that aim to build a favorable ecosystem for companies that use the strength of the market to provide solutions to social and environmental problems. Sistema B is an active member of the ENIMPACTO committee²⁸ and participates in public hearings on business regulation and self-regulation aiming at an increasingly higher standard of purpose, responsibility, and transparency.

For the certified B corporations, Sistema B also requires the adoption of two clauses in the bylaws, known as the "B Clauses." One is to insert in the social object clause that the activity is developed in connection with (i) *the short- and long-term interests of the company and its partners; and; (ii) the short and long-term economic, social, environmental and legal effects of the company's operations in*

²³Marquis (2020), p. 171.

²⁴Information on the global movement and the number of companies involved available at <https://www.bcorporation.net/en-us>.

²⁵B Corp Directory in Latin America and Caribbean available at <https://www.sistemab.org/en/b-corp/>.

²⁶Complete list of certified B Corps in Brazil available at <https://www.sistemabrasil.org/empresas-b/#buscador>.

²⁷Available at <https://bimpactassessment.net/>.

²⁸All ENIMPACTO committee activities available at <https://www.gov.br/produktividade-e-comercio-externo/pt-br/assuntos/inovacao/enimpacto>.

*relation to the employees, suppliers, consumers and other creditors of the company, as well as in relation to the community in which it operates locally and globally.*²⁹

Especially considering challenges in the Brazilian economic and social contexts, Sistema B can be credited with bringing forth a clear path for a new way of doing business that could otherwise have taken longer to be identified, if at all.

5 Regulation and Self-Regulation to Promote Positive Impact

Even though it is clear that the economic principles are an integral part of Brazilian law, in light of the lack of real effectiveness of the aforementioned mechanisms, a regulatory path for the incentive of impact businesses and purpose entities should be developed for structural measures that would effectively and lastingly ensure that goals for the common good can be met.

By revamping its structure, a corporation can provide the means to rescue and promote its broadest function.³⁰ That way, a safe legal landscape can ensure that funds are raised from investors interested in socio-environmentally responsible practices and that its officers, safeguarded by a specific legal framework, feel secure to take the steps they see fit to reach goals that are broader than short-term financial returns.

5.1 Legislative Bill to Create the Qualification of Benefit Corporations

Sistema B Brazil has been fostered since 2014 through a community of practice formed by volunteer lawyers known as B Legal Group, as well as studies and discussions on legal matters that are relevant to the economic-corporate arrangements of the new economy.³¹

As a result, the B Legal Group prepared a proposal for a preliminary bill that created a legal qualification such as the “Benefit Corporations” (*Sociedades de Benefício* in Portuguese), which, in technical terms, does not mean a new type of company but signifies a legal accreditation of existing types. To bear this qualification, the entity would not need to change its bylaws to add the qualifying elements, namely, (1) inserting positive social and environmental impact into its business purpose; (2) adopting governance instruments in the form of a chief impact director position, an impact committee, and coparticipation in the board of directors, in

²⁹B Clauses available at <https://www.sistemab.org/modificaciones-legales-brasil/>.

³⁰Comparato (1995), p. 4.

³¹Information about the B Legal Group available at <https://www.sistemabrazil.org/economia/>.

accordance with the size and the structure of each organization; and (3) periodically measuring and disclosing the impact report and management accounts.

The usefulness of setting up a legal framework for activities that combine profit with the purpose of positive socio-environmental impact has been extensively analyzed by a task-force workgroup of the G8³² dedicated to impactful investments, which resulted in a document titled *Profit with Purpose Businesses: Subject Paper of the Mission Alignment Working Group*,³³ totaling 20 recommendations on formalizing regulations on the matter.

There is consensus that laws and regulations must be used as facilitators, eliminating identified statutory constraints and fostering an environment of minimum common grounds in favor of developing and securing organizations dedicated to activities that reconcile profit with social environmental solutions.

The *Sociedades de Benefício* draft was incorporated in the legislative proposal n. 3284 presented in the Senate in September 2021, including general provisions, qualifying elements, management entities, and an impact report.³⁴

The positive social and environmental impact under the proposal is seen as having short-, medium-, and long-term repercussions, whether direct or indirect, upon the communities and the supra-individual interests surrounding the corporation, stemming from the benefit corporation's activities, with the requirement that management should take account of the impact in their decision-making.

The social and environmental impact extends further to the controlling shareholders and must be prioritized having the best interest of the corporation in mind in the event of any conflict with the interests of its partners, shareholders, and technical and consulting bodies.

The adoption of the legal qualification by the organization would also have a direct impact on the structure of its corporate governance. Three new elements are listed and become part of the administrative structure of the company, acting as instruments to ensure the effectiveness of the aggregate impact of the organization's activities: chief impact director, stakeholder committee, and a member of the board of directors appointed by the stakeholder committee.

The stakeholder committee or the impact committee can be a valuable governance instrument, through which partners and the management can objectively voice concerns when facing the repercussions of business activities on those collectivity affected, whether directly or indirectly.

Albeit optional, the committee can be created through a provision in the corporation's bylaws or even through a separate resolution. The governance committees enjoy great freedom of organization and management, allowing each company to

³²Made up of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the European Union, and Russia—at that time under the management of the United Kingdom.

³³Social Impact Investment Taskforce. Mission Alignment Working Group. Profit-with-Purpose Businesses (2014). <https://gsgii.org/reports/profit-with-purpose-businesses/>.

³⁴Legislation bill and procedure available at <https://www25.senado.leg.br/web/atividade/materias/-/materia/149934>.

create them and make them up and use them in the best way possible within its management structure.

The coparticipation has its origin in the 1950s in Germany since the ineffectiveness of the so-called *Gemeinwohlklausel* (clause of common good) was realized, as determined in the German legislation of 1937, which compelled company management (*Vorstand*) to take decisions considering the common good of the people and the *Reich*, under penalty of being obliged to adhere to the conduct, removal of officers, or even civil liability³⁵—without ever defining the concept of “common good” and allowing it to be explored by governments and business people aligned with evil legal regimes such as the Nazis.

The postwar period of the 1950s gave rise to an environment suitable for nurturing the coparticipation model, which was devised to serve as a tool for resolving conflicts between the interests of shareholders and those of employees based on the assumption that both converged toward maintaining an enduring and profitable company.

In Germany, coparticipation takes place through a direct representation of workers on the board of directors, the percentage of seats being proportionate to the number of employees. An employee-appointed director has the same attributions as the other directors and may even be a trade-union representative:

Under German institutionalism, the definition of the social interest as different from that of the interests of the partners and the presupposition of their persecution by the corporate entities, does not eliminate the conflict of interests from the corporate dialectic. On the contrary, it reinforces them because it introduces, within the corporate entities, representations of effectively opposing interests.³⁶

The German model is especially interesting because it shows the possibility of introducing an effective model of participation and even coparticipation by other stakeholders in the high administration of the companies. It could and should serve as a model for initiatives aiming at transforming companies into companies with a purpose other than profit (companies with social and environmental positive impact).

With the benefit corporation proposal the intention is to create an instrument of effectiveness in promoting positive impact, participation means welcoming as a member of the management board, a representative or representatives of the interests of the *stakeholders*, or experts in the areas where the business activity has a potential impact. It is a governance policy that adds to the decision-making conclave the voice and vote of the main or residual recipients of products and consequences of the exercise of business activities. It still falls short of the scope and extent of, for example, the German coparticipation model, but it is a step in the right direction.

In the proposal for the qualification of *Sociedades de Benefício*, the impact report is integrated into the management report and will be subject to prior assessment by the internal bodies and to resolutions passed in the meetings of shareholders or members, in which management accounts will be scrutinized.

³⁵Frazão (2011), pp. 131–133.

³⁶Salomão Filho (2011), p. 37.

There is a concern that the governance instruments do not excessively encumber the activity and therefore gradually apply in accordance with the size of the company, the nature of its activities, and the complexity of the products and services it offers.

The governance measures aim at creating self-fulfilling and eligibility instruments for decision-making in the search for positive socioenvironmental impact. Similarly, they allow for more effective measuring and rendering of accounts at frequent intervals with respect to the impact, using third-party developed metrics.

In comparison with other studies and legislative projects on the matter currently existing in over 15 countries, the proposal for benefit corporations is the only one that adds a governance structure to the eligibility elements of the impactful businesses to ensure that the search for socioenvironmental impact is an effective and long-lasting practice, with adequate tools and tools compatible with the organization's economic capacity.

The proposed qualification is an element that is added to the types of entities that can rely on it. The legislative bill proposes that, when adopting the qualification, the company may add to its corporate name the identification "de Benefício," thus becoming a "Limited Liability Company de Benefício," "Corporation de Benefício", and so on, depending on the case.

The proposed law is concise in addressing the essential elements of impact businesses, is consistent with the existing legal system, and, given its corporate nature, preserves the entrepreneur's innovative initiatives. At the same time, it reveals itself as a framework and an important mechanism for setting the minimum elements for the benefit of the common good.

Finally, it should be noted that although the proposal raises the bar (in terms of governance, information, control of impactful practices, etc.), it does not affect the existing obligations of companies on the whole (whether nonaccredited corporations or benefit corporations). Thus, for instance, all other corporations and their controllers are required to carry on with their duties to the collective and the workers, as per article 116 of the Corporations Act (for corporations) and article 1,053 and its sole paragraph of the Civil Code (for limited liability companies). Indeed, the enactment is expected to serve as a model for improvement in governance and better regulations for the protection of stakeholders across all types of legal entities (just as how the New Market regulations of Bovespa in the past inspired changes to the Corporations Act).

5.2 *Self-Regulation Projects*

To say that an enactment favoring the organization of *Sociedade de Benefício* would be a step in the right direction does not mean closing one's eyes to the usefulness and efficacy potentially stemming from the adoption of self-regulatory measures.

The advantages of such a model could be especially enjoyed through private regulatory instruments geared toward promoting purpose practices among small

businesses. This is because issuing regulations tending to the specificities of small- or large-sized businesses, in light of the Brazilian legislative reality, can be difficult.

Given the importance of structuring financing mechanisms for activities that seek to meet socio-environmental purposes and considering the difficulties faced by small businesses to obtain resources, it would be particularly interesting to improve entry-market regulations to value the impact measures and, at the same time, lure investors naturally interested in a more conscientious entrepreneurial activity.³⁷

Self-regulation could contribute especially to the channeling of investment opportunities by way of capital markets, spearheading financial autonomy, and safeguarding the interests that a purpose entity seeks to protect.

There are two kinds of improvement that could be introduced through self-regulation: firstly, the creation of an Impact New Market,³⁸ where companies listed would be only those that could show within their governance relevant changes that would advance their social and environmental objectives (including, among other changes, the participation of members of the community and representatives of environmental nongovernmental organizations (NGOs) in the directing bodies of companies). The advantage of such an alternative is to give a positive screening to companies that incorporate social and environmental objectives in their internal corporate governance.³⁹

A second alternative that is being pursued would be to create within the existing self-regulatory environment—at B3, the *Bovespa Mais*⁴⁰—a listing segment for small purpose companies.

The *Bovespa Mais* appears to have been created to pave the way for companies of all sizes to seek out funding through a private placement.

This is an instrument devised to make up for the fact that in Brazil, due to the association between policies that strengthen conglomerates and those that provide a stimulus to capital markets, listed companies tend to have grown to a certain size and have turned to the market to raise funds.

³⁷We are referring here to investors interested in the so-called socially responsible investments, who find it difficult to pinpoint the potential recipients of the amounts, particularly due to the absence of a standardized system for disclosing information and understanding the concept of good socio-environmental practices. On this issue, see, for example, Benjamin (2008), p. 303.

³⁸The proposal of creating a listing segment with an impact focus was formally presented to BMFBovespa in September 2016 within the initiative of Review of Listing Segments Regulations. Available at https://www.b3.com.br/pt_br/regulacao/regulacao-de-emissores/atuacao-normativa/revisao-dos-regulamentos-dos-segmentos-especiais-de-listagem.htm. See also the text presented by por C. Salomão, S. Cerezetti e C. Brandão available at https://www.b3.com.br/data/files/D6/C2/74/3A/4C76751035EA4575790D8AA8/2016.08.29%20-%20Calixto_%20Cerezetti%20e%20Brandao.pdf.

³⁹See, for the theoretical justification for such an alternative, the discussions in Salomão Filho (2019).

⁴⁰Institutional information of the Bovespa Mais listing segment (2021). Available at: http://www.b3.com.br/pt_br/produtos-e-servicos/solucoes-para-emissores/segmentos-de-listagem/bovespa-mais/.

Small- and medium-sized companies, in turn, have been historically met with numerous challenges when seeking funds through direct placement. Generally, they have had to resort to bank loans at usually unfavorable rates of interest. The effects of this reality are even more deleterious when one takes into account the fact that close corporations are saddled with higher interest rates than listed corporations.⁴¹

It should be acknowledged that, even among publicly held corporations, true access to funding sources through the capital market is markedly restricted to the group of larger companies.⁴²

This scenario calls for urgent steps to be taken to enable companies to join the market and start to benefit, albeit in baby steps, from placing their securities in the primary market. An environment conducive to this can be called “entry market,” the importance of which has been stressed by researchers on the subject.⁴³

Entry markets, such as *Bovespa Mais*, not only have listing costs and market maintenance costs lower than those incurred by the companies that participate in the common market but also normally rely on a regulatory system that is simpler and sufficiently attractive to small-sized companies. These markets are marked by few admission requirements, less onerous continuous obligations, and the enforcement of but a few principles of corporate governance. Tax advantages are another possible feature luring investors.

A possibly interesting self-regulatory route for the purpose companies could entail creating a unique segment within the *Bovespa Mais*, specifically in tune with the business environment occupied by corporations that are formed with a purpose that goes beyond mere generation and distribution of profits. Some of the measures indicated for benefit corporations could be picked up, and other bolder features could be required, especially with regard to the disclosure of information and the participation of socially responsible investors as officers.

Nevertheless, if this solution is to become a reality, it means tackling issues that are still controversial when one defends stimulating an entry market in Brazil.

One such issue is the need to come up with an underwriting structure willing to take on smaller issuances of bonds. Thus, it's necessary to revert the financial deterrents connected with underwriting an initial public offering (IPO) for smaller

⁴¹ See data presented by Rocca (2001), p. 57.

⁴² Indeed, empirical research shows that 20% of the largest Listed Companies get 70% of the total amount of resources raised from outside sources (Rocca 2001, pp. 60–61).

⁴³ See Da Costa (1991), p. 19, de Medeiros (1991), p. 85 (which labels the Brazilian market as elitist, precisely in view of the difficulties faced by smaller companies in bearing the costs of listing and in obtaining liquidity for their papers), and Cantidiano (2007), p. 223. Even the CVM, in the Development Plan of the Securities Market, approved by Directive 86 of 1988, indicated, as one of the main objectives and goals, the “increase in the number of open companies, facilitating the access of small and medium enterprises to the securities market, through mechanisms appropriate to their size and structure.”

companies.⁴⁴ Conversely, it is true that the underwriter's job is to protect the issuer against important risks pertaining to the placement of securities and, precisely because of that, involves compensation that varies according to the characteristics of the company and the assessment of the risks involved in the transaction. One cannot, therefore, expect the same commissions to indirectly apply to renowned companies and companies with less or no status. On the other hand, if the costs necessarily incurred for the issuance of bonds end up rendering it impracticable, they represent an insurmountable barrier to entry and need to be challenged if one wishes to effectively clear the access routes to the market.⁴⁵ In fact, studies on tax incentives or regulatory structures more capable of protecting the interests of investors are of no use if the market effectively does not exist, a fact that depends on its true openness to the listing of issuers.

Lastly, it would also be important to reflect on funding mechanisms that do not restrict debt to corporate issuers. The adoption of the *sociedade limitada* (limited liability company) format, which represents most of the impactful businesses in Brazil, must not, in itself, impede access to resources that are potentially structured to meet the funding needs of companies aligned with socio-environmental values.

6 Conclusion

For the operation of the economic system to be improved, it is necessary to provide readily useful tools that promote entrepreneurial projects. For this initiative, the judiciary (through laws) and the stakeholders themselves must collaborate, pushing for and participating in the regulation and self-regulation of their activities, in line with sustainable development goals. For the inner workings of the economic system to be improved, useful tools to foster entrepreneurial initiative must be made available. For the initiative to succeed, the legislature (through enactments) and the interested parties must collaborate, exerting pressure for and promoting the regulation and or self-regulation of their activities in line with sustainable development.

The economic concepts and inherent legal principles under Brazilian law not only provide support for but are also aligned with a corporate legislative proposal offering an organizational structure that contemplates all stakeholders directly or indirectly affected by its activities.

The creation of benefit corporations could also benefit from self-regulatory complements, particularly developed with a view to attracting resources from

⁴⁴Data indicate that the costs of *underwriting* are usually 3 to 4% for companies with a better reputation, but can reach up to 10% in the case of less well-known companies interested in opening up capital (Rocca 2001, p. 78).

⁴⁵See Mendoza (2008), p. 281 (mentioning that the reluctance of *underwriters* in intermediating transactions of low value is an important obstacle for the entry to small issuers). In Brazil, the topic is extremely relevant for the proper development of the Brazilian Access Market.

socially responsible investors to companies listed in the stock exchange, both through the creation of new indexes and through a new access segment especially geared toward small-sized business entities that cater to the well-being of the myriad communities affected by their activities. These proposals, albeit presented, have not yet been incorporated into our self-regulatory environment.

They seem to be an important theoretical and practical path to be pursued in the near future around the globe through legal initiatives directed toward the creation of incentives and a friendly legal framework for enterprises with positive social and environmental impact.

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The Suitability of Belgian Law to B Corp



David Hiez

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1 Introduction

While Brussels is one of the capitals of the European Union, Belgian law is not well known abroad. However, it is not uninteresting, for a major reason: the direct origin of Belgian law in the French tradition is challenged by the increasing importance of its Flemish part of the country. The consequence is a remaining Napoleonic grammar with a different wording. That general assessment is far true about company law. Belgian company law deviated from French law in the nineteenth century and is now absolutely autonomous and original. Firstly, the traditional notion of the *commerçant* trader has been removed. The core of the commercial law of Belgium is now economic activity, to which a full code adopted in 2018 is dedicated, and any person that undertakes such an activity is considered an enterprise. That major reform was the first step of a wider program and a new code on companies and associations has been enacted in 2019. Nevertheless, these evolutions have not

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Fig. 1 Number of B-Corp per year

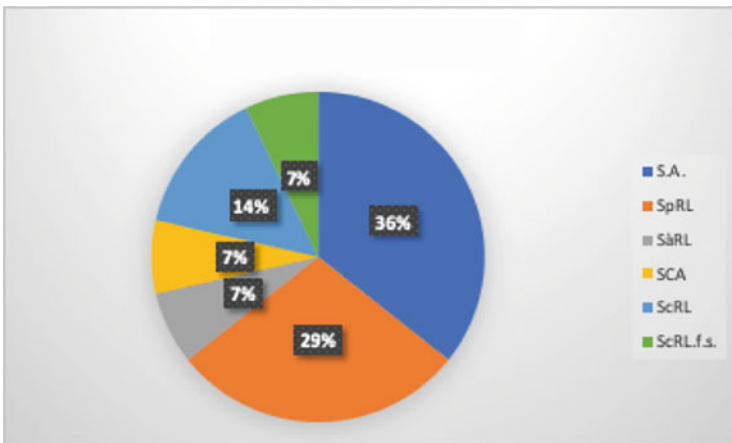


Fig. 2 B-Corp legal form

severely changed the legal background for B Corp. The B Corps developed in Belgium like in Europe (see Fig. 1).

It is difficult to have a perfect view of their legal forms since the legal context has changed; for example, the social purpose company disappeared in 2019 (see Fig. 2), but here are the available data.

Since B Corps created before 2019 have been labeled before the new codes, it is necessary to describe the legal landscape in which they developed. Then we will explain the major points of the reform, and we will conclude that the number of B Corps is likely to keep on growing.

2 The Legal Context of the Emergence of B Corps

Belgian law is particularly interesting when considering benefit corporations. Indeed, the authors debated strongly and during many decades about the notions of association and company (Sect. 2.1), and the legislator concluded that period by the establishment of the first benefit corporation, i.e., the social purpose company (Sect. 2.2).

2.1 *The Traditional Notion of Company*

After Napoleon's defeat, Belgium adopted French legislation. Therefore, its company law was similar to the French one, with its famous article 1832: "A partnership is created by two or several persons who agree by a contract to appropriate property or their industry for a common venture with a view to sharing the benefit or profiting from the saving which may result therefrom. It may be created, in the cases provided for by statute, through the act of the will of one person only. The partners bind themselves to contribute to the losses." The industrial revolution in Europe during the century required a modernization of the legislation. Some adjustments were adopted in the middle of the nineteenth century, but the major reform was passed in 1873.¹ This act replaces the old sections of the commercial code pertaining to commercial companies. Its main innovations were the removal of the state accreditation required for the creation of public limited companies and the generalization of registration of information in order to protect third parties. It remained the core of Belgian company law till the end of the twentieth century. But the reform of 1873 did not touch the civil code, and article 1832 remained unchanged.

The discussion about the scope covered by the company arose only when a competing institution was legally organized, i.e., the not-for-profit association (*association sans but lucratif*).² Its article 1 stated that *the not-for-profit association is the one which does not undertake industrial or commercial activities, or which does not aim at providing a material win to its members*. Apparently, the distinction is clear, except that there were strong debates all along the century about the precise domain of the not-for-profit association. The first point of debate has been grammatical—to acknowledge that the "or" should be understood as an "and" since the two conditions are not alternative but cumulative.³ Indeed, the opposite interpretation would have allowed them to provide material win to their members if they did not have an industrial or commercial activity. The problem arose with the development of the economic activities of not-for-profit associations. The case law admitted that a not-for-profit association could have a lucrative activity if such activity is accessory to its

¹Loi du 18 mai 1873 sur les sociétés commerciales; Malherbe et al. (2020).

²Loi du 27 juin 1921 sur les associations sans but lucratif, les fondations, les partis politiques européens et les fondations politiques européennes.

³Coipel (dir.) (1985).

main activity and that this lucrative activity is a necessary means to achieve its purpose.⁴ This point will not be further developed, but it has concentrated the debates about the definition of association and company. Indeed, the definition of the association directly impacts the one of the companies.

Undoubtedly, a company is aimed at the distribution of profits, and it is not allowed to adopt the legal form of a company if distribution is not possible. But currently, there is no serious debate on the possibility of integrating social purposes into the object of a company nor into its management.⁵ No case law had yet declared a manager liable for having neglected the maximization of company profits for the shareholders. Moreover, when a company engages into the corporate social responsibility, it is connected with the sustainable development and benefit from the support of the state institutions in charge of this question. The only limit is the prohibition for a company to exclude any distribution or profit.

Belgian authors discussed also the nature of the company: contract, institution, and more recently functional or structural theory. However, Although the debates have not reached an agreement, a disenchanted opinion is that it is an essentially academic dispute and that all these theories cover part of the regulation of the company.⁶ This debate echoes on the notion of company interest. Company interest (*intérêt social*) refers sometimes to the financial interest of the company to provide the maximum of profits to its shareholders, but it refers as well in other contexts to the interest of all its stakeholders, notably when the board must assess the opportunity of a take-over bid.⁷ The question of the lucratively of the company has been fundamentally renewed since the reform of 1995.

2.2 *The Experience of Social Purpose Companies*

The adoption of a special framework for benefit corporation, in Belgium with the social purpose company (*société à finalité sociale*) is strongly related to the general context of company law, and more particularly to the relationship established between companies and associations. For sure, the benefit corporation movement has been initiated by businessmen wishing to escape from the maximization of profit as the single compass for their enterprise. In that respect, the company is the suitable legal status for the enterprise, and not the association is not. Indeed, the association refers to a grouping of persons that pursuit a philanthropic aim or organizes social activities, such as sport, theatre. . . This has been exactly the implicit conception in

⁴Malherbe et al. (2020), n°426.

⁵For a nuance, but mainly motivated to defend the existence of social purpose company (see below): Foriers and François (2014), footnote 103. The authors do not claim that this would be unlawful or would engage the managers' liability, but draw the attention on the debates about the notion of company interest.

⁶Malherbe et al. (2020), n°406.

⁷Malherbe et al. (2020), n°514.

which the act on associations was drafted in Belgium.⁸ Meaningfully, the act on associations of 1921 does not deal with all associations but only not for profit associations.

In the meantime, in Belgium like, in other countries, enterprises with an important economic dimension but aimed at the provision of social services without the pursuit of profit emerged, such as schools, hospitals, organizations supporting jobless persons or people with disability. This has created a grey area, and consequently some legal uncertainty, in the restrictive definition of a not-for-profit association and the company. Some social economy enterprises claim the creation of a new legal form⁹ to bring more clarity and in order not to hinder the development of these new enterprises. In the meantime, on a more conceptual level, it was suggested to rethink difference between a company and an association. Some authors claimed that the opposition of companies and associations was not a necessity, but a conceptual construction that could be modified.¹⁰ In that conception, it would be possible to utilize use the legal form of a company, which demonstrated to be very successful to organize an enterprise, to ran other purposes than, the maximization of profits and their distribution.

This conception was not unanimously approved among the academics, but it was a very promising renewal of the conception of the coordination of the various private law groupings.¹¹ In the francophone legal thinking, till the end of the nineteenth century, any grouping was considered as an association, without any connection with its legal personality, and company was a contract by which was created a special association. The first evolution, during the nineteenth century, has been the increasing importance attached to the question of legal personality. With the adoption of acts on association in the beginning of the twentieth century, to which legal personality was attributed under some conditions, association and company appeared as distinct groupings and association could not be considered anymore as the general category. This is the reason why the major doctrinal debate of that time was about the border between the company and the association, even if Belgium and France did not give the same answer. Along the twentieth century, with the company has become the usual way to run an economic activity instead of the traditional personal enterprise undertaking on its personal behalf. Therefore, the company has become the pattern for the enterprise. In that context, the proposal to admit the possibility for a company to run a non-for-profit economic activity is to be considered as the achievement of the evolution: the company would become the general category, and association would be a special grouping.

Whereas there is no direct relationship between that proposal and the functional theory of company, some common features can be established between that latter

⁸ Act 27th of June 1921, *Moniteur belge*, 1st of July 1921, n. 182. Davagle (1994).

⁹ Foriers and François (2014).

¹⁰ Coipel (2002), pp. 549 f.

¹¹ The major promotor of that renewal was Michel Coipel. See also: Coipel (1996), pp. 49 f. For some Flemish references, see Foriers and François (2014), footnote 87.

conception and the functional theory of company. Let's remind that the functional theory,¹² proposes, in the 1960s 1970s, to consider the company has a frame for the enterprise.¹³ Instead of being assimilated to the enterprise itself, the company is considered as a tool to regulate the functioning of the enterprise, from the shareholder point of view, with the obligation to mitigate their selfish interests to include the ones of the enterprise's stakeholders. Related with the institutional conception of the company, the functional approach has been an attempt to incorporate the critics addressed to the institutional conception in a contractual theory perspective. Likewise, the proposal to extend the domain of the company consists in removing its specificity i.e., to distribute profits, and to consider it as a more general pattern, able to perform various functions.

To ensure the validity of such a company with regard to the civil code, the evolution has been explicitly stated in the definition of company.¹⁴ However, the general definition has not been amended in the core provision, but a new line added to allow such companies that do not pursue the distribution of profits, in the cases provided by the code. Therefore, the possibility for a company to pursue another goal was not general but limited to the hypothesis defined by the company code. This came up with the creation of the social purpose company in 1995.¹⁵

Pursuant to the article 661 of the ancient company code, the social purpose company is a modality of company, that may be added to most companies recognized as legal persons: general partnership, limited liability partnership, private limited liability company, cooperative society, public limited liability company, limited stock ownership company, economic interest grouping.¹⁶ Of course, to qualify as a social purpose company, these companies must meet additional conditions: they don't aim at the enrichment of shareholders, and their by-laws contain mandatory provisions. The by-laws have to include some clauses: the shareholders pursue a limited profit or no profit, the definition of the social purpose and the absence of any indirect financial profit as the main purpose of the company, the definition of the profit allocation policy suitable to the object of the company and the rules for the constitution of reserves, the limitation of voting rights in the general meeting to 10% for one shareholder, the limitation of distribution of profit (if any) to the maximum allowed for approved cooperatives, the elaboration of a special annual report on the achievement of the social purpose, the possibility for any employee to become a shareholder one year after he/she has been hired at the latest and the termination of its quality of shareholder one year after he/she is not employee anymore, the allocation of net assets to a similar company in case of liquidation.

¹² Malherbe et al. (2020), n°405.

¹³ Mainly into the French doctrine: Paillusseau (1967). More recently in Belgium a close writing: Dierx (2002), pp. 628 f.

¹⁴ Ancient Company Code, art. 1. In 1995, this precision was added into article 1832 of the civil code, but this provision has been moved from the civil code into the company code when it was enacted.

¹⁵ Act 13 April 1995.- An Act to amend the acts on commercial companies, co-ordinated November 30, 1935.

¹⁶ C. sociétés, art. 661.

The description of the regulation of these companies will not be further developed,¹⁷ it was only necessary to highlight their legal orientation. Even if social purpose companies and cooperatives differ, the latter inspired the former: there is no historical connection, but the proximity of legal provisions is obvious. Moreover, it seems that most existing social purpose companies were a modality of cooperatives.¹⁸ Actually, there has been a consensus that social purpose companies have not been a success since they remained rather few. Several reasons have been proposed to explain this relative failure. First of all, there has been no tax incentive since a social purpose company is taxed as another company. Secondly, if a not-for-profit association was able to convert into a social purpose company, the outcome was partially unsecured, since all the public support to associations were not guaranteed for social purpose companies. This is problematic, since one of the goals of the creation of the social purpose company was to provide a solution for associations wishing to develop their economic activities securely. This was not a good starting point to ensure a rich future to that experience, even if it has been positively considered abroad, and sometimes inspired other reforms, like in Luxembourg.

Nevertheless, some authors claimed for the maintenance of the social purpose company in the perspective of a general reform that has been considered in the 2010s. Apart from Michel Coipel, who was one of the promoters of this modality of company, Paul Alain Foriers and Alain François articulated several reasons to keep that possibility.¹⁹ Firstly, they observe that the high majority of companies remain targeted at the distribution of profits and that it is still meaningful to offer a special pattern for the few companies aiming at another goal. Secondly, that modality would allow these peculiar companies to be visible. Thirdly, there is a practical interest i.e., to benefit from the advantages of companies, notably the attractivity for financing.

However, the major reform of grouping law in 2019 has strongly transformed the whole system.

3 The Recent General Reform of Company Law

Belgium seems to have adopted during the last years a frenetic activity to reform private law. Already in 2001, a company code was adopted,²⁰ and in 2013, the process for the drafting of the economic law code started,²¹ but some proposals also

¹⁷For more details, notably: Hindriks et al. (1996) and Lacour (2002). More recently: Foriers and François (2014), ns°20 f.

¹⁸Foriers (2018).

¹⁹Foriers and François (2014), n°47.

²⁰Loi du 7 mai 1999 contenant le Code des sociétés.

²¹Economic Law Code, 28 February 2013.

appeared for the reformation of the civil code.²² The bill to fully reform the civil code was adopted on April 4, 2019,²³ which is intended to contain nine titles (instead of three books nowadays). Book 3 on property law and Book 8 on proof have been adopted²⁴ and have entered into force. Other books are still under discussion. Things sped up in 2018 and 2019 in business law as, respectively, the economic law code was enacted²⁵ and the new company and association code adopted.²⁶ These new codes do not only aim at better coordination, they also introduced grate innovations, that impact necessarily the question of B-Corp.²⁷

The first innovation of the economic law code is his title. If legal thinking uses usually the expression commercial law and business law, it refers more rarely to economic law. The purpose of the code is to cover all areas in the regulation of economic activities: competition law, consumer law, insolvency law, etc. Considering only economic activities, the distinction between civil and commercial has disappeared. But the most unusual is maybe the scope of this new code since it is applicable to any enterprise, and the definition of an enterprise is extremely wide. The definition of an enterprise under the code²⁸ lists three categories: (a) any natural person who runs a professional activity in an independent way, (b) any legal person, and (c) any other organization without legal personality. Then, the code provides some derogations, but they concern only some organizations without legal personality or some public persons. For example, a manager of a company, when he is not an employee, is considered as an enterprise for the application of the economic law code. Of course, a company, whether a B Corp or not, will be considered an enterprise, as well as a not-for-profit association. This means that both will be subject to the same legal regime concerning their economic activity. And apart from the new notion of enterprise, the substance of the regulation has been renewed as well and this impacts companies.²⁹

Of course, B-corp is far more concern with the new company and association code. Its title may not surprise; as the economic law code considers altogether for-profit and not-for-profit organizations, it is perfectly coherent to deal with the structure of these two groupings into the same legislation. But this new code goes beyond and renews substantially the definition of these two legal persons. The new

²²<https://legalworld.wolterskluwer.be/fr/nouvelles/domaine/droit-civil/denis-philippe-pour-un-nouveau-code-civil/>.

²³<https://justice.belgium.be/fr/bwcc>.

²⁴Act of the 4 February 2020 introducing the book 3 “Les biens” into the Civil Code; Act of the 13 April 2019 introducing the book 8 “La preuve” into the Civil Code.

²⁵April 15, 2018. - enterprises Law Reform Act (n°2018-04-15/14). <http://www.ejustice.just.fgov.be>.

²⁶March 23, 2019. - Act introducing the Code of Companies and Associations (n°2019-03-23/09).

²⁷For a summary of the reform: De Cordt (2019), pp. 435 f.

²⁸Economic law code, art. I.1 1°.

²⁹Bossard (2018).

definition of company is to be quoted in totality:³⁰ A company is constituted by a legal act by which one or several persons, named shareholders, make a contribution. It has a patrimony, and its object is the pursuit of one or several activities. One of its goals is to distribute or provide to its shareholders a direct or indirect financial advantage.

Surely, legislation has taken one step further since distribution of profits is not anymore literally the core object of a company. The only prevalence of this object remains, symbolically in the fact it is the only one mentioned, and technically in the impossibility to create a company without, at least partly, that object. Apart from that, there may be other objects the company can pursue, and it is not even required that distribution of profits is the major one. However, this will not change practically the situation of companies since most of them will remain oriented to the maximization of profits for shareholders.

In the meantime, the definition of the association³¹ has been as well renewed: an association is established by a convention between two or several persons, named members. It pursues a not-for-profit purpose in the framework of one or several determined activities that constitute its object. It may not distribute or provide, directly or indirectly, any financial advantage to its founders, its members, any board member or any other person but in the disinterested purpose stated by the by-laws. Any transaction that violates this prohibition is void.³²

The change seems conceptually less general than for companies, but it is actually probably more important. Indeed, the debate about the coordination of the different conditions required from not-for-profit associations has been terminated by the removal of the most controversial one: the prohibition of commercial and industrial activities. Therefore, the only requirement is now the absence of any distribution of financial advantage, which can be compared to the French solution.³³ That extension of the domain of activities of not-for-profit associations improves their legal certainty and surely facilitates their development. Whereas associations and companies were distinguished by their activities and their ability to make profit, the single remaining criterion is the possibility or not to distribute the profits. The restriction laid down for not-for-profit associations on this distribution has been extended, or at least specified, about both its substance and its recipients. The prohibition on profit distribution concerns not only the members but also the founders and board members; in other words, it also means a prohibition on any remuneration for these board members. Moreover, the prohibition of any provision of a financial advantage to any other person entails the voidness of any gratuitous act of association that would not be covered by its statutory object. It may be noticed also that the prohibition mentions any financial advantage, that is to say that it is wider than profits. Whereas in French law there is a strict opposition, or complement, between association and

³⁰Company and association code, art. 1:1.

³¹For an extensive study of the innovations for associations: Davagle et al. (2019).

³²Company and association code, art. 1:2.

³³L. 1st of July 1901, art. 1.

company, with the identical criterion of the distribution of profits, the definitions of company and association in Belgian law are situated in two different levels: only company refers to profits and association refers to financial advantage.

These two new definitions have established an original framework for enterprises that pursue a social purpose. Whereas before 1995 these enterprises were likely to meet difficulties in finding a legal form suitable to their specificities, nowadays they have the choice between a not-for-profit association and a company. Indeed, both are possible since a company may easily include other purposes than the distribution of profits in its object, while an association may undertake industrial and commercial transactions. In that new context, and taking into account the low number of social purpose companies, the legislator simply decided to remove this new modality for the company. The authors that were initially reluctant to remove the social purpose company admit now that the new landscape implies logically their disappearance.³⁴ Interestingly, it may be noticed that the justification for such a removal is not the possible inclusion of a social purpose in a company's object but the possibility for a not-for-profit association to run any economic activity.

One concrete effect of the modification of the definition of a company is to facilitate the classification of cooperatives into the category of the companies since its specific object fits better with the new wider definition. The definition of the cooperative itself has been fully changed.³⁵ Whereas its definition was very formalistic, referring only to the variability of its capital,³⁶ The cooperative is now defined: The cooperative society has as main purpose the satisfaction and/or the development of economic and/or social activities of its shareholders and/or of third parties interested notably by the conclusion of agreements with the former towards the provision of goods or services or the execution of works in the context of the activity that the cooperative society performs or makes perform.³⁷

The definition is a little bit complicated, but, the inclusion of the satisfaction or the development of the activities of its members may find an inspiration in the definition provided by the European regulation. Meanwhile, it complies with the definition and principles of the International Cooperative Alliance. This may solve the tricky problem that faced Belgian law during many years i.e. the false cooperatives.³⁸ It must be precise as well that the cooperative may be accredited if it meets some more strict conditions, notably about its governance and its limited profitability.³⁹ More interestingly for the question of B Corp, it may also be accredited as social enterprise, if it meets three conditions: 1° its main purpose is, in the general interest, to produce a positive social impact for man, environment or society; 2° any

³⁴ Malherbe et al. (2020).

³⁵ Tilquin et al. (2020), <http://www.iuscooperativum.org/>.

³⁶ Ancient companies code, art. 350.

³⁷ Companies and associations code, art. 6:1 §1.

³⁸ Tilquin et al. (2020).

³⁹ Companies and associations code, art. 8:4. This is a heritage of the regulation established to distinguish true and false cooperatives.

advantage for the shareholders are limited by reference to the regulation on true cooperatives; 3° in case of winding-up its net assets have to be allocated in a manner that fits the best possible with its object as social enterprise.⁴⁰ It must be noticed that a cooperative society is the only organization that can be accredited as a social enterprise.

When comparing the new definition of a company with the previous definition of a social purpose company, the company appears to be more of a capitalist since it cannot prohibit the distribution of any profits, whereas the by-laws of a social purpose company could do so. But the general evolution of company law is surely more important and realizes a complete revolution. The pursuit of another goal than the distribution of profits is no longer reserved to special companies but is open to any company without any special regulation. The legislator drew the conclusion of that major evolution, and the social purpose company has been simply removed. The question arises whether that loss makes really no damage; indeed, the social purpose company did not allow only the pursuit of an economic activity without the purpose to distribute profits; it contained as well other provisions, notably about the voting rights or allocation to reserves. The flexibility of Belgian company law makes possible to adopt the same provisions, notably through the choice of the legal form of the cooperative. Therefore, the new solution appears technically neutral, but it may be symbolically considered a defeat for social enterprises, which lost their own legal form.

In the end of that chapter, it must be assessed if the new legislation is more friendly for B Corp. Despite recognizing the possibility for companies to pursue a non-profitable purpose besides a profitable one, the goal of the reform was not specifically this one. Three guidelines were considered: simplification and coherence, freedom and flexibility, facilitation of the mobility of companies to comply with the European objective.⁴¹ To put it differently, the possibility for a company to pursue another goal than the maximization of profits is not the consequence of a critic of such maximization; no limit is put to the persons who will wish to create such a company. But the wish to simplify the regulation and a neutral liberalization entails the absence of impediment to use the company in order to achieve a social or whatever else goal. Before 2019, there was no precise impediment to add some social principles to the functioning of the company, and the number of companies labeled B Corp at that time show it clearly. This has never been contested. Therefore, it cannot really be said that the new companies and associations code improved the situation for B-Corp; this would be possible only if some impediments could have been shown before. But that does not mean that nothing has changed. What is new is that these companies that are tempted to run their activities differently are now absolutely free to go further in that direction without adopting another legal form.

⁴⁰ Companies and associations code, art. 8:5.

⁴¹ De Cordt (2019) (art.), n°2.

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B Corps, Benefit Corporations and Socially Oriented Enterprises in Canada



Cynthia Giagnocavo

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1 An Introduction to B Corps and Benefit Corporation Law in Canada

New forms of hybrid for-profit companies are being created in response to social dissatisfaction with the negative social, economic and environmental impacts of capitalism, which ignores the balancing of the “3Ps”—people, profit and planet. These hybrid forms seek to avoid the shortcomings of not-for-profit companies, which may be limited by a lack of financial sustainability, thus at times limiting their ability to scale up and/or create a wider impact. In addition, social, economic and

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environmental challenges require many more resources, given the retreating role of the state.¹ Citizens and entrepreneurs wishing to link business with “doing good” have sought legislative responses around the world in an attempt to give directors and officers leeway to pursue other interests and goals other than strictly financial. In doing so, they also want greater transparency for investors, consumers and other stakeholders so that they can influence social and environmental impact and outcomes. In Canada, such new forms of hybrid companies include the B Corp, benefit corporations, community interest/contribution companies, and co-operatives and social enterprises. This chapter is predominantly concerned with B Corps and benefit corporations.

The first B Corp community established outside of the United States was in Canada, and the first Canadian B Corp, “FlipGive”, formerly “Better the World”, was certified in 2009 and founded in Ontario. FlipGive currently operates across Canada, predominantly in Alberta, British Columbia, Ontario, Quebec and Saskatchewan. Its initial concept was to have collaborating companies donate a small percentage of all members’ purchases to a designated fundraising account. Presently, there are over 400 certified Canadian B Corps in the B Lab registry, representing a diverse range of industry sectors.² Common B Corps known to Canadian citizens include the Business Development Bank of Canada (loans, investments and advisory services for small and medium-sized enterprises (SMEs)), Danone Canada (food and beverages), Optel Group (traceability systems for diverse industries such as pharma, food, natural resources), Beau’s Brewery (natural brewery), Fiasco Gelato (wholesale and retail gelato, events and catering), Bullfrog Power (renewable energy provider) and SPUD.ca (organic food delivery). These numbers can be expected to grow across all sectors.

In addition to B Corp certified companies, “benefit corporations”, which have a legal status different than that of not-for-profits and corporations, have also been established in the province of British Columbia, the first Canadian province to recently adopt it. In April 2019, the Green Party of British Columbia introduced a private member’s bill, with the aim to allow corporations to incorporate as “benefit companies” in British Columbia. It was the first private member’s bill to be directly translated to law in British Columbia, and B Lab was a stakeholder in such process. This required an amendment to the *Business Corporations Act (British Columbia)*. The *British Columbia Bill M 209, Business Corporations Amendment Act (No. 2), 2019*,³ which received royal assent on 16 May 2019, came into force on 30 June 2020. This provincial legislation created a sub-type of corporate entity that, according to the statute, is “committed to conducting its business in a responsible

¹Strange (1996). See also Mazzucato (2018), for a discussion of the retreating state and the re-emergence of entrepreneurial state action for the public good.

²See the B Corp directory <https://www.bcorporation.net/es-es/find-a-b-corp/search?query=canada&refinement=countries%3DCanada> (accessed 25 January 2022).

³<https://www.bclaws.ca/civix/document/id/bills/billsprevious/4th41st:m209-3> (accessed 25 January 2022).

and sustainable manner and promoting one or more public benefits". This means that the company may promote public benefits that have a positive effect on a group of people, such as communities, organisations or the environment, other than the company's shareholders.

It is unknown how popular benefit corporations will become in British Columbia and whether other Canadian provinces will follow in adopting such legislation. Investors and pension funds are increasingly interested in finding sustainable and responsible investment opportunities, and benefit corporations may fill such need.

2 Sources and Legislative Features

2.1 *Antecedents to B Corps and Benefit Companies*

In the United States, benefit corporations spread rapidly across state legislatures, after having been introduced in 2010. Such companies were introduced to supposedly remedy the very strong shareholder primacy theory espoused by scholars like Milton Friedman, who in 1970 famously argued that the "social responsibility" of companies was to increase their profits and that their purpose was to maximise shareholder value.⁴ The hybrid company was seen as a necessary remedy to counterbalance such position and to reign in unabated capitalism. However, the strict adherence to the theory of shareholder value at the expense of all other stakeholder interests may be put in doubt, despite the rhetoric, due to "other constituency" legislation across the majority of US states.⁵ For this reason, B Lab attempts to enshrining the consideration of other constituencies and stakeholders in its certification process, for the avoidance of doubt. However, while Canada is influenced by its neighbour to the South, its legal tradition is substantially different from that of the United States, relying on UK jurisprudence for precedent. In fact, until an act of the Canadian Parliament in 1949⁶ abolished all remaining rights of appeal to the Judicial Committee of the Privy Council, making the Supreme Court of Canada the ultimate appellate tribunal, the Crown was still considered the "fountain of justice" for appeals from "colonial courts" to ensure that justice was being done.⁷ After the Canadian Constitution was passed in 1982, resource to US constitutional law jurisprudence was cautiously considered, but not as a binding precedent.

Legal traditions are different in the two countries with respect to corporate law, particularly given the shareholder primacy often seen to be enshrined in US judicial interpretation or, for example, the obligation of directors to seek the highest price in a change of control or takeover bid in order to maximise profit for shareholders.

⁴Friedman (September 13, 1970).

⁵See discussion in Liao (2017), p. 687.

⁶Supreme Court Act, 1949, 13 Geo. VI, c.37 (Canada).

⁷Livingston (1950), pp. 104–112 (9 pages).

Canadian law has a tradition of granting protection to interests other than those of the shareholders, as can be noted by its very strong “oppression remedy”,⁸ allowing complainants to bring action against a corporation where conduct that is oppressive or unfairly prejudicial or unfairly disregards the interests of a shareholder, creditor, director or officer has occurred. In addition, several Supreme Court of Canada (SCC) cases have further distinguished Canadian jurisprudence from that of the United States.

While the creation of a distinct category of benefit companies in British Columbia was a first for Canada, the concept of expanding the scope of the fiduciary duties of directors and officers of a corporation has arguably been underway since the SCC’s *Peoples Department Stores Inc (Trustee of) v Wise*⁹ ruling in 2004 and was recently reinforced by amendments to s. 122 of the *Canada Business Corporations Act*, which codified central aspects of the *Peoples* ruling. The SCC, in a unanimous ruling, addressed the principal question, raised on appeal from the Quebec Court of Appeal, of whether directors of a corporation owe a fiduciary duty to the corporation’s creditors comparable to the statutory duty owed by such directors to the corporation. On this specific point, the SCC concluded that directors owe a duty of care to the corporation’s creditors, but that duty does not give rise to a fiduciary one. It also found that this duty of care extended to other stakeholders and the environment, and that in determining the statutory fiduciary duty, the best interests of the company included other factors beside the economic.

Section 122(1) of the *Canada Business Corporations Act* (CBCA) establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

- 122.** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
- (a) act honestly and in good faith with a view to the best interests of the corporation; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The Supreme Court observed that “the first duty” has been referred to in this case as the “fiduciary duty”. It is better described as the “duty of loyalty”. The SCC observed:

⁸Section 241 of the *Canadian Business Corporations Act* gives a complainant the right to bring a court action against a corporation where conduct has occurred which is oppressive, unfairly prejudicial or which unfairly disregards the interests of a shareholder, creditor, director or officer. This right is commonly referred to as the “oppression remedy” and has been interpreted by courts and legal scholars as imposing a general standard of “fair” conduct on Canadian corporations and their management. When this standard has been breached, complainants may apply to court for an order rectifying the oppressive conduct. The court may make any order it thinks fit, including awarding money damages, appointing a receiver, dissolving the corporation, forcing the acquisition of securities and amending charter documents.

⁹2004 SCC 68 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2184/index.do> (accessed 25 January 2022).

[T]his duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the “duty of care”. Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation’s affairs.

The SCC held that the trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1) and that the Court of Appeal had correctly observed that the trial judge appears to have confused the two duties and that they are, in fact, distinct and are designed to secure different ends.

The SCC also clarified that the appeal did not relate to the *non-statutory* duty that directors owe to shareholders but rather concerned itself only with the statutory duties owed under the CBCA. It held:

Insofar as the statutory fiduciary duty is concerned, *it is clear that the phrase the “best interests of the corporation” should be read not simply as the “best interests of the shareholders”*. From an economic perspective, the “best interests of the corporation” means the maximization of the value of the corporation.¹⁰ However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation (emphasis added).

The SCC then referred to *Teck Corp. v. Millar*,¹¹ where Berger J. stated, at p. 314:

A classical theory that once was unchallengeable must yield to the facts of modern life [. . .] *if the directors were to consider the consequences to the community of any policy that the company intended to pursue*, and were deflected in their commitment to that policy as a result, *it could not be said that they had not considered bona fide the interests of the shareholders* (emphasis added).

The SCC when on to say:

[I]t would be a breach of their duty for directors to disregard entirely the interests of a company’s shareholders in order to confer a benefit on its employees¹² *but if they observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense*, that will not [. . .] leave directors open to the charge that they have failed in their fiduciary duty to the company (emphasis added).

The SCC also referred to the case of *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.*¹³ and held that it

[A]ccepted as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, *the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment* (emphasis added).

¹⁰The SCC referred to *E. M. Iacobucci* (2003), pp. 400–401.

¹¹(1972), 33 D.L.R. (3d) 288 (B.C.S.C.).

¹²*Parke v. Daily News Ltd.*, [1962] Ch. 927.

¹³(1986), 59 O.R. (2d) 254 (Div. Ct.), approved, at p. 271, the decision in *Teck*, supra.

However, the SCC also found that directors and officers would not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis, which is known as the “business judgement rule”. That is, perfection is not demanded, but an appropriate degree of prudence and diligence should be brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

Another interesting SCC precedent from 2008,¹⁴ which is related to fiduciary duties, declared that the directors of for-profit corporations have a fiduciary duty to act in the best interest of the corporation as a “good corporate citizen”. In the context of an oppression remedy, the SCC held:

In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, *having regard to all relevant consideration, including, but not confined to the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen* (emphasis added).

The ruling prompted a reconsideration of the characterisation of corporate behaviour in Canada but left ambiguous whether directors “may”, “should” or “are obligated” to consider stakeholder interests.

2.2 Other Socially Oriented Business Types

Canada has other socially oriented business forms, such as B Corps, community interest/contribution companies, co-operatives and other social enterprises. The report entitled “Social Enterprise in Canada” finds that “five main types of social enterprises emerge, which cut across the cultural and policy regimes in Canada: co-operatives, non-profit organisations, community development/interest organisations, First Nations businesses, and business with a social mission”.¹⁵ The Social Enterprise Council of Canada¹⁶ defines social enterprises as “community-based businesses that sell goods or services in the market place to achieve a social, cultural and/or environmental purpose; they reinvest their profits to maximize their social mission”. In 2014, it was incorporated as a federal non-profit corporation in order to create a greater capacity for social enterprise practitioners, supporters, intermediaries, funders and thinkers to engage in building the social enterprise sector. Many of its members are B Corps or, if applicable, benefit corporations.

In addition to benefit corporations, British Columbia also allows for the creation of community contribution companies (CCCs). In 2012, amendments were made to the British Columbia *Business Corporations Act*, which legislated the first hybrid

¹⁴BCE v. 1976 Debentureholders 2008 SCC 69) Aegon Capital Mgt. Inc. v. BCE Inc., AZ-50497605.

¹⁵McMurtry et al. (2015) https://www.researchgate.net/publication/279199611_Social_Enterprise_in_Canada_Context_Models_and_Institutions (accessed 25 January 2022).

¹⁶<https://secouncil.ca/> (accessed 25 January 2022).

for-profit social enterprise structure in Canada, known as the community contribution company. The option has been available in British Columbia since July 2013, following changes to the British Columbia *Business Corporations Act* (SBC 2002) c. 57, which permitted the creation of community contribution companies, effective 29 July 2013. Directors and officers of CCCs must “act with a view to the community purposes of the company set out in its articles”. However, uncertainties exist. It is unclear whether this obligation would be subordinate to the general obligation to act with a view to the best interests of the company. In addition, directors and officers are not clearly protected from liability should acting with a view to the community purpose of the company have a negative impact on its best interests. CCCs are also subject to certain restrictive financial provisions that could make them less attractive to investors, such as limits on return on investments.¹⁷ While their aim is also to attract socially conscious investors, CCCs have additional rules, such as requiring a company to allocate 60 per cent of its profits towards a social purpose, with only the remainder distributed to shareholders. CCCs are also required to have three directors when they incorporate and have a partial asset lock, wherein they must direct at least 60 per cent of their value towards a social purpose upon dissolution. CCCs cannot convert to benefit companies, although both are for-profit enterprises with a social purpose. Fifty community contribution companies have been incorporated in British Columbia as of summer 2019.

Nova Scotia’s social enterprise hybrid structure, the community interest company (CIC), was introduced in 2016 under the Community Interest Companies Act (CICA).¹⁸ The law allows new and existing businesses incorporated under the Companies Act (Nova Scotia) to apply for designation as a CIC. Following the model used in British Columbia’s *Business Corporations Act* for community contribution companies and the UK’s Companies (Audit, Investigations and Community Enterprise) Act for its own CICs, the Nova Scotia Act provides a governance framework for social enterprises incorporated in Nova Scotia. As a hybrid corporate vehicle, Nova Scotia CICs combine certain characteristics of for-profit businesses with the social purpose nature of non-profit entities. CICs must have a community purpose, defined as “a purpose beneficial to: society at large; or a segment of society that is broader than the group of persons who are related to the CIC”. A CIC may not carry on any of its activities with a political purpose, although this has not been defined under the Act or its Regulations. CICs may issue shares, but there is a limit on return on investments, restrictions on transfer and an “asset lock” upon dissolution. As a business corporation, the income of a CIC is taxable at the rate applicable to all other business corporations.

¹⁷For more information, see the British Columbia government information on incorporating CCCs: https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/permits-licences-and-registration/registries-packages/pack_01_ccc_-_bc_community_contribution_company_incorporation_package.pdf (accessed 25 January 2022).

¹⁸Community Interest Companies Act Chapter 38 of the Acts of 2012 as amended by 2014, c. 34, s. 3 <https://nslslegislation.ca/sites/default/files/legc/statutes/community%20interest%20companies.pdf> (accessed 25 January 2022).

3 Legal Requirements and Characteristics of B Corporations and Benefit Corporations

The legal requirements and characteristics corresponding to a certified B Corp and a benefit company differ. Requirements to become a certified B Corp Canada-wide are set out below, followed by the requirements to incorporate as a benefit company, the latter currently available only in British Columbia.

3.1 *Requirements and Characteristics of B Corporation Certification*

“Certified B Corporations” have typically been certified in Canada by the not-for-profit “B Lab” after an assessment has been completed. One of the steps for obtaining certification is meeting what B Lab calls the “legal requirement”. In jurisdictions where benefit companies do not exist, B Lab requires companies to add provisions to their constating documents allowing the company to act in a way that considers its impact on society and the environment and protects the directors and officers from liability arising from those considerations. It is questionable, under Canadian law, whether the inclusion of these provisions in the articles of a company that is not a benefit company would allow the directors and officers of the company to pursue activities that, while socially important, might negatively impact the company’s financial interests, beyond what is already provided under recent SCC precedent, set out above. The amendments to the *Business Corporations Act* (British Columbia) allowing for the creation of benefit companies attempt to clarify this dilemma in British Columbia, but the rest of the provinces are still in mainly uncharted territory.

The first step to becoming a certified B Corporation in Canada requires a corporation to amend its articles since it is considered a “fundamental change”, thus requiring a “special resolution” by the shareholders. Across Canada, provincial business corporation acts generally consider that a “special resolution” requires not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution. Companies have until one year after certification as a B Corp to complete this process to amend their articles.

To incorporate stakeholder interests, B Lab suggests that Canadian companies amend their articles to include the following language (although B Lab cautions that such suggestions should not be considered legal advice).

In English:¹⁹

¹⁹https://assets.ctfassets.net/1575jm76171t/71ZhGrSMLclpJXtkpHilDr/c3366a52ef3accf528c3235492b82d5b/Canada_B_Corp_Memo_.pdf Suggestions in the French language: <https://www.bcorporation.net/en-us/legal-requirement/country/canada/province/quebec/corporate-structure/corporation/> (both accessed 25 January 2022).

1. The purpose of the Company shall include, but is not in any way limited to or restricted by, the creation of a positive impact on society and the environment, taken as a whole, from the business and operations of the Company, which impact is material in view of the size and nature of the Company's business
2. The Directors shall, when deciding what is in the best interests of the corporation, consider the short-term and the long-term interests of the corporation and the interests of the corporation's shareholders, employees, suppliers, creditors and consumers, as well as the government, the environment, and the community and society in which the corporation operates (the "Stakeholders"), to inform their decisions.
3. In discharging his or her duties, and in determining what is in the best interests of the corporation, each director shall consider all of the Stakeholders (defined above) but shall not be required to regard the interests of any particular Stakeholder as determinative.
4. Nothing in this Article express or implied, is intended to create or shall create or grant any right in or for any person other than a shareholder or any cause of action by or for any person other than a shareholder.
5. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under provincial law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a change in control transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

For corporations incorporated under the federal legislation, the *Canadian Business Corporation Act*, B-Corp suggests that the Sect. 5 above, suggested for provincially regulated companies, be amended as follows:

5. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under federal law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a change in control transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

With respect to the province of British Columbia, a company meets the legal requirement for B Corp certification if it meets the provincial requirement of being a "benefit corporation" (see below for benefit corporation requirements for British Columbia).

Credit unions must also add an amendment to their by-laws and seek approval for the amendment from their members in order to become a certified B Corporation in Canada. Credit unions have until one year after certification to complete such process.

To incorporate stakeholder interests into the by-laws of credit unions, the following language is suggested by B-Lab:²⁰

The purpose of the Credit Union includes, but is not in any way limited to or restricted by, the creation of a positive impact on society and the environment, taken as a whole, from the business and operations of the Credit Union, which impact is material in view of the size and nature of the Credit Union's business.

²⁰<https://www.bcorporation.net/en-us/legal-requirement/country/canada/province/ontario/corporate-structure/credit-union> (accessed 25 January 2022).

The directors shall, in accordance with their applicable statutory and regulatory duties and requirements and in alignment with the co-operative principles of the Credit Union and its purpose, act with a view to the best interests of the Credit Union. In considering the best interests of the Credit Union, the directors shall consider the interests of the Credit Union's members, shareholders, employees, suppliers and creditors, as well as the government, the natural environment, and the community and society in which the Credit Union operates (collectively, the "Stakeholders") and the short-term and long-term interests of the Credit Union, to inform their decisions. In discharging their duty to act with a view to the best interests of the Credit Union, the directors shall consider the interests of all of the Credit Union's Stakeholders and shall not be required to consider the interests of any particular Stakeholder as determinative, in exercising their judgment.

3.2 Requirements and Characteristics of Benefit Corporations in British Columbia

A benefit company in British Columbia is incorporated under the rules set out in the *Business Corporations Act* (British Columbia), which is applicable to all companies incorporated in the province. However, the notice of articles of a benefit company must contain the following "benefit statement":

This company is a benefit company and, as such, is committed to conducting its business in a responsible and sustainable manner and promoting one or more public benefits.

The articles of a benefit company must also include a "benefit provision" specifying the public benefits to be promoted by the company. "Public benefit" refers to something that has a positive effect that benefits (i) a class of persons other than the shareholders of the company in their capacity as shareholders or a class of communities or organisations or (ii) the environment. The "environment" includes air, land, water, flora and fauna, and animal, fish and plant habitats. The positive effect can be artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, and/or technological.

In accordance with the language of the amendment, the articles must also set out its commitments to conduct its business in a responsible and sustainable manner and to promote such public benefits that it has specified in its by-laws. "Fair and responsible manner" is defined as "a manner of conducting the business that (a) takes into account the well-being of persons affected by the operations of the benefit company, and (b) endeavours to use a fair and proportionate share of available environmental, social and economic resources and capacities".

An existing British Columbia company may convert to a benefit company if its shareholders pass a special resolution altering its notice of articles and articles to include the required benefit statement and benefit provision. To cease to be a benefit company, its notice of articles and articles must be altered to delete the benefit statement and benefit provision. The company must file a notice of alteration with the company's registry. Shareholders (including non-voting shareholders) have dissent rights in respect of the special resolution, giving them the right to alter the

company's notice of articles or articles to include or delete the benefit statement or benefit provision. If the special resolution is approved, they may be entitled to be paid the fair value of their shares.

The directors and officers of a benefit company are required to act honestly and in good faith with a view to conducting its business in a responsible and sustainable manner and promoting the public benefits that the company has identified in its benefit provision. This somewhat augmented fiduciary duty requires the balancing of their public benefits duty against their duties to the company. Currently, there is no guidance with respect to achieving this balance and complying with the "Balancing Duty". However, the amendments state that the public benefits duty does not create a duty on the part of directors or officers towards persons who are affected by the company's conduct or who would be personally benefitted by it.

Several significant provisions in the amendments relate to enforcement and remedies where duty is breached. Shareholders are the only persons who are able to bring an action against a British Columbia *Business Corporation Act* benefit company's directors and officers over an alleged violation of their duty relating to public benefits. Only shareholders that, in the aggregate, hold at least 2% of the company's issued shares may bring such an action (in the case of a public company, a \$2-million shareholding, in the aggregate, will also suffice), and the court may not order monetary damages in relation to a breach of that duty. Other remedies, such as removal or a direction to comply, would still be available.

4 Activity

Given the fact that the benefit corporation status is new in Canada and applicable only with respect to British Columbia at this writing, it is difficult to ascertain its scope. However, certified B Corps are well embedded, with more than 400 certified B Corps.²¹ Newfoundland and Labrador do not have B Corps, although they do have social enterprises. In addition, B Corps such as SkyFire Energy Inc of Alberta (provider of turnkey residential, commercial and utility solar PV system solutions) operate in all three territories. The Business Development Bank of Canada also provides services.²² The range of activities of B Corps is wide across diverse sectors, including advisory services, financial services, technology solutions, eco and environmental services, utilities and energy, food and household products, cultural and educational offerings, etc.

²¹<https://www.bcorporation.net/en-us/find-a-b-corp/search?query=canada&refinement=countries%3DCanada> (accessed 25 January 2022).

²²<https://www.mun.ca/socialenterprise/> (accessed 25 January 2022).

5 Registration, Transparency and Control

A benefit corporation is incorporated under the Business Corporations Act. All the regular incorporation rules apply to a benefit corporation, including filing the incorporation application with the registry. A benefit company must include the benefit statement in its notice of articles, as well as have the benefit provision in its articles.

The benefit corporation must produce an annual benefit report that provides an assessment of the company's performance compared against a third-party standard. A third-party standard means a standard for defining, reporting and assessing the performance of a benefit company in conducting its business in a responsible and sustainable manner and in relation to its public benefits. The benefit corporation itself must annually choose a third-party standard that it will use to assess its performance in meeting its commitments. It is important to underline that the benefit corporation applies the assessment to itself; the third party does not perform the assessment, and there is no government oversight of the assessment.

Benefit corporations must provide the report to their shareholders and keep their benefit reports at the company's registered office where it is accessible to the public. If the benefit company has a publicly accessible website, it must also post the benefit report on that website. The benefit report is not filed with the registry. The benefit report must disclose the following:

- (a) a fair and accurate description of the ways the benefit corporation demonstrated commitment to conducting its business in a responsible and sustainable manner, and to promoting the public benefits specified in its articles;
- (b) a record of the third party assessment and the results of that assessment;
- (c) the circumstances, if any, that hindered the benefit corporation's endeavours to carry out the commitments set out in its provision;
- (d) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report, including, as applicable,
 - (i) a statement that the standard was applied in the year before the most recently completed financial year and is being applied in the most recently completed financial year in a manner consistent with the previous application of that standard,
 - (ii) a statement that the standard was applied in the year before the most recently completed financial year but is not being applied in the most recently completed financial year, and the reasons for the inconsistency, or
 - (iii) if the report is for the first financial year in which the company is a benefit company, a statement that the report is the first benefit report for which the standard was selected and applied.

The directors of a benefit corporation must ensure that the report is approved by the directors and signed by one or more directors to confirm that the approval required under paragraph (a) above was obtained.

If the directors of the benefit corporation do not prepare and post the benefit report as required by the British Columbia *Business Corporations Act*, it is considered an offence with a potential fine of up to \$2000 for individuals or \$5000 for persons other than individuals.

6 Specific Tax Treatment

In Canada, B Corp companies are taxed under appropriate tax laws for their chosen legal status (e.g. cooperatives, corporate entities, social enterprises, etc. that are B Corps would be taxed under relevant federal and provincial tax codes). Benefit companies are “for-profit” companies and thus are treated in the same manner as other companies for tax purposes.

7 Comments

Although the benefit corporation is new to Canada and is only currently available as a legal form in British Columbia, it has generated some discussion. The main question appears to be whether it is needed or not. In her detailed article,²³ Prof. Liao argues that the adoption of the benefit corporation in Canada is inadvisable. Her argument is that the legal features in the United States’ benefit corporation model are largely redundant, given the Canadian corporation laws and Supreme Court of Canada rulings, mentioned above. She points out the risk that the implementation of the benefit corporation in Canada would result in incorrect assumptions about Canada’s corporate governance model and that, more importantly, it would impede the further progressive development of Canada’s corporate laws. From a practical point of view, she also criticises the laxity in third-party standards and the benefit report and highlights the risk that “greenwashing” or a simple “branding exercises” may occur. She concludes that the benefit corporation legislation has no “meaningful teeth” behind it and that its offerings to Canadian corporate law are minimal, given the existing minority protection statutes and oppression remedy.

However, the author also acknowledges that “[d]espite the fact that Canadian statutes and common law have tended to favour a more stakeholder-based governance model, Canadian legislators and the courts have often taken a backseat in the development of corporate governance standards”, leaving securities regulators to dominate and push forward with the shareholder agenda. She goes on to note that institutional investors deliberately seek to enhance shareholder rights.²⁴ These very observations may also lend support for the necessity of including an explicit

²³Liao (2017), pp. 683–716.

²⁴Ibid., p. 704.

statement of both social and economic goals in the benefit corporation requirements. A more “wait and see” or experimental attitude is taken by other authors, where they note that there is not so much a change in corporations but an evolution in the way that people think about the corporation and its coexisting with planet and people.²⁵

In a 2021 systematic literature review²⁶ on the B Corp movement worldwide, it was found that there was a diverse range of motivations for seeking to be a B Corp and that in some instances, a B Corp reputation resulted in better financial results within a sample of like competitors.

How the benefit corporation evolves in British Columbia and Canada is unknown, of course, particularly given the fact that the only benefit corporation law is barely a year old at the time of writing this chapter. However, what is evident from the growing number of B Corps and the interest in various hybrid business models, such as CICs, CCCs, social enterprises, and co-operatives persisting in a wide array of sectors, is that Canadians seek to harness the familiar and flexible for-profit business form and leverage its strengths to “do good”. They want a corporate law that also engages with social, economic and environmental values, even if they are reticent about the importation of a model not “Made in Canada”.

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²⁵Tobin (2013) https://www.blaney.com/files/EvolutionPublicBenefitCorporations_DTobin_2013.pdf (accessed 25 January 2022).

²⁶Diez-Busto et al. (2021), p. 2508. <https://doi.org/10.3390/su13052508> (accessed 25 January 2022).

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Purpose-Driven Companies and the Projected Legal System for Benefit and Collective Interest Companies in Chile



Jaime Alcalde Silva

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1 Introduction

In Chile, there is no specific legislation for purpose-driven companies, nor is there recognition of social enterprises as a special category.¹ This absence is paradoxical if we consider that the country has 26% of the certified B Corps in Latin America.² However, legislative initiatives have been the topic of public debates, even though their fate has been diverse. The first of these dates back to 2013 and came from the

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¹For some historical background, see Alcalde Silva (2018), pp. 401–403.

²El Mercurio, Innovation Supplement N° 147 (Special purpose-driven companies), February 24, 2022, p. 1.

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Ministry of Economy, Development, and Tourism, which was followed by another proposal made public in 2015. In the parliamentary field, there have been two motions, one in 2015 and the other in 2017, presented by then Congresswoman Maya Fernández Allende (Socialist Party of Chile) and then Congressman Felipe Kast Sommerhoff (Political Evolution—*Evolución Política*), aimed at regulating social enterprises, although each of them with different results.³ Only the latter prospered in the parliamentary discussions, albeit with meager results.

Next, the movement of certified B Corps in Chile is described, and each of the recently mentioned bills is analyzed, emphasizing the one that has aroused discussion. Finally, some conclusions and perspectives are offered.

2 The Certified B Corp Movement in Chile

The beginning of the 2010s showed a growing interest from important groups of Chilean society in facing social problems through forms of hybrid business organizations.⁴ In September 2011, Pedro Tarak, María Emilia Correa, Gonzalo Muñoz, and Juan Pablo Larenas traveled to New York to meet the founders of B Lab with the purpose of replicating their business model in Latin America. Beginning in 2012, the B Corp certification system began operating in the country through an initiative called “B System” (B Sistema in Spanish), a private law corporation that has an international franchise granted by B Lab, following the trend that was beginning to materialize in the United States at that time in legal frameworks for the operation of this class of companies.⁵ For the new business model, the name *empresa B* (in Spanish, meaning B company) was adopted. That year, TriCiclos was certified, the first certified Chilean B Corp. TriCiclos is a Chilean company that seeks to reduce the problem of waste before it is generated or to ensure that it has the most circular destination possible (through its reuse, return, and recycling).⁶

The growth in the number of companies was gradual and sustained. For example, by September 2014, there were already 53 certified B Corps in the country,⁷ with a turnover in excess of US\$100,000,000.⁸ A year later, BancoEstado Microempresas (State Bank Micro-Enterprises), one of the subsidiaries of Banco del Estado de Chile

³Maya Fernández Allende was a Congresswoman for two periods, presiding over the Chamber of Deputies or Congress between 2018 and 2019. On March 11, 2022, she concluded her second four-year term as a Congresswoman. That day she assumed the position of Defense Minister of the Government of President Gabriel Boric. Felipe Kast Sommerhoff was a Congressman in the 2014–2018 period. On March 11, 2018, he took office as a Senator, a position he currently holds.

⁴Caballero (2021), p. 9.

⁵The first law passed in the United States for B-Corp was enacted in the state of Maryland in 2010 (Senate Bill 690, February 3, 2010).

⁶<https://triciclos.net/> [date accessed: March 15, 2022].

⁷Alcalde Silva (2014), p. 43.

⁸El Mercurio, Economía y Negocios (Economy and Business), May 5, (2014).

(Chilean State Bank), was certified, and the Spanish translation of Ryan Honeyman's book on B Corps was published.⁹ At that time, the Ministry's Associativity Division considered certified B Corps, as well as fair trade-related ventures, to be social enterprises.¹⁰ In January 2021, Viña Concha y Toro obtained its certification, becoming the first listed public limited company to obtain a certified B Corp status in Chile.¹¹ During that year, 48 new companies were added, including the first "unicorn," Betterfly.¹² As of February 2022, there are 810 certified companies in Latin America, 210 of which are Chilean.¹³ The reasons for this boom experienced by certified B Corps are found in the economic and social reality of the continent itself, which demands solutions that are not (or not timely) provided by the respective states.¹⁴

However, in February 2022, 54% of a sample taken from among people linked to entrepreneurship and innovation still believes that the triple impact model implemented by these companies has not permeated into the country's business field.¹⁵ For the supporters of the movement, the challenge continues to be the legal recognition of the business model.

3 The Ministerial Draft Bill of 2013

In 2012, the Ministry of Economy, Development, and Tourism convened two panels to discuss initiatives (contained in the program of the first government of President Sebastián Piñera (2010–2014)) that would make the promise of achieving the economic development of the country by 2018 a reality, launching a sustained and sustainable growth plan to achieve this goal.

The first of these was devoted to drafting a document aimed at proposing a national policy on social responsibility for the sustainable development of the country. The second panel sought to generate a space for discussion on new business models for companies in the fourth sector, evaluating the suitability and justification of legislation that recognized them and gave them legal certainty to operate. Based on the existing legal framework, the participants agreed on the need to give visibility to two types of entities: worker cooperatives (Articles 60 to 64 of the General Law on Cooperatives) and functional community organizations (Law 19.418).¹⁶

⁹Honeyman (2015).

¹⁰DAES (2015), p. 17.

¹¹Viña Concha y Toro is the principal winemaker of Latin America. Source: <https://vinacyt.com/content/uploads/2021/05/press-release-1t21-espanol.pdf> [date accessed: March 15, 2022].

¹²<https://gobetterfly.com/> [date accessed: March 15, 2022].

¹³Source: <https://www.sistemab.org/directorio-b/> [date accessed: February 24, 2022].

¹⁴Caravedo (2016), p. 96.

¹⁵El Mercurio, Innovation Supplement N° 147 (Special purpose-driven companies), February 24, 2022, p. 3.

¹⁶See Gatica et al. (2013).

The work of the second panel concluded with the writing of a draft bill that recognized and regulated companies belonging to the fourth sector, which was presented to the Ministry of Economy, Development, and Tourism on April 30, 2013, with the support of Sistema B (B System) and the Association of Social Enterprises.¹⁷ Unfortunately, this text, coinciding with the electoral situation of the country at that moment, did not receive political support from the government and was not presented to Congress.¹⁸ Its existence was little known, and its text was only circulated informally among groups of people related to social entrepreneurship.¹⁹

The bill recognized civil and commercial companies that voluntarily complied with its requirements as fourth-sector companies (Article 1). It did not contemplate a new corporate business model but rather allowed existing ones to benefit from the law voluntarily through a reform of their statutes and the observance of certain practices in the future (Article 2). In any case, the bill offered a broad definition of a company from the fourth sector since it referred to a dynamic concept that must have room to evolve. Therefore, the companies that had this characteristic were as follows:

those legal entities, whose corporate purpose includes generating a positive material impact on society and the environment, their managers not being able to adopt policies or decisions that contravene that purpose, and reporting social and environmental performance using the standard of an independent third party (Article 3).

The bill immediately defined when a company is considered to generate a positive social or environmental impact:

[when it] develops its business complying with sustainability standards in all [sic] dimensions, from its labor, environmental policies, with its suppliers, communities, or other different stakeholders that the company defines (Article 3).

For companies to be recognized as belonging to the fourth sector, they had to incorporate in their statutes the mentions established by law and be registered on the public registry of the Undersecretariat of the Economy and Smaller Companies of Chile, after verifying that the statutes had included such elements required by law (Article 4). If the company was a public limited or joint-stock company, the modification to become a fourth sector company had to be adopted by a two-thirds vote of the shareholders with voting rights (Article 5).²⁰ In the case of a public

¹⁷The Explanatory Statement of the 2017 bill makes the names, “B Company,” and “fourth sector company,” synonymous. Cfr. Comisión de Economía (Economics Commission) (2018), p. 42.

¹⁸On April 29, 2013, Pablo Longueira Montes resigned from the post of Minister of Economy, Development, and Tourism that he had held since July 18, 2011, to become the presidential candidate for the Unión Demócrata Independiente (Independent Democratic Union) party. On May 7 that year, he was replaced in office by Félix de Vicente Mingo, who served until the end of the first government of President Sebastián Pinera (March 11, 2014), without being able to present to Congress the bill that regulated fourth-sector companies.

¹⁹Caballero (2021), p. 10, does not even mention it: he only refers to the Ministerial Bill of 2015, and the two bills presented by Congresswoman Fernández and Congressman Kast in 2015 and 2017, respectively.

²⁰Hence, for other companies, the modification had to have the unanimous agreement of the partners.

limited company, any shareholder who would not have consented to the statutory change of the company to a fourth sector company had the right to withdraw under the terms of Article 69 of Law 18.046 on Public Limited Companies (Article 7).

To give credibility to the system and the market, the bill required fourth-sector companies to prepare an annual report, where they notify the fulfillment of their social or environmental purpose. This had to be audited by an independent third party and subsequently published on both the public registry created for them and the company's website (Article 6). These high transparency standards were intended for the market to judge and draw its conclusions regarding the impacts that this class of companies generated compared with other economic agents.

The bill included a concept that remained in subsequent bills:

directors or administrators cannot adopt decisions and policies that do not have, as their basis, the organizational purposes defined in accordance to this law, including therein, the social or environmental impact, with the company itself, its partners or administrators being able to claim judicially the observance of this duty (Article 8).

The loss of recognition would arise from different causes:

(i) by the will of the partners, shareholders, or of the constituent assembly, which should materialize through the reform of statutes following the quorums required by law; (ii) when the company did not present the audited reports to the registry, or if the audit found, as a result, that the company was not fulfilling its social or environmental purpose; (iii) when there is a court decision that the company was in breach of its obligations (Article 10).

Whatever was the reason for the loss of the fourth sector company status, this circumstance had to be noted in the margin of the corporate registration, without this entailing a dissolution of the legal entity (Article 10).²¹

Company obligations, arising from commitments taken on to generate positive social and environmental impacts, could only be enforced by the company itself or any of its shareholders, partners, or administrators but not by unrelated third parties (Article 9). This is because the stakeholders do not assume reciprocal obligations as a counterpart to those assumed by the company; thus, only the latter, its partners, and administrators have sufficient legitimacy to claim noncompliance with the commitments that have as a cause the statutorily indicated generation of social or environmental impact.²² In this way, the minimum protection for these third parties, and in general for the market, was the fact that the company would lose its status if the audit detected that the said purpose was not being fulfilled in practice (Article 10).

²¹ On February 8, 2013, Law 20.659 was published, simplifying the commercial company constitution, modification, and dissolution system through the creation of a registration system via an electronic form, and its immediate incorporation in the Companies Registry set up by the Ministry of Economy, Development, and Tourism (<https://www.registrodeempresasysociedades.cl/>). Until then, the formalization of a company with legal representation had to be done by registering it in the respective Trade Registry. Since 2013, the two systems have coexisted, with a clear preponderance in favor of the simplified system.

²² This was the reason offered in the Explanatory Statement of the Bill.

In addition to legal recognition, the first Chilean bill brought with it an important tax benefit for fourth-sector companies:

the expenses and costs, including audits, that the company had to incur to meet the objectives and obligations taken on under the law, were considered necessary to produce income and deductibles from its taxable base for income tax purposes (Article 11).

4 The Ministerial Draft Bill of 2015

In a more general and open way than what happened with the panels held in 2012, the “Agenda for productivity, innovation, and growth,” presented on May 16, 2014, by President Michelle Bachelet for her four years of government (2014–2018), included the promise to send a bill to Congress to create a legal framework for social enterprises, establishing their rights and obligations and giving them the certainty they require to operate, including their formal unified registration (through number 42).²³ Immediately, the Ministry of Economy, Development, and Tourism began to work to make that commitment a reality and, in March 2015, made public the draft bill to regulate social enterprises, which was socialized and submitted to the consultation of B System and the advisory public-private associativity (Consejo consultivo público-privado de asociatividad y economía social) and social economy council.²⁴ However, as had happened with the previous government initiative, this bill was not officially published.²⁵

Moreover, this proposal also lacked the political and budgetary support needed to begin its parliamentary process. The internal changes in the composition of the Ministry of Economy, Development, and Tourism after the resignation of Katia Trusich Ortiz from the post of Undersecretary of the Economy and Smaller Companies on January 4, 2016, as well as observations by the Ministry of Finance on the tax aspects involved, led to the draft bill being eventually forgotten and the government finally supporting the second motion of Congresswoman Fernández and Congressman Kast, which will be explained later.²⁶ It is this initiative that has attracted parliamentary discussions.

This second ministerial bill intended to regulate both the growing social economy sector and the so-called social enterprises.²⁷ The bill thus assumed that both terms, although related to each other, admit a certain differentiation. In this sense, social economy denotes the macroeconomic dimension of the phenomenon because it offers an overall look at the solidarity system using the collective or global

²³The government program of the *Nueva Mayoría* (New Majority) referred only to cooperatives, with no specific mention of social enterprises. Cfr. Bachelet (2013), pp. 61, 64, and 81.

²⁴This bill was analyzed in Alcalde Silva (2016a), pp. 368–371.

²⁵For example, Caballero (2021), p. 10, points out that he only knows about this from the references made by Alcalde Silva (2016a, 2018).

²⁶See *infra*, Sect. 6.1.

²⁷The terms do not exactly match and have differences. See Monzón and Chávez (2020), pp. 21–42.

magnitudes to describe it and observing the impact their principles and values have. This includes the primacy of persons and social purpose over capital; the application of the results of economic activity, which takes into consideration the work provided, along with the service or activity carried out by the partners; the promotion of internal solidarity and solidarity with society; and the independence of public authorities.²⁸

This reality required a coherent public institution. Therefore, Title IV of the bill foresaw two separate institutions as a materialization of positive subsidiarity that corresponds by nature to the state, also called “duty of interference,” one dedicated to supervision (the Department of Supervision, Registration, and Control of Social Enterprises) and the other to the promotion of this sector of the economy (the Division for the Promotion of Associativity and Social Economy).²⁹

In turn, the definition of social enterprises as a legal status itself required discriminating the genre (of companies) and the specific difference behind the proposed regulatory system (what is known as social, compared with others that are purely focused on seeking profit to be shared among the partners). Thus, the view was microeconomic because it paid attention to specific agents, which under the company’s organization operate in the market within the social economy category.³⁰

Within this context, the ministerial proposal defined social enterprises as “those associative-based legal representations engaged in an economic activity, whose purpose includes, in addition to their line of business, creating [sic] a positive material impact on society or the environment, either based on its own legal type or by the decision of its members and what is laid out in the statutes” (Article 3, point (g)).

Because of their legal type, the status of social enterprises corresponded to cooperatives and trade associations (Article 4).³¹ Meanwhile, purpose-driven companies also had this condition to the extent that they modified their statutes to incorporate a social or environmental benefit and underwent certification by an authorized agency (Article 5). Concerning the latter, the 2015 bill was based on

²⁸The concept of “social economy” and “social enterprise” has been discussed in Alcalde Silva (2014), pp. 173–179, and Alcalde Silva (2018), pp. 383–384, respectively.

²⁹This Division for the Promotion of Associativity and Social Economy only partially replaced the one created on a functional basis through Exempt Resolution No. 1774, of August 4, 2014, of the Undersecretariat of the Economy and Smaller Enterprises, since in the existing one (called Associativity Division) the supervision and promotion of cooperatives and trade associations converge.

³⁰Alcalde Silva (2016a), p. 359.

³¹Cooperatives are defined as “associations that, following the principle of mutual aid, aim to improve the living conditions of their members” (Article 1 of the General Law on Cooperatives). Trade associations are “organizations established in accordance to this law, with natural or legal people, or both, with the purpose of promoting the rationalization, development, and protection of common activities, considering their profession, trade or branch of production or of the services, and of those related to such common activities” (Article 1 of Decree in Law 2757/1979, which establishes rules on trade associations). Caballero (2021), p. 13, denies that cooperatives are purpose-driven companies by virtue of their legal type, since “the positive impact on the environment is not the end purpose or feature of a cooperative.” The author does not comment on trade associations.

the regulation made by the one from 2013 (Articles 7 to 14), which introduced the appropriate improvements.³²

The status of social enterprise brought with it a series of benefits, which were developed in Title III of the bill. From an operational viewpoint, benefits related to expenses and costs, including expenses from audits that the company had to make to meet the goals and obligations for its classification, were considered necessary to produce the income and, thus, were deductible from the taxable income for income tax purposes. The same applies to benefits that have a social or environmental purpose (Article 26). Although the Internal Revenue Service criterion is restrictive and specifies that only essential or unavoidable expenses for income generation should be considered necessary expenses to reduce taxable income,³³ the situation would change as a result of Law 21.210 of February 24, 2020, which expanded the definition of “necessary expense to produce income.”³⁴ The new wording of Article 31 of the Income Tax Law (contained in Article 1 of Decree in Law 824/1975) indicates that necessary expenses are understood as “those that can generate income, in the same or future years, and that are associated with the interest, development or upkeep of the business.”

Likewise, the social enterprise classification allowed benefiting from state technical support (Article 22), operating in protected wildlife areas (Article 25), and having preference in public procurement or tender processes when facing technical ties (Articles 23 and 24).

In any case, the most important benefit was the opportunity to apply for a development fund foreseen in the bill, which focused on providing the resources needed for business and organizational management training for social enterprises that were either newly created or in the incorporation or classification process, as well as disseminating and promoting this form of entrepreneurship (Article 17). The administration of this fund was entrusted to the Division for the Promotion of Associativity and Social Economy (Article 19).

However, the draft bill had a formulation issue, arising from the breadth of the spectrum it looked to cover, and perhaps it was that ambition (following the political commitment behind it) that harmed its viability. Since it sought to encompass different classes of social enterprises, either by legal type or by registration, the standards imposed to delineate this category were not suitable for all companies, especially those that referred to gender equity, democratic participation in decisions, and the distribution of profits, as occurs in benefit and collective interest companies. Something similar can be said of the administrative reorganization of departments related to the social economy, which gave the false idea of a greater increase in public spending on bureaucracy when in reality it sought to separate different

³²For example, the creation of the reserve fund was envisaged, where 7% of the company’s profits should be allocated every year to ensure the fulfillment of the collective benefit that it was pursuing over time (Article 13).

³³Servicio de Impuestos Internos, Oficio Ordinario No. 88, April 26, 2017.

³⁴Caballero (2021), p. 14.

realities (the promotion of social enterprises on the one hand and their control on the other hand) and encourage administrative decentralization using the same existing resources.

5 Parliamentary Bill of 2015

On November 6, 2015, then Congressman Felipe Kast and Congresswoman Maya Fernández introduced a motion aimed at regulating social enterprises, using the name Bulletin No. 10.321-13.³⁵ This bill was the first effort to regulate this type of entrepreneurship, until then (and still today) only accredited by a private agency (B System) and without greater recognition than that given by the press and the market. However, the proposed legal text was brief and not well handled from a dogmatic and stylistic viewpoint.³⁶ Nevertheless, the initiative did not progress beyond its presentation on the floor, before moving to be studied by the Congress' Committee on Economy; Development; Micro, Small, and Medium Enterprises; Consumer Protection; and Tourism.³⁷

The 2015 motion has at its heart the legal recognition of certified B Corps.³⁸ It contained only three articles. Article 1 said that social enterprise was a particularization of for-profit persons who, as part of their corporate purpose, included the generation of a positive social or environmental impact and registered themselves in a special public registry. Article 2 imposed on directors and managers the duty to ensure the fulfillment of social goals rather than maximizing profits. Also, Article 2 recognized a civil action for members to demand the fulfillment of these goals more than compensating for the damages caused. Lastly, Article 3 harked back to the regulations that the Ministry of Economy, Development, and Tourism should rule upon for the implementation of the law.

6 Parliamentary Bill of 2017

The bill, currently under discussion in Congress, was presented in 2017 by Congresswoman Maya Fernández and Congressman Felipe Kast. With regard to this project, it is possible to distinguish three different moments: the original bill, the

³⁵Previously, both members of congress had published a column calling for “transversal work to define an agenda that allows strengthening the pillars of a more collaborative economy and with a focus on the positive change it can generate to society.” See Fernández and Kast (2014).

³⁶The content of this bill was analyzed in Alcalde Silva (2016a), pp. 361–368.

³⁷The project was presented in the 77th Session of the 363rd Legislature of the Congress, held on Wednesday, October 7, 2015.

³⁸Caballero (2021), p. 10.

amendments presented by President Michelle Bachelet, and the following orientation assigned to the matter by President Sebastián Piñera, who also attached extreme urgency to the bill for its discussion.

6.1 Original Bill of Congresswoman Fernández and Congressman Kast (2017)

On June 13, 2017, Congresswoman Maya Fernández and Congressman Felipe Kast presented a new bill (Bulletin No. 11273-03) aimed to regulate benefit and collective interest companies (*empresas de beneficio e interés colectivo*), to give them credibility and legal certainty before society and investors.³⁹

This parliamentary motion seems to have a much greater depth than the other more or less contemporary Latin American bills because its objective is the creation and operation of benefit and collective interest companies (Article 1). The bill recognizes that there are economic agents whose genesis and mission are based on providing a social purpose, which requires mechanisms so that the mission and impact are maintained over time.

The bill has some signs that allow thinking that this is a new business model defined in a way similar to public limited companies (Article 3),⁴⁰ which explains why its text concludes with a modification (described as an “imperfect faction”⁴¹) to the duty of directors to propose amendments to the statutes that are contrary to the corporate interest contained in Article 42, No. 1, of Law 18.046 on Public Limited Companies (Article 12).⁴² This is why Article 4 indicated that the status of a benefit

³⁹The name partially follows the standardized nomenclature adopted for the continent and avoids the equivocation that followed the denomination of “social purpose company” used in the 2015 Ministerial bill (Articles 2 and 5), which resembles a business model typical to financing processes, such as special purpose entities. These represent a sophisticated financial structure that is separate from the balance sheet of a company, whose purpose is to provide an efficient way to raise money in the debt markets. See Hernando (2017) for details.

⁴⁰The reason may lie in the feature of certified B Corps that Embid and del Val (2016), p. 73, highlight: “This particular social form harks back to the foundation, as a legal entity, regarding the willingness of its activity to perform a purpose of general interest; but it is totally separated from this regarding its configuring elements (organic structure, personal and non-patrimonial basis, among others), which unequivocally reveal its corporate nature.” For the rest, and as the same authors explain, the public limited company is the preferred home of corporate social responsibility (Embid and del Val 2016, pp. 95–98).

⁴¹Caballero (2021), p. 28.

⁴²From a legislative technical viewpoint, the proposed modification is strange. If successful, it means that Article 42, No. 1 of Law 18,046 on joint-stock companies would be worded as follows: “Directors may not [...] propose amendments to statutes or issues of transferable securities or adopt policies or decisions that are not aimed at the social interest; or are Benefit or Collective Interest Companies.” The semicolon fulfills the role of dividing the duties of the directors listed by law, as the closure of each of the list’s elements, so that the proposed form of inclusion renders the phrase meaningless. Strictly speaking, and following a criterion of context and harmony, it is reasonable to

and collective interest company is acquired through its incorporation based on the provisions of the proposed law or through a reform of its statutes and compliance with other formalities provided for in the bill.

This status is somewhat blurred, since the bill itself explains that there is a certain degree of supplemental applicability, as benefit and collective interest companies are governed by their special law and, in turn, are subject to those that regulate their respective company type, which can never take precedence over their own law (Article 2).⁴³ This primacy may entail some hermeneutical difficulties, such as that arising from the content of the statute following Article 5, with the consequence of nullity in corporate matters. There it is established that the statutes of benefit and collective interest companies must contain four mentions, three of which relate to their specificity (the other refers to the name and address of the company).⁴⁴ This considers the following references: (i) the listing of the goals, commitments, objectives, obligations, and principles to achieve the positive impact or the reduction of any negative effect on the community and the environment; (ii) the obligation for those in the company, who in the exercise of their roles, shall ensure the fulfillment of these objectives; and (iii) how a report is given to the rest of the members of society about the monitoring and evaluation of the impact of the company. It seems absurd to think that this content displaces all the other clauses that the laws regarding corporate types usually require, but the matter may well be raised by how the supplemental application is laid out, and the way it operates as a technical regulatory integration file.⁴⁵

This leads to a bigger conceptual problem due to the way Article 3 defines benefit and collective interest companies. According to that definition, a benefit and collective interest company is

a legal entity formed by a common fund, provided by its partners, who are responsible solely for their respective contributions [...] which includes in its corporate purpose [...] the

understand that the restriction from being a benefit and collective interest company is on the same plane as those practices described there that deviate from the social interest, which is redundant since the said benefit is part of the purpose the company develops (article 30 of Law 18.046 on Public Limited Companies). The delegation of President Michelle Bachelet requested the elimination of Article 12 of the original motion, and the same was subsequently done by Congressman Felipe Kast, which was approved during the first study of the project by the Congress' Economy Committee.

⁴³The presentation that precedes the bill specifies that the area proposed for benefit and collective interest companies "is applicable to any type of company that complies with the obligations and requirements established by law." This means that "any corporate entity currently in force can choose to adhere to these regulations, or [sic] be incorporated in accordance with the provisions of this law."

⁴⁴Strictly speaking, and in accordance with Article 1 of Law 19.499, on the remediation of nullity defects of companies, the omission of these mentions should be considered as a formal defect susceptible to remediation.

⁴⁵Vergara (2018), p. 65.

positive impact, or the reduction of any negative effect on the community or the environment.⁴⁶

The concept is broader than the one in other Latin American bills of that time and in the Colombian law passed in 2018, and apparently it comes from Italian law.⁴⁷ The idea of common benefit refers to the pursuit sought by the company, in the exercise of its economic activity, of one or more positive effects, or the reduction of negative effects, related to people, communities, territories, and the environment, cultural goods and activities, organizations, and other stakeholders with whom it has committed (Article 378, letter a) of Law 208/2015).

The original version of the bill left unsolved several questions. For example, whether it is possible for a benefit and collective interest company to be a single person company, as it seems that having a common fund that supports it is enough,⁴⁸ or whether it includes corporate types that do not contemplate limitation of liability as a structural factor or branches that act in the country on behalf of foreign companies that have recognized the status in the country of their registered office.⁴⁹ Ultimately, the fundamental question is whether one can strictly speak of a corporate type of its own or is it just an alteration of a basic corporate form, particularized by the inclusion of a benefit and collective interest as part of the corporate purpose.⁵⁰

In any case, this non-economic benefit becomes an element of the social contract itself as part of the purpose and therefore, is one of the elements that must be considered when configuring the social interest.⁵¹ The difficulty in this matter comes from the jurisprudential line that has been consolidated from the incidental reference that is made in the judgment of the Supreme Court of July 7, 2015, ruling upon the framework of the ENERSIS group takeover (the so-called “Chispas

⁴⁶ Article 1 of Law 18.046 defines a public limited company as “a legal entity formed by a common fund, provided by shareholders responsible solely for their respective contributions, and managed by a board of directors comprising essentially revocable members.”

⁴⁷ When the Chilean bill began its discussion, no law on benefit and collective interest companies had been passed in Latin America. The first of these was the Colombian law (2018), followed by Ecuador (2020), Peru (2021), and Uruguay (2021). The first three have been analyzed in Alcalde Silva (2021b).

⁴⁸ The presidential amendment solves the problem and points out that companies that can adhere to these companies are those that have at least two partners. This means that individual limited liability companies and sole proprietorships are excluded (new Article 2). Hence, once this associative basis disappears, the company loses its status as a benefit and collective interest company (new Article 16, letter d)).

⁴⁹ The point is rather theoretical, since Embid (2013), pp. 69–70, recalls the reduced prominence that partnerships have today.

⁵⁰ Caballero (2021), p. 34, leans toward the second possibility.

⁵¹ Embid and del Val (2016), p. 73. For Chilean law, the issue has been addressed, among others, by Alcalde Rodríguez (2007), pp. 29–60, Alcalde Rodríguez (2013), pp. 54–62, and Vásquez (2014), pp. 137–141. It is also advisable to read McCall (2015), which is summarized in Alcalde Silva (2016b), where an approach to the corporate governance of the public limited company from public law is proposed, and the systematization offered by Embid and del Val (2016), pp. 50–72, and Hernando (2020), regarding new comparative orientations about social interest.

case”),⁵² which was the first corporate governance case in Chile.⁵³ However, the allusion to a contractual concept of social interest is not part of the reasoning of the Supreme Court, but rather includes the statement made by that court regarding arguments of people who handled the controlling companies of the group.⁵⁴

Ten years later, the situation changed, and the Supreme Court adopted a definition of social interest, which has been followed in subsequent cases.⁵⁵ From the judgment of December 3, 2015,⁵⁶ the said court defined social interest “as that which is common to all shareholders and different from the particular interest of each of them, and which is related to the purpose and cause of the company.” The said cause concerns “obtaining a monetary benefit and distributing it among the partners.” Hence, it corresponds to “the common interest of the current shareholders of a company in an objective and abstract sense,” which turns out to be a kind of “lowest common denominator of all shareholders from the incorporation of the company to its liquidation, without considering any external element.” All in all, this is a hypothetical interest because the reasons shareholders participate in a given company are diverse. The only purpose in common among them is the desire to obtain the greatest individual economic benefit possible: the social interest is thus the distributable profit that is taken from the line of business.

There are two main arguments to justify this contractual reading of the social interest. On the one hand are the concepts of company and contribution provided for in the Civil Code, and on the other hand is the rule of Article 30 of Law 18.046.⁵⁷ Since the company is formed by the partners “to share among themselves the benefits arising from it” (Article 2053 of the Civil Code), this means that the distribution of profits is essential as a justification of the corporate structure. This is endorsed by Article 2055 of the Civil Code, which states that there is no company without profit sharing, and that it cannot be purely moral and nonappreciable in monetary terms. Meanwhile, Article 30 of Law 18.046 on Public Limited Companies states that “shareholders must exercise their social rights, respecting those of the company and those of other shareholders,” based on which it can be concluded that both interests are intertwined. However, none of these arguments is conclusive to rule out an institutional view of the corporate phenomenon.⁵⁸

⁵²Supreme Court (Chile) ruling of July 7, 2005, Docket N° 4261-2005, Westlaw CL/JUR/6134/2005.

⁵³Alcalde Rodríguez (2013, pp. 439–459).

⁵⁴Caballero (2021), p. 22.

⁵⁵Supreme Court (Chile) rulings of July 30, 2020, Docket N° 29.503-2019, Westlaw CL/JUR/164181/2020; Supreme Court (Chile) ruling of March 24, 2021, Docket N° 12.574-2020, Westlaw CL/JUR/46366/2021, and Supreme Court (Chile) ruling of April 16, 2021, Docket N° 76.400-2020.

⁵⁶Supreme Court (Chile) ruling of September 3, 2015, Docket N° 3389-2015.

⁵⁷The judgment cites Zegers and Arteaga (2004) in support of its reasoning. Caballero (2021), p. 20, points out that “the [Chilean] doctrine has been interested in filling that gap [around the concept of social interest], considering - overwhelmingly - that in the Chilean legal system, social interest must be understood from a contractual perspective.” However, that view has begun to change in recent years. See Manterola and Díaz (2020), and Baquero (2021).

⁵⁸Alcalde Silva (2022).

The 2017 bill also provides that “any stipulation of the corporate statutes and any agreement of the management body aimed at limiting or freeing from the obligation to respect, protect, and consider the interests of the company and seeking the fulfillment of the social or environmental purpose that it pursues” lacks nullity outside the joint and several liabilities that fall upon the members of the management body (Article 8).⁵⁹ Although this mention was present in all the previous bills, it is explained by the configuration of American Company Law, which is seen as an incontrovertible reference standard, where the understanding of fiduciary duties has been made from the maximization of the personal profit of shareholders,⁶⁰ with the resulting derived economic problem.⁶¹ However, this understanding is not fully comparable to Chilean law, especially when problems of agency, to use Anglo-Saxon terminology, end up being resolved at the administrative headquarters and not through actions relating to directors’ liability exercised by the interested shareholders.⁶² This is also not consistent with the elements that define the company from a structural perspective.

The contribution of any member to the company is an element to carry out the activity collectively. This indissoluble functional linkage makes it possible to explain both the purpose and the cause of the agreement. The company exists to develop the line of business that the partners establish as a business project in the statutes. This economic activity is carried out to produce profits for distribution. Hence, profit is an issue that is related to the typicality of this form of business (Article 547 of the Civil Code), although the point also admits discussion. The distribution of profits is a historical remnant of the exceptionality of a partnership agreement in the face of the prohibition of usury since the distributable profit obtained with the joint activity of the partners was considered legitimate.⁶³

However, so that the business to be consolidated, the partners must commit to providing the goods or services that the chosen legal form allows. This is the subject of the partnership agreement (Article 1460 of the Civil Code). For this reason, Manuel Pino and Juan Ignacio Font explain that “profit and social purpose are part of the causal program of the company agreement, both legally and economically.”⁶⁴ The requirement made by General Standard No. 461, of November 12, 2021, of the

⁵⁹The reference to the responsibility of the management body disappears in the amendments of President Michelle Bachelet, where—only the nullity of any stipulation of the statute or any agreement of the management body that tends to limit the obligations it has regarding the collective interest pursued by the company—is preserved (new Article 7).

⁶⁰Balouziyeh (2012), pp. 25–40. For the rest, and as evidenced by Embid and del Val (2016), pp. 60–64, one thing is the configuration of managers’ fiduciary duties from *other constituency statutes* (also known as *non-shareholder* or *takeover statutes*) proper to American practice, and quite another, the reconfiguration of the company (including social interest) thanks to the addition of a collective benefit as part of its purpose.

⁶¹Reyes (2012), pp. 65–71.

⁶²See the reasons in Núñez and Pardow (2010).

⁶³Segovia (2021), p. 88.

⁶⁴Pino and Font (2001), p. 76.

Financial Market Commission on the duty to make the mission, vision, purpose, and values of listed companies explicit, points in the same direction: it wants to outline, beyond the description of a specific economic activity, the business project that is carried out. The objective is to describe and make public the reason behind the company, answering the fundamental questions about its existence (what, why, how, and where), before the market.⁶⁵

The concept of profit has many consequences in corporate law. For example, it allows asking whether it is possible to control, through an illegal case file, the decision to constitute guarantees in favor of third parties since these may be gratuitous acts that exclusively benefit the debtor (Article 1440 of the Civil Code). Law 18.046 on Public Limited Companies indeed allows taking on exogenous guarantees, thus distinguishing the corporate body, which must give its approval, depending on whether the beneficiary is a subsidiary or a third party (Article 57), with a different quorum in each case (Article 67). However, this does not mean that the act may not be susceptible to a causal control particularly outside of the assumption, which is exclusive, that the constitution of this guarantee may be revoked in the context of bankruptcy (Article 287 of the Act 20.720 on the reorganization and liquidation of businesses and personal assets). Strictly speaking, this type of act does not necessarily constitute a transaction between related parties (Article 146 of Law 18.046 on Public Limited Companies), because the guarantee is constituted between the company and the creditor. However, the requirement that a publicly held company may only be able to carry on operations with related parties when they have to contribute to the social interest and adjust the price, terms, and conditions to those prevailing in the market at the time of their approval (Article 147 of Law 18.046 on Public Limited Companies), seems to be an explanation of the meaning, purpose, and cause that the corporate agreement has during its life, as a projection of the business project developed.

Another relevant issue is the use of the term “enterprise” and not “company” by the bill to define the business model. This is now being analyzed, which further aggravates the terminological issue due to the vagueness of a concept defined only by labor legislation,⁶⁶ which has been discussed at length by commercial doctrine.⁶⁷ The idea of an enterprise refers to the notion of an economic nature adopted by law to designate an organization of personal and material means aimed at the production of

⁶⁵ Alcalde Silva (2021a).

⁶⁶ Article 3 of the Labor Code states that for the labor and social security law “an enterprise is understood to be any organization of personal, material and intangible means, organized under the direction of an employer, to achieve the economic, social, cultural, or charitable purposes, endowed with a certain legal individuality.” Decree in Law 1006/1975, which contained the Corporate Statutes of the enterprise, defined it as “the entity devoted to the production, trade, or distribution of goods or provision of services that under a single management unit has an economic and social aim and is organized with the support of workers and investors” (Article 7), and may adopt the legal structures deemed most appropriate to its activities and purposes (Article 2).

⁶⁷ See, for example, Sandoval (2015), pp. 124–127. The issue has been discussed extensively in Carvajal (2015, 2017a, b).

goods or the provision of services.⁶⁸ This implies that it is not necessarily limited to a certain legal form (e.g., of the individual trading entrepreneur), or even to the need for the chosen economic activity to be performed for profit.⁶⁹ Hence, from this, a foundation can perform exchange activities (Article 557-2 of the Civil Code), even though its patrimonial base does not depend on those who participate in it, or its purpose is not for profit.⁷⁰ The dichotomy formulated in the second paragraph of Article 11—between company and association as possibly being benefit and collective interest enterprises—is an issue that is not completely resolved by the bill, at least as far as associative-based organizations are concerned.⁷¹

Nevertheless, the most discussed issue of the bill presented by the motion of Congresswoman Fernández and Congressman Kast is related to the loss of the status of “collective benefit and interest enterprise” through a well-founded resolution of the Undersecretariat of Economy, Development, and Tourism, when it has not complied with the obligations and requirements established by the bill (Article 10, letter b)).⁷² The first question that arises regarding this cause behind the loss of the status of a benefit and collective interest enterprise is whether the said state agency can make a prudent judgment in applying such a drastic sanction of depriving an attribute beloved by the partners to characterize the enterprise, especially since not all obligations have the same importance.

The collective benefit and interest companies must comply with the following obligations: (i) their statutes have to conform with the information expressly required by law (Article 5); (ii) they must have their statutes permanently available to the public and allow open access to their content (Article 6); (iii) statutory changes that affect their benefit and collective interest company status must be informed to the partners and be public access information; (iv) there are certain special duties of respect, protection, and consideration for company administrators regarding the social or environmental benefit that the company seeks to fulfill (Article 8°); and (v) the latter is required to submit a sustainability report each year to give an account of the means and efforts that have been deployed to accomplish its social and environmental objectives (Article 9).

There is no clarity on the way these obligations are fulfilled and even less on their grading. For example, it is not specified how certain information relating to the company should be made public, especially if it is considered that both the Trade Registry and the Enterprises and Companies Registry are public and open for consultation (Articles 39 of the Regulations of the Trade Registry, and 7 and 11 of

⁶⁸ Muñoz (2017), p. 908.

⁶⁹ See Arteaga (2002).

⁷⁰ This has been discussed in Alcalde Silva (2015).

⁷¹ Thanks to the reform introduced in Title XXXIII of Book I of the Civil Code by Law 20.500, published on February 16, 2011, the term association is synonymous with corporation and designates “a meeting of people around objectives of common interest to associates” (Article 545, third paragraph of the Civil Code).

⁷² The other cause for the loss of the status of a benefit and collective interest company is “by voluntary decision of its members through the amendment of its statutes [. . .]” (Article 10, letter a)).

Law 20.659, which simplifies the system for the incorporation, modification, and dissolution of commercial companies) and that notaries, land registrars, and the Ministry of Economy, Development, and Tourism have among their roles to facilitate review by any stakeholder (Articles 401, No. 9 and 455 No. 3 of the Organic Code of Courts and 11 of Law 20.659, which simplifies the system for the incorporation, modification, and dissolution of commercial companies).

The annual sustainability report needs to be submitted to the Ministry of Economy, Development, and Tourism, which also could not demand this without prior modification of its organic law to understand the control of this class of companies, as is the case with cooperatives (Article 108 of the General Law of Cooperatives) and professional associations (Article 21 of Decree in Law 2757/1979), especially taking into account that the general rule is precisely the opposite. That is, only certain corporate forms are subject to public auditing, and these are those whose activities are crucially important for the country's economy (Article 126 of Law 18.046 on corporations). In fact, the existence of a specific inspection for benefit and collective interest companies has been criticized because it would constitute an important entry barrier for smaller companies (micro, small, and medium enterprises), being advisable to resort to existing control mechanisms.⁷³ As an example, the obligation to publish the report is satisfied if it is available on the company's website or in some means of public or free access (Article 9).

The annual report does not support scrutiny beyond public opinion, and there is no way to check how reliable are the assertions made by the company regarding their sustainability policies, many of which are impossible to quantify through unfamiliar judgment. This is demonstrated by the complexity surrounding the inclusion of the sustainability criteria in the annual report, as required by the Standard General N° 461/2021 of the Commission for the Financial Market. The problem is that the parameters where compliance with these practices should be reviewed are only indicated generically in Article 9 of the 2017 bill, without further clarification on how sustainability policies and the statements of commitment to the community that the company makes should be measured.⁷⁴ In part, this omission is solved by the presidential amendment of President Michelle Bachelet, which refers to a regulation that will contain "the characteristics which entities that will perform the external audits must contemplate and the minimum content of the report that said entities must issue [. . .]" (new Article 11, fourth paragraph). To this end, the preparation of the regulations must make differences between the sizes of companies subject to audit (new Article 11, fourth paragraph), following the principle of graduality of Law 20,416, which establishes special rules for smaller companies.

⁷³ Caballero (2021), p. 31.

⁷⁴ With the appropriate adaptations, a reference index could be General Standard N° 461, of November 21, 2021, issued by the Financial Market Commission, regarding social responsibility and sustainable development information that the annual report of public companies should contain. Cfr. Economics Commission (2018), p. 25, with reference to General Standard No. 386, of July 8, 2015, which preceded it.

Another issue concerns the powers of the Undersecretariat of Economy, Development, and Tourism related to the loss of the status of a benefit and collective interest company. That loss brings with it the effect described in Article 11: it must inform the Trade Registry or the Enterprises and Companies Registry of Law 20.659, so that this circumstance is marginally noted in the respective registration. This means that a mismatch arises between the content of the statutes and their registration reference because the company still has the social or environmental benefit as part of its purpose but without being able to show that status publicly. The means of challenging administrative procedures set out in Law 19,880 (Article 10, second paragraph) apply against the resolution that makes it lose the status of a benefit and collective interest company.

The bill does not provide for the right of withdrawal for partners who have not consented to a modification of the statutes that change the physiognomy of the company to which they belong, which was recognized in the Ministry's proposals of 2013 (Article 7) and 2015 (Article 9). This faculty in favor of the dissenting shareholder is included in Article 69 of Law 18.046 on Public Limited Companies for the cases expressly indicated therein, one of which is the transformation of the company. Although it implies the change of status or social type of a company, thanks to a reform of its statutes (Article 96 of the Law on Public Limited Companies), it seems that a modification aiming to alter the social line of business in the sense that it becomes one of benefit and collective interest involves a disturbance of sufficient magnitude to grant the shareholder, who has not agreed with that amendment, the right to withdraw from the company.⁷⁵ At least, from the way the bill under discussion is drafted, it can be concluded that the option of becoming a benefit and collective interest company assumes that the company becomes a different legal type.⁷⁶

⁷⁵Strictly speaking, the right of withdrawal is often given on facing structural modifications; that is to say, situations that impinge on items considered by the legislator as essential to the social type, with the purpose of adapting the company to the demands of the market (a concept taken from Article 1 of the Federal Law on mergers, divisions, transformations, and transfers of Swiss patrimony [FusG], 3 October 2003). Therefore, these are business models that have in common a strategic mission of the technical reorganization of the company, and which affect essential elements of the company. However, Article 69 of Law 18.046 on Public Limited Companies does not include division as a cause behind the right to withdrawal, and only mentions mergers and transformations.

⁷⁶Embidi and del Val (2016), p. 73, are even more categorical with this similarity: "Acceptance of this social form [...] by means of a structural modification similar to transformation [...]" Embidi (2019), pp. 39–41, develops the idea under the concept of "circulatory possibilities." Caballero (2021), p. 34, denies this effect: "[t]he amendment of the statutes to acquire the status of a purpose-driven company does not constitute transformation."

6.2 *The Amendments Introduced by President Michelle Bachelet (2018)*

The Executive Branch on January 8, 2018, having foregone elaborating their own project to meet the commitment taken on in the Productivity Agenda, presented a series of amendments to the aforementioned Parliamentary motion (Official Document No. 353-365), which sought to modify several of the problematic points observed and answer some of the questions behind the original bill. They are inspired by two central themes. The first was the linking of the bill with the Human Rights and Business Policy, presented on August 21, 2017, which had the Guiding Principles on Business and Human Rights approved in 2011 by the United Nations (UN) Human Rights Council and the 2030 Agenda for Sustainable Development. The second, which had been the subject of criticism,⁷⁷ concerned establishing the obligations and the appropriate publicity and control mechanisms to ensure that benefit and collective interest companies fulfill the purposes that have been set under certain evaluation criteria determined by the law and its regulations.

In essence, the amendment introduced by President Michelle Bachelet pursued the following objectives:

- Improve the definition of positive social impact, which “derives from the prevention and mitigation of negative effects on the community, workers, the value chain or the environment” (new Article 1);
- Limit the concept of benefit and collective interest companies to certain specific legal entities, provided that there is a plurality of partners in them, and to the extent that the latter are registered in a national registry of the Ministry of Economy, Development, and Tourism (new Articles 1 and 2);⁷⁸
- Establish the obligation to notify the competent authority of any amendment to the company’s statutes (new Article 5);
- Impose the abstention of members of the management body when they must pronounce on situations that may generate conflicts of interest with those of the company that hinder their independence of judgment (new Article 8);
- Better organize the transparency obligations the company must observe (new Article 10);
- Indicate the characteristics and requirements to be met in the external audit, which the company must be subjected to verify compliance with its collective benefit, by independent entities specialized in transparent governance and impacts on the community, workers, the value chain, and the environment (new Article 11);

⁷⁷ Caballero (2021), p. 29.

⁷⁸ The inclusion of a list of legal entities likely to enjoy the status of benefit and collective interest companies, following Law 20.659, which simplifies the system of incorporation, modification, and dissolution of commercial companies, also has some problems. For example, civil partnerships and other for-profit companies, such as mining legal partnerships, and branches of foreign companies, are excluded.

- Add the obligation to register the company in the National Registry of Benefit and Collective Interest Companies, which will be the responsibility of the Undersecretariat of Economy, Development, and Tourism (new article 12), and whose validity is two years (new Article 15);⁷⁹
- Add two causes of loss of status for the benefit and collective interest company to the two already in place, whether due to the expiration of the registration two years from being practiced without it being renewed (recovery is not accepted if it has not been renewed promptly) or due to the loss of the company's associative basis (new Article 16); and
- Set the competence to ensure adequate compliance with the law through the Undersecretariat of the Economy and Smaller Companies (new Article 18).⁸⁰

The original bill and the Executive's amendments were submitted to Congress's Committees on Economy; Development; Micro, Small, and Medium Enterprises; Consumer Protection; and Tourism for review and were discussed in the following sessions: October 24, 2017; November 7 and 21, 2017; December 5, 2017; and January 2 and 9, 2018. As stated in the Commission's Report dated January 26, 2018, the idea of legislating on the matter was generally approved, but all the articles of the parliamentary motion and the government's amendments were rejected, except for the purpose of the law and the definition of benefit and collective interest companies that have such status (Article 1) along with its entry into force (transitional article), although each of them for different reasons.⁸¹

On March 5, 2018, the report of the Economics Commission was taken to the floor so that it could be presented. This took place at the 30th Session of the 336th Legislature, held on July 5, 2018, and it was agreed that the bill would revert back to the Economics Commission for a new first report, forwarded for this purpose on the same day.

6.3 Processing of the Bill Under the Presidency of Sebastián Piñera (2019)

On March 11, 2018, President Sebastián Piñera began his government period and the Congress was renewed. Through a message presented on November 6 of that year, the government gave urgency to a discussion on the bill. This led to the bill being discussed again by the Economy Committee of Congress in its session of January 5, 2019. However, the discussion was limited to explaining to the new members of

⁷⁹The new articles, 13 and 14, which were introduced by the amendments of President Michelle Bachelet, deal with the requirements and procedures for such registration.

⁸⁰However, the presidential amendment does not expressly place that competence in the Associativity Division of the Ministry of Economy, Development, and Tourism, which is responsible for cooperatives and trade associations.

⁸¹Cfr. Economics Commission (2018), pp. 42, 46, and 72.

the Committee the content and purposes of the project. Michelle Labbé, head of advisors of the Ministry of Economy, Development, and Tourism, said that the purpose of these talks was to “generate a position with the Economics Commission on this issue” to allow the bill to move forward. From that moment and until August 10, 2021, the government renewed the urgency of the project 14 times, without the Commission continuing its discussion.

The last activity that the bill had in the Economics Commission was the withdrawal of utmost urgency by the government through the message presented on August 21, 2021. Since then, there has been no action recorded on the Congress’s website.⁸² On March 11, 2022, a complete renewal of Congress took place, while in parallel (until July 4, 2022) the Constitutional Convention has continued its work. It has announced the replacement of the current bicameral Congress model with a single Legislative Assembly.⁸³

Guillermo Caballero points out that the fundamental disagreement regarding the text of the bill that the Economics Commission should work out with (the reformulated version following the amendments introduced by President Michelle Bachelet) the leaders of the initiative lies in whether benefit and collective interest companies must be subject to special control by public power or just a private system of control, similar to the certification in place for B-Corps through B System, as was the goal of the initial project.⁸⁴ Specifically, this author proposes that the failure to comply with the obligation to issue an annual report, or an incomplete issuance thereof, constitutes an act of unfair competition, which is sanctioned by Law 20.169 on unfair competition.⁸⁵

Despite the legislative setback, Sistema B Chile has continued to work on improving the bill. During 2020, a group of lawyers held a series of meetings aimed at fine-tuning the regulation for the benefit and collective interest companies, in the hope that this material would serve as input when the legislative discussion resumed. The result is a set of ten fundamental lines that the law should contain on the matter. The following issues appear: the notion of a purpose-driven company, denomination, subjective scope of application of the business model, supplemental application system, right to withdrawal, duty of administrators to comply with the purpose established in the statutes, obligation to issue an audited report regularly, need to use external auditing entities, publicity of the report, and sanction.⁸⁶

⁸²See: <https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=11789&prmBOLETIN=11273-03> [date accessed: March 15, 2022].

⁸³As of March 15, 2022, the committee of the Constitutional Convention has not yet voted on the design of the Legislative Branch in the Commission on the political system, government, legislative branch, and electoral system.

⁸⁴Caballero (2021), pp. 30–31.

⁸⁵Caballero (2021), p. 35.

⁸⁶Caballero (2021), pp. 33–35.

7 Conclusions and Perspectives

This chapter offers an overview of the different legislative initiatives developed in Chile since 2013 to regulate benefit and collective interest companies, following the standardized terminology adopted in 2015 to designate in Latin America this kind of companies. The motion of Congresswoman Fernández and Congressman Kast presented in 2017 has the merit of being the first to address the issue organically, as the previous bill that both had filed in 2015 was limited solely to defining social enterprises, to regulating the concern that the management body should have toward the collective benefit, and to following the regulations that the Ministry of Economy, Development, and Tourism would rule as applicable to implement the law. Therefore, this bill has not yet been discussed by the Economy Committee of Congress.

The fate of the 2017 bill has been different. It received amendments from the Executive before its passage to the Economics Commission, where it was discussed between late 2017 and early 2018, though not with good results: only approving, in general, the idea of legislating on the matter, and the articles dedicated to the denomination of the benefit and collective interest company and the law's entry into force, rejecting all the rest. The reasons behind this rejection are reflected in the Commission's report, which explains their reservation to approve the drafting of a law whose ultimate purpose is unclear. This is because both the initial bill and the amendments of President Michelle Bachelet deal with which companies can be given the status of benefit and collective interest, imposing certain obligations of transparency toward the market and regulating how the management body must be loyal to that purpose, but without attributing ulterior consequences to that condition.

The structure of the bill in question has indeed many similarities to the other initiatives promoted in Latin America, which currently has four countries (Colombia, Ecuador, Peru, and Uruguay) that regulate this form of entrepreneurship. This explains some of the missing parts that may attract the attention of those who are unfamiliar with certified B-Corps and the movement around them. However, the first two initiatives in the country regarding this class of companies (one under the name of fourth sector companies and the other under the name of social enterprises) did entail certain consequences to the fact that the company pursued a nonprofit purpose that became part of its organizational structure.

The first proposal submitted to the Ministry of Economy, Development, and Tourism in 2013 allowed deducting as a necessary expense to produce income, both the costs that the company had to meet the objectives and obligations taken on due to its classification and those derived from the benefits with a social or environmental destination that it made.

The 2015 Ministerial Proposal was more fruitful. This included a complete title intended to regulate the consequences of being a social enterprise, a status that was acquired both by legal type (as what happened with cooperatives and trade associations) or by certification and registration (as what happened with the now so-called benefit and collective interest companies, which the said proposal designated as "purpose-driven companies"). It also imposed on the state, as is the case with

Colombian law, the duty to promote business forms that produce social or environmental benefits through a differentiated body to the one responsible for its supervision, thus making operational the pretermitted positive aspect (or duty of interference) of the principle of subsidiarity.

As has been said, and outside the measures aimed at materializing institutional transparency, the main consequence of the bill with regard to regulating benefit and collective interest companies is that it specifies that the management body must respect, protect, and consider the positive social or environmental impact in the decisions it adopts. Moreover, this is the main and explicit reason for the bill: to give benefit and collective interest companies legal certainty before society and investors.⁸⁷ However, this need comes from a contractual reading of the concept of social interest, which leaves out the consideration of other agents that the company affects, those which are not alien to the current regulations of Chilean Corporate Law⁸⁸ and the trends emerging in comparative law under the so-called “enlightened shareholder value.”⁸⁹ It should not be forgotten that between 1975 and 1987, Decree in Law 1006/1975, which contained the company’s social statutes, was in force in Chile. Therein, it was established that it was a duty of the company, whatever the legal structure it had adopted, to be economically efficient for the society it served and socially just for those it comprised (Article 2, second paragraph).

In other words, the problem to be solved with the parliamentary bill that has continued its discussion is only apparent, and the same conclusion can be reached through an institutional approach to that concept, without needing an express rule.⁹⁰ Furthermore, the business model of benefit and collective interest companies has to serve as a pretext to rethink the company as a whole under a view rooted in the moral principles that govern the economy.⁹¹ This has been the flank of criticism that the movement has aroused. It is accused of worrying about social or environmental impact as a way to keep the general understanding of the economy unchanged.⁹² From an empirical perspective, some studies show that in Chile, consumers assign zero value to certification as a B Corp,⁹³ which seems to show an internal desire of its promoters over a real market need.

Hence, to make a serious analysis of a rising phenomenon such as that of benefit and collective interest companies, it is advisable to avoid two unsuitable approaches

⁸⁷ Cfr. Economics Commission (2018), pp. 42, 25, 29, and 39.

⁸⁸ The most obvious example is the aforementioned General Standard N° 461/2021 (successor to General Standard N° 386/2015) of the Commission for the Financial Market, although this idea also underpins Article 27 of Law 18.046 on Public Limited Companies and 289 of Law 20.720 on the reorganization and liquidation of assets of businesses and individuals, as the rules for the protection of creditors regarding company decisions.

⁸⁹ Embid and del Val (2016), pp. 73, 67–72. In Chile, this approach is defended by Zuloaga (2021).

⁹⁰ Blount and Offei-Danso (2013).

⁹¹ See, for example, Cortina (2008), pp. 91–94, and the five principles proposed by Schumacher (2011), pp. 251–264.

⁹² An obligatory reference on this matter is Giridharadas (2018).

⁹³ Cea et al. (2016).

that emerge on this matter: one that consists of speaking in general, without offering positive and tangible results, and one that presents a range of specific topics, just by reducing the scope of the study to results of limited value due to their lack of systemic correspondence.⁹⁴

The status of the 2017 bill looks uncertain; as such, it cannot be clearly foreseen what will happen in Chile regarding the regulation of benefit and collective interest companies.

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⁹⁴ Embid (2019), p. 25.

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Social Enterprises and Benefit Corporations in China



Jian Li, Meng Zhao, and Caiyun Xu

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1 Introduction

Social enterprises (SEs) originated in the United Kingdom, dating back as far as the Rochdale Pioneer—generally considered the forerunners of the “social enterprise movement” in 1844,¹ but it was not until the 1990s that they emerged globally and became a public issue. As social enterprises are different from both purely commercial enterprises and nonprofit organizations (NPOs) in general, existing laws in various countries were not fully adapted to the requirements of social enterprises. In order to introduce the special characteristics of social enterprises and improve the institutional environment for social enterprises, many countries have enacted legislation on social enterprises or amended their existing laws, such as the *Law on Social Cooperatives* (1991) and the *Law on Social Enterprises* (2006) in Italy, the *Act on Social Enterprise* (2003) in Finland, the *Community Interest Company Regulations* (2005) in the United Kingdom, the *Social Enterprise Promotion Act* (2007) in South Korea, and so on. These countries have provided a legal basis for the development of social enterprises.

Before the twenty-first century, social enterprises were rarely known in China. It was only in 2004 that the concept of social enterprise was first introduced to China by Dr. Liu Jitong of Peking University. He translated part of the report of *Social Enterprise*, drafted by the Organisation of Economic Co-operation and Development (OECD), and published it in *China Social Work Research*.² In 2006, Wu Shihong translated David Borstein’s book *How to Change the World: Social Entrepreneurs and the Power of New Ideas*,³ making the concept of social enterprise further known. Subsequently, the British Council launched the “Skills for Social Entrepreneurs” project across China. This encouraged a large number of social entrepreneurs to join the wave of social entrepreneurship and innovation practices or actively explore the transition to social enterprises. Since then, social enterprises have taken root on Chinese soil. At present, macropolicies at the national level provide a wide scope for the development of social enterprises in China, and there have been breakthroughs in the attitude and actions of local governments to support the development of social enterprises. For example, the governments of Beijing, Chengdu, Shunde district in Foshan, and Futian district in Shenzhen have issued policies to support social enterprises. This experience sets a positive example for other local governments. However, the development of social enterprises in China is still in its infancy. There

¹ See Roy et al. (2015), pp. 781–782.

² Social Enterprise is defined in *Social Enterprise* as an organization that takes different legal forms in different countries, which is organized according to entrepreneurship and pursues both social and economic goals. See Liu (2004), p. 199.

³ The book tells the stories of social entrepreneurs from the United States, Brazil, Hungary, and many other countries that are solving social problems through business means. David Bernstein defines a social entrepreneur as “people with new ideas to address major problems who are relentless in the pursuit of their visions, people who simply will not take “no” for an answer, who will not give up until they have spread their ideas as far as they possibly can”. See Bernstein (2006), p. 25.

is no legislation on social enterprises in China, nor is there a specific policy at the national level.

The framework for this paper is as follows: firstly, it focuses on the context in which social enterprises emerge in China. Secondly, considering that China has not yet devised a specific legal form for social enterprises but rather grants a social enterprise status through certification, this paper will give an overview of the general situation of social enterprise certification in the country, including the B Corp certification of B Lab and the indigenous social enterprise certification system in China. Thirdly, the policy environment for social enterprises in China will be discussed. On the one hand, social enterprise policies issued by local governments will be systematically explained, and on the other hand, macropolicies at the national level will be discussed. Finally, suggestions are made for improving the social enterprise policies in China.

2 The Background of the Social Enterprises in China

2.1 Governments' Promotion and the Origin of Social Enterprises

The prototype of social enterprises in China emerged from the reform of the social welfare system in the 1980s. At that time, the Chinese government introduced revenue-generating reforms to state-owned welfare entities. This reform advocated the diversification of financial resources and services for state-owned welfare entities and encouraged them to seek new sources of income by providing paid services and operating businesses.⁴ The reform of the welfare system has driven continuous change and innovation in all types of formal organizations in China. As a result, social welfare enterprises (SWEs), specialized farmers cooperatives (SFCs), and projects such as community service and reemployment programs were born—arguably the earliest prototype of social enterprises in China.

Firstly, the Chinese government has introduced a series of policies to facilitate the transformation of social welfare factories into SWEs through measures such as lowering the threshold for opening SWEs and providing tax incentives. Since The People's Republic of China (PRC) was founded in 1949, under the leadership of civil affairs departments, production units were widely established around 1950, which were composed of families of martyrs, disabled soldiers, and poor people. The functions of these production units were multifaceted, such as special care, social relief, and social welfare, and they developed into social welfare factories of a certain scale after the mid-1950s. However, social welfare factories were heavily dependent on government resources and lacked financial sustainability. It was not until the 1980s that social welfare factories were transformed into SWEs, driven by the

⁴See Yu (2011), p. 14.

market economy. Their organizational purpose of pursuing economic efficiency was further strengthened. In 1990, the state issued the *Interim Measures for the Administration of Social Welfare Enterprises*,⁵ which regulate the recruitment requirements for disabled employees as well as the management of SWEs. According to the *Measures of Qualification Accreditation for Welfare Enterprises*, issued by the Ministry of Civil Affairs in 2007, social welfare enterprises must employ at least 25% of the employees with disabilities and have at least ten disabled employees.⁶ SWEs possess the social and commercial features of a social enterprise. This is close to the modern meaning of “work-integrated social enterprises”. Therefore, some Chinese scholars view social welfare enterprises as a “quasi-social enterprise” (准社会企业).⁷ Although the number of social welfare enterprises has shrunk dramatically since the Ministry of Civil Affairs abolished the qualification for welfare enterprises in 2016, it is undeniable that some social enterprises were born out of social welfare enterprises, such as Canyou Group—an SWE with several branch offices across China employing people with disabilities.⁸

Secondly, in the context of economic reform and opening up, SFCs began to emerge in China. In 2007, China introduced the *Law on Farmers’ Professional Cooperatives* and provided that an SFC is a mutual economic organization dedicated to providing benefits to its members.⁹ China’s SFCs have played social functions, such as microfinance, preservation of traditional crafts, and rural community building, as well as economic functions, such as agricultural production and trade. They are required to achieve a balance between promoting agricultural development and protecting the interests of member farmers, ensuring their economic benefits, and gaining social equity for them.¹⁰ Thus, SFCs embody characteristics typical of social enterprises. According to the latest statistics from China’s National Bureau of Administration for Commerce and Industries, there were 1.933 million SFCs nationwide by the end of August 2017, with an average of three cooperatives per village and 46.8% of the country’s farming households enrolled. However, some scholars have argued that the operation model of Chinese SFCs is business dominated or government dominated¹¹ and so does not reflect the most basic characteristics of cooperatives, namely voluntary, autonomous, and people governed.

Finally, to oversee the restructuring of the economy, deepen the reform of state-owned enterprises, and solve the problem of resettling laid-off workers, Chinese labor authorities implemented nationwide “re-employment programs” in 1995.

⁵ According to art. 2, *Interim Measures for the Administration of Social Welfare Enterprises* of September 15, 1990, social welfare enterprises are special enterprises of social welfare nature established for the placement of disabled persons in labor and employment.

⁶ The *Measures of Qualification accreditation for Welfare Enterprises* of June 29, 2007, art. 2.

⁷ See Zhao (2012), p. 33.

⁸ See Cui and Kerlin (2017), p. 82.

⁹ The *Law on Farmers’ Professional Cooperatives* of October 31, 2006, art. 2.

¹⁰ See Lou et al. (2011), pp. 96–104.

¹¹ See Li and Wang (2015), pp. 9–15.

During this time, Shanghai took the lead and established a reemployment service center in July 1996, ensuring for the laid-off workers vocational training, job referrals, labor export, payment of living expenses, payment of pension and medical insurance premiums, and other management services. Moreover, in 1998, the State Council issued the *Notice on Effectively Ensuring the Basic Livelihood Standards and Re-employment of Laid-off Employees from State-Owned Enterprises*, stipulating that all state-owned enterprises with laid-off workers must establish reemployment service centers and perform three basic functions: first, to pay basic living expenses to laid-off workers; second, to pay pension, medical, and unemployment social insurance fees on behalf of laid-off workers; and, third, to assist laid-off workers to participate in vocational guidance and reemployment training and to guide and help them achieve reemployment. In 2001, eight central administrative departments, including the Ministry of Labor and Social Security, issued the *Several Opinions on Promoting Community Employment* to turn the growing demand for community building into a new approach to tackling large-scale urban unemployment and to help more unemployed people to rejoin the workforce in urban community building. Under this policy, community-based employment entities (CBEEs) are the main workplaces for providing community employment for laid-off workers. This approach has been also identified by Chinese scholars as a prototype of the work-integrated social enterprise (WISE), which emerged during the market reforms.¹²

2.2 The Development of Civil Society

The development of civil society has laid an important foundation for the emergence of social enterprises in China. Civil society is a civil public sphere formed spontaneously by citizens who freely associate, discuss public issues, and independently engage in social activities outside the political sphere and market economy. As its core elements, it has various nongovernmental and nonbusiness organizations. Before the reform and opening up, civil society in China was absent or subsumed by the state. Since the reform in 1978, changes in China's political and economic systems have provided the conditions and space for the growth of civil society. On the one hand, the shift from a planned economy to a market economy has established the necessary economic foundation for the emergence of civil society, while on the other hand, the government has changed from direct full-scale planning to indirect macroregulation and control, creating a relatively loose political environment. In this context, the citizens' awareness of self-government developed considerably. In 1988, there were only 4446 social organizations in China.¹³ By January 2021, the

¹²See Shi (2005), pp. 42–44.

¹³In China, social associations (社会团体, *shehui tuanti*), civil non-enterprise units (民办非企业, *minban feiqiye*), Foundations (基金会, *jijinhui*) are three forms of non-governmental entities known collectively as “social organizations” (社会组织, *shehui zuzhi*) which is the official Chinese term for non-governmental NPOs.

total number of social organizations exceeded 900,000.¹⁴ It is evident that social organizations have grown rapidly over the past two decades as a new driving force for social and economic development.

There are three legal types of social organizations in China: social associations,¹⁵ civil nonenterprise units (CNU),¹⁶ and foundations.¹⁷ While all three types of social organizations are gradually increasing in number, many scholars have pointed out that CNU may display more features of social enterprises than the other two forms.¹⁸ CNU, as nonprofit entities, are established by nongovernmental organizations and individuals through the use of nonstate resources. They play an important role in providing various types of social welfare services. To solve the problem of the lack of sufficient funding, there is a trend for some CNU to operate on a commercial basis. They adopt enterprise-style management and engage in a variety of market-based income-generating activities, such as providing paid services, participating in government-purchased services, partnering with commercial companies in charitable activities and charity marketing, and making venture capital investments. CNU with innovative spirit and autonomy consciousness have actively taken the initiative to engage in solving social problems through social entrepreneurship. Such broad social engagement has expanded the cohort of social entrepreneurs.¹⁹

2.3 Chinese Enterprises and CSR

China's profound Confucian business thought, the development of the market economy, and social concern for corporate social responsibility (CSR) have also provided a constant impetus for the emergence of social enterprises in China.

Firstly, Chinese Confucianism—balancing righteousness and profit—has prompted entrepreneurs to take the initiative to fulfill their social responsibility.

¹⁴Data provided by China Social Organization Government Services Platform. For further information about Chinese social organizations, see the website at <https://www.chinanpo.gov.cn/> accessed 21 September 2021.

¹⁵Social Associations are essentially membership associations of various kinds. Many industries and professional associations fall into this category. They are formed to advance “the common desires of their members,” and may be formed for mutual benefit or public benefit. See *Regulations on the Registration and Administration of Social Associations*, Article 2.

¹⁶Civil Non-Enterprise Units are similar to service providers, now known as Social Service Organizations (SSOs) (社会服务机构, shehui fuwu jigou). SSOs are “non-profit legal persons established by natural persons, legal persons, or other organizations mainly using non-state-owned assets to provide social services”. See *Draft Regulations on the Registration and Administration of Social Service Organizations*, Article 2.

¹⁷A foundation is a not-for-profit organization that promotes public benefit undertakings through grants and donations. Its assets are donated by individuals, legal persons, or other organizations. See *Regulations on the Administration of Foundations*, Article 2.

¹⁸See Wong and Tang (2006/2007), pp. 623–640.

¹⁹See Liu and Wang (2019), pp. 82–91.

Zhu Xi²⁰ said, “the doctrine of righteousness and profit is the core essence of Confucianism.” Modern ethnic entrepreneurs who received traditional Confucianism education have aligned their business interests with the benefits of the state and society. For example, Zhang Jian²¹ was deeply influenced by the essence of Chinese traditional culture, especially the Confucian doctrines and orthodox ethics, in his world outlook, life philosophies, and values. He spent his life serving society with all his wealth. He first set up businesses, then used his business to support education, and donated his business profits to charity and local public welfare. When President Xi Jinping visited the Nantong Museum and saw the exhibition of Jian Zhang’s life on November 12, 2020, he pointed out that Zhang was a pioneer and model of Chinese private entrepreneurs as he invested the money he earned from running his business in education and social welfare. The Confucian concept of “unity of righteousness and profit” has always accompanied Chinese entrepreneurs and the historical evolution of business organizations. This has laid the value base for the emergence of social enterprises.

Secondly, with the further separation of the government from society and the market, Chinese enterprises have gradually become independent market players. After the founding of the new China, China practiced a planned economy and a centralized statistical system. This system meant that the state exercised comprehensive control over all areas of social life. Production, supply, and distribution in the economic sphere were entirely arranged by the state. Under the dominant spirit of national collectivism, the interests of the state and society were a priority over commercial interests. After the reform and opening up, the market became the main subject of resource allocation, transforming from an accessory of the government to an independent subject. Also, the development of entrepreneurial spirit which had been imprisoned for almost 30 years, was able to resume. Nowadays, their entrepreneurial spirit has led enterprises to constantly focus on new social issues and see problems as new opportunities.²²

Finally, in the past few years, CSR has been gaining momentum in China. Part of the impetus for the CSR movement comes from the Chinese government’s promotion of the idea of common prosperity, which aims to narrow the gap between the rich and the poor. First, some government policies led to a rapid increase in the number of private foundations, creating new channels for companies to get involved in philanthropy. For instance, the *Regulations on the Administration of Foundations*, issued in 2004, allow companies and entrepreneurs to use their private assets to set up foundations for public good.²³ Before the 2016 *Charity Law*, the public

²⁰Zhu Xi (1130–1200), a native of Wuyuan of ancient Huizhou Prefecture (today’s Wuyuan, Jiangxi Province), is a distinguished thinker, educator, and the most outstanding Chinese philosopher of Neo-Confucianism.

²¹Zhang Jian (1853–1926) was an illustrious person in the late Qing dynasty and the early Republic of China.

²²See Liu and Wang (2019), pp. 82–91.

²³See article 2 of Regulations on the Management of Foundations. For further information, see the website at <http://xxgk.mca.gov.cn:8011/gdnps/pc/index.jsp?mtype=7> accessed 17 January 2022.

fundraising status was sought and enjoyed only by public foundations, many of which were government-organized nongovernment organizations (GONGOs). Only a few private foundations were able to obtain a public fundraising status. The 2016 Charity Law has effectively erased the distinction between public and private foundations by allowing all organizations that have held a charitable organization status for two years to apply for a public fundraising status.²⁴ Nowadays, private foundations have grown very quickly and now far outnumber their public foundation counterparts. Second, an increasing number of companies are undertaking CSR. On the one hand, the revised *Company Law* in 2005 introduces a CSR clause, which states that “companies must comply with laws and regulations, abide by social and business ethics, be honest and trustworthy, accept the supervision of the government and the public, and assume social responsibility when engaging in business activities.”²⁵ On the other hand, the Wenchuan earthquake in 2008 accelerated Chinese companies' commitment to philanthropy and CSR. In addition, the rise of philanthropic ventures in China has facilitated companies' initiative to help Chinese NPOs overcome financial, technical, and human resource barriers through this approach.

2.4 *The Global Social Enterprise Movement*

The introduction of a foreign social enterprise concept has also contributed to the emergence of social enterprises in China. In 2006, Muhammad Yunus, Nobel Peace Prize winner and founder of Grameen Banks, came to Beijing and popularized the idea of a microfinance business model. In October 2009, the Grameen Trust of Bangladesh and Alibaba Group joined forces to create Grameen (China). The aim is to provide microfinance services to China's poorest residents, creating income-generating opportunities for the poor and helping them escape poverty. One of the key events in the development of social enterprises in China was the three-day social entrepreneurship skills training program conducted by the British Council in 2008, covering strategic planning, financial management, marketing and media communications, social impact assessment, and fundraising.

The British Council has established partnerships with several organizations and social investors, including Narada Foundation,²⁶ YouChange China Social Entrepreneur Foundation,²⁷ and so on. By providing mentorship and funding, they help

²⁴See article 22 of Charity Law.

²⁵See article 5 of Company Law.

²⁶The Narada Foundation, founded on 11 May 2007, is a private foundation approved and supervised by the Ministry of Civil Affairs of China, with a registered capital of RMB 100 million donated by the Shanghai Narada Group Co. Ltd. For more information, see the *Narada Foundation* website available at: <http://www.naradafoundation.org/> accessed 17 January 2022.

²⁷YouChange China Social Entrepreneur Foundation (hereafter YouChange) is a nationwide charitable organization approved by the State Council and registered at the Ministry of Civil Affairs of PRC. YouChange's goal is to promote social justice and harmonious development and also to

project participants grow and build successful social enterprises in many areas. In 2009, the British Council started the Social Entrepreneur Award Program²⁸ in collaboration with YouChange China Social Entrepreneur Foundation. This program has awarded outstanding social enterprises in the form of cash grants or noncash grants, including no-interest loans, equity investments, and stock share investments. In eight years, the program has trained over 3200 social entrepreneurs around the world. Also, this program has greatly contributed to the understanding of the concept of social enterprise in China and has brought more attention to successful social enterprise cases. At the end of the British Council's project, or in 2014, 17 organizations, including Narada Foundation and Leping Social Entrepreneur Foundation, launched the China Social Enterprise and Social Investment Forum (CSESIF), after half a year's deliberation and consultation, to integrate resources and jointly promote the development of social enterprises and social investment.

Indeed, the introduction of foreign programs, such as Yunus' microfinance and the British Council's social entrepreneurship skills training program, has not only improved the acceptability of the social enterprise concept in China but has also attracted the participation of partners. They have certainly facilitated the localization of this social enterprise concept. Along with these foreign social enterprise concepts, some Chinese entrepreneurs, have taken the initiative to identify, develop, and exploit social opportunities hidden in the social market and solve social problems through social innovation.

3 The Social Enterprises Phenomenon in China: Some Data

3.1 B Corps in China

Founded in 2007, B Lab is dedicated to promoting B Corp certification, which defines a B Corp as a new type of business that balances social purpose with the pursuit of profit. B Corps shall simultaneously consider the interests of employees, customers, suppliers, communities, and the environment in their articles of association and organizational decisions. B Corps are committed to promoting business for good and building a more inclusive and sustainable economy. According to the news

discover and support "neo-philanthropy" leaders. The mission is to establish social innovation network support platforms for cross-sectoral cooperation. For more information, see the website available at: <http://en.youcheng.org/> accessed 17 January 2022.

²⁸ Selection into the Award program is a complex process. Only applicants who pass an interview can join the training program. There they learn about different topics such as better business planning and skill training. The next phase is led by an advisory group for the candidates' SE. After a 2–3-month period of site visits and in-depth coaching, the final winners are selected. See Cui and Kerlin (2017), p. 97.

released by B Lab, as of May 2021, the number of global co-benefits has surpassed 4000 in 77 countries or territories.²⁹

In China, the B Corp movement has only recently arrived in the mainland. The first B Corp in mainland China was First Response from Shanghai, which mainly provides first aid training.³⁰ This organization was accredited as a B Corp in June 2016. In 2017, B Corps China was established as an independent task force developed by the Leping Social Entrepreneur Foundation.³¹ B Corps China aims to create a thriving leadership community with high working standards, cutting-edge ideas and methods, and the power of a collective community. And then it will promote the B Corp movement in China with the goal of “business for good” and encourage the cocreation of a social ecosystem with the “stakeholder economy” as its core value. Since 2021, Leping Foundation has led the B Corp China to empower the “Common Good Economy” with intelligence and system building and promote the establishment of a sustainable business ecosystem in China with “Business for Good” as the core value and enterprises as the main driving force. As of August 2021, a total of 30 companies in mainland China have been certified as co-benefits.³² The details of these companies are shown in Table 1.

Number of Certified B Corps In 2016, the certification of B Corps began in mainland China. From 2016 to 2021, the number of newly certified B Corps per year in mainland China is generally on a wave-like upward trend. The number has increased by nine times, from three in 2016 to 30 in August 2021, with a relatively rapid development rate. In 2020, nine new certified social enterprises were added, which is mainly attributable to B Lab China’s strong promotion and advocacy in the mainland. In 2021 (as of August), six B Corps have been certified, and the overall development trend is good (see Figs. 1 and 2).

Geographical Distribution Geographically, most domestic B Corps are located in the Yangtze River Delta region, with 12 located in Shanghai and one each in Hangzhou and Jinhua (see Fig. 3). This is strongly linked to the fact that B Lab China is located in Shanghai. Meanwhile, B Corps is mainly located in China’s first-tier cities, with six in Beijing and five in Shenzhen, in addition to the 12 located in Shanghai.

²⁹Data provided by B Lab. For more information, see the website available at: <https://bcorporation.eu/about-b-lab/> accessed 30 May 2021.

³⁰For more information, see the website available at: <https://www.youjiule.cn> accessed 17 January 2022.

³¹In April 2002, Beijing Fuping Development Institute was registered as a private non-enterprise organization. In October, Fuping Domestic Service Centre was founded. As a catalyst and architect for the social innovation ecosystem in China, the Leping Social Entrepreneur Foundation accelerates the rapid development of innovative social enterprises through impact-driven investments to facilitate their potential for large-scale social impact. For more information, see the website available at: <http://en.lepingfoundation.org/about> accessed 17 January 2022.

³²Data provided by B Corps China. https://mp.weixin.qq.com/s/_x_beFEYaAHB49fyFZrkJQ accessed 18 October 2021.

Table 1 Information on B Corps in China

B Corps in China						
No.	Name	Structure	Industry	Business	Certification	Location
1	First Respond	Co., Ltd	First aid	First aid training, services, and solutions	2016	Shanghai
2	Singbee	Co., Ltd	Manufacturing industry	LED and LED lamp development and production	2016	Jinhua
3	Gung Ho! Pizza	Co., Ltd	Catering service	Healthy gourmet pizza, pasta, and salads	2016	Beijing
4	People's Architecture Office	Co., Ltd	Construction industry	Architecture design, prefab, temporary structures	2017	Beijing
5	Bottle Dream	Co., Ltd	Cultural and creative industries	The BEST content/program curator and spreader	2017	Shanghai
6	Shenzhen Liandi	Co., Ltd	Information technology	Testing, consulting, training, and public relations	2017	Shenzhen
7	Oplus	Co., Ltd	Education	Reading cellphones and reading robots, specifically designed for preschoolers	2017	Shenzhen
8	SKT Education Group	Co., Ltd	Education	General secondary education	2018	Shenzhen
9	JUMP Consulting	Co., Ltd	Education	Experimental education	2018	Beijing
10	Moonshot Academy	Co., Ltd	Education	Primary/secondary education	2018	Beijing
11	Smart Air	Co., Ltd	Environmental protection	Air purifiers, air pollution education and research	2018	Beijing
12	Chengdu Longlive Pension Industry	Co., Ltd	Elderly care service	Products and services for the elderly in the home	2019	Chengdu
13	Norlha	Co., Ltd	Textiles	Fashion and apparel, natural khullu scarves, shawls, clothing, and other treasures	2019	Gannan
14	BA YAN KA LA	Co., Ltd	Commodity	Hair care, bath, and skin care products with traditional Chinese herbal	2019	Shanghai
15	Ai-Care Shanghai VSI Intelligent Technology	Co. Ltd.	Elderly care service	Long-term care service operator based on smart care technology	2019	Shanghai

(continued)

Table 1 (continued)

B Corps in China						
No.	Name	Structure	Industry	Business	Certification	Location
16	CEIBS Ruiyi	Co., Ltd	Education	Operates the Alumni Association	2020	Shanghai
17	HowBottle	Co., Ltd	Fashion	Bags and accessories	2020	Shanghai
18	Dayi Fuping	Co., Ltd	Finance	Microfinance for low-income people	2020	Chengdu
19	People & Data	Co., Ltd	Information technology	Advanced and innovative data collection and outcomes tools	2020	Guiyang
20	Being Art Space	Co., Ltd	Mass media	Advertising, public service videos	2020	Hangzhou
21	Gobeyond	Co., Ltd	Tourism	Field experiential learning	2020	Shanghai
22	The Fuguan Law Firm	Partnerships	Law	Legal and compliance service, philanthropy and social impact investment consulting	2020	Shanghai
23	LearningLeaders	Co., Ltd	Education	Communication training services for young adults and corporates	2020	Shanghai
24	Danone ELN Greater China	Co., Ltd	Food	Infant milk formula and baby food	2020	Shanghai
25	Maison Capital	Co., Ltd	Finance	Private equity fund management	2020	Shenzhen
26	ARCH Textiles	Co., Ltd	Textiles	Textile manufacturing	2021	Shanghai
27	EKLARER	Co., Ltd	Health	Medical devices, biomedical technology	2021	Shenzhen
28	GIVINGBACK	Co., Ltd	Fashion	Making upcycle bags, furniture items, and so on by using waste advertising fabric	2021	Shanghai
29	YICHANG BIORIGINAL ORGANICS	Co., Ltd	Commodity	Organic textile and sanitary pad production and selling	2021	Yichang
30	Fuping Chuangyuan	Co., Ltd	Agriculture	Farming solutions and digital tools	2021	Beijing

Fig. 1 The newly certified B Corps per year

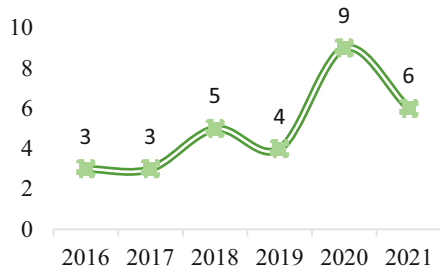
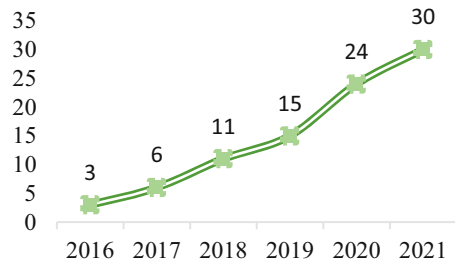


Fig. 2 The total certified B Corps per year



Industry Sectors Thirty B Corps in mainland China cover an extremely diverse range of sectors, including education, elderly care, catering, health, culture and creativity, fashion brands, natural care products, textiles, construction, agriculture, and more. Of these, there are six co-benefits in the education sector, two each in Beijing, Shanghai, and Shenzhen. It should be noted that the majority of B Corps in mainland China are active in the service sector, and only a few are active in the manufacturing sector.

Legal Structure Under the current legislative framework in China, there are no legal forms specifically designed for social enterprises. Therefore, social enterprises in China have to adopt a legal status with one of the existing legal forms. B-Corps certification for Chinese companies is evaluated through B Lab’s B Impact Assessment (BIA) system.³³ In practice, this means that companies amend their articles of association to reflect the principles of the BIA. Overall, of the 30 B Corps, only one is legally structured as a general partnership,³⁴ i.e., Fugun Law Firm, while the rest are limited liability companies. It is important to note that six of these companies are

³³For more information, see the website available at: <https://bcorporation.net/certification> accessed 17 January 2022.

³⁴Partnership enterprises include the general partnership enterprises and limited liability partnership enterprises which are established within China by natural persons, legal persons and other organizations in accordance with the law. A general partnership enterprise may be formed by general



Fig. 3 The distribution of B Corps in China

either wholly owned by Hong Kong, Macau, and Taiwan corporations, or wholly owned by foreign corporations, or joint ventures. They are People’s Architecture Office, JUMP Consulting, Norlha, BA YAN KA LA, LearningLerders, Danone ELN Greater China.

3.2 Indigenous Social Enterprise Certification

In China, social enterprises are identified through accreditation rather than registration. Indigenous social enterprise certification in China includes two major systems: firstly, industrial certification, meaning that social enterprises are certified by civil society organizations throughout the country, such as the social enterprise certification held by China Charity Fair. The second is local social enterprise certification, which is initiated by local governments. In 2015, the Shunde District of Foshan city was the first to break the ice in certifying social enterprises, and since then, social enterprise certification has been carried out in Chengdu and also in Beijing.

3.2.1 Industry Certification for Social Enterprise

In 2015, China Charity Fair launched the first social enterprise certification, becoming the organizer of China’s first civil and industry-based social enterprise certification. The specific certification implementation work was assigned to the China

partners. The partners shall bear unlimited joint and several liabilities for the debts of the partnership enterprise. See article 2 of the Partnership Enterprise Law of the People’s Republic of China.

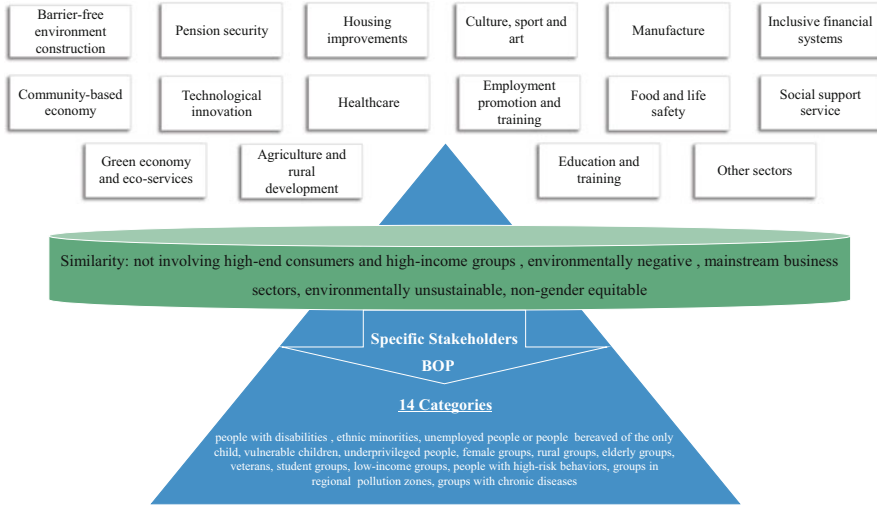


Fig. 4 Areas and groups of interest for social enterprises in China (Data provided by China Social Enterprise Service Platform. See *A Guidebook for Social Enterprise Certification of China*, p. 13)

Social Enterprise Service Platform (CSESC). As of January 2020, 297 social enterprises have been certified by CSESC, covering 16 social sectors, including environmental protection, barrier-free services, community development, social finance, elderly care, education, employment of disadvantaged groups, agriculture, poverty alleviation, Internet, public safety, and women’s rights, and focusing on 14 specific groups (see Fig. 4). The most concerning areas are barrier-free services (employment, rehabilitation, empowerment), children and youth (education), disadvantaged groups, community development, elderly care, and rural development. Of the 297 social enterprises, 207 organizations (around 70%), have a legal status of an enterprise, 88 belong to NPOs, and three are farmers’ specialized cooperatives.³⁵

From 2020, the China Charity Fair has handed over the certification of social enterprises to CSESC. It defines a social enterprise as “an enterprise or social organization with the primary objective of solving social problems without mission drift, innovatively solves social problems in a manner consistent with social entrepreneurship, with clear and measurable results.” The scope of the certification includes limited liability companies initiated and established in accordance with the *Company Law* and its relevant regulations, social associations, civil nonenterprise units, and mutual economic organizations established in accordance with the *Farmers’ Specialized Cooperatives Law*. The abovementioned organizations should have been in operation for one year or more, have a robust financial system, and conduct independent accounting. Meanwhile, CSESC has released the latest social enterprise certification standards, covering indicators in four

³⁵Data provided by China Social Enterprise Service Platform.

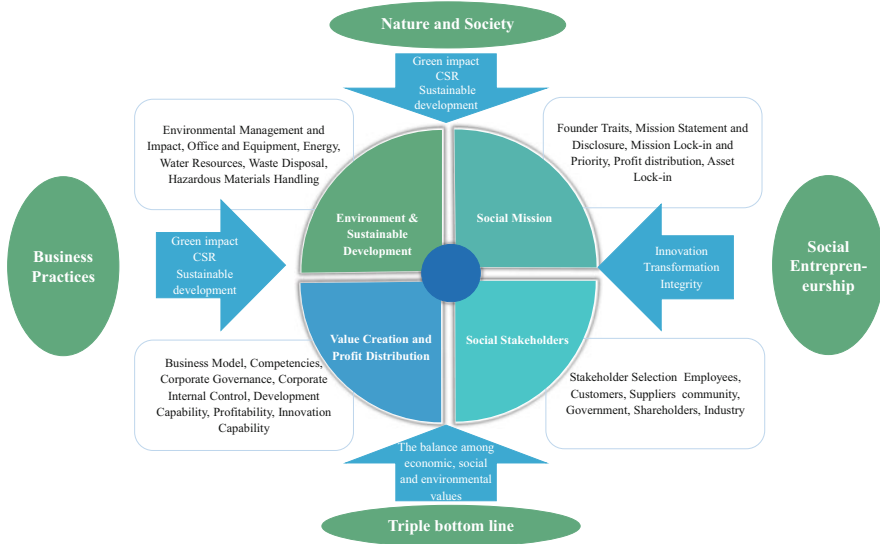


Fig. 5 CSESC’s accreditation criteria for social enterprises (Data provided by China Social Enterprise Service Platform. See *A Guidebook for Social Enterprise Certification of China*, p. 14)

dimensions: social mission, social enterprise’s stakeholders, value creation and profit distribution, and environment and sustainable development (see Fig. 5).

3.2.2 Local Social Enterprise Certification

A. Shunde Social Enterprise Certification

The Shunde District of Foshan was the first local government in mainland China to undertake social enterprise certification. In 2012, the Shunde Social Innovation Center (SSIC) was established as a quasi-governmental agency initiated by the Shunde government. The SSIC is a think tank and support platform for social innovation and a builder of the regional social innovation ecosystem. Shunde District has carried out four sessions of social enterprise certification: in 2015, 2016, 2018, and 2020. A total of 32 social enterprises have been accredited after expert assessment. The business areas cover disability support, public safety, education, culture, and international communication. The Shunde social enterprise certification is only for market entities, including joint-stock companies, limited liability companies, individual proprietorships enterprises, partnerships, privately or individually owned businesses, and farmers' specialized cooperatives. Starting from the fourth certification, it has cooperated with the CSESC to further enhance the standard and influence of the certification process. The assessment criteria are shown in Table 2.

B. Chengdu Social Enterprise Certification

The accreditation of social enterprises in Chengdu is conducted by CSESC, a third-party organization commissioned by the Chengdu Market Supervisory Authority (CMSA). According to the *Opinions on Fostering Social Enterprises for Community Development and Governance*, a social enterprise in Chengdu is a specific type of enterprise approved by the enterprise registration organ whose purpose and primary objective is to solve social problems, improve social governance, and serve disadvantaged and special groups or the interests of the community and whose main methods is to innovate business models and operate in a market-oriented manner, with part of the profits reinvested in its own business, the community, and public welfare causes according to its social objectives, and whose social objectives are sustainable and stable.

Since the beginning of 2018, Chengdu has carried out three sessions of social enterprise accreditation, certifying 12, 27, and 33 social enterprises, respectively, in every session, with a total of 72. Both the number of declarations and the rate of passing the preliminary examination have continuously increased. In terms of the number of declarations, a total of 177 enterprises applied for accreditation in 2020, an increase of 101 enterprises from 2018. In terms of the preliminary approval rate, it was 39.47% in 2018, 47.37% in 2019, and up to 57.95% in 2020. With regard to the services, Chengdu's certified social enterprises cover 11 major areas: education and training, community economy, housing improvement, technology innovation and the Internet, medical and health care, elderly security services, employment promotion and skills, agriculture, livestock, fisheries and rural development, culture, sports and arts, green economy and ecology, and social support services. Education and training as well as employment promotion and skills are the two most concentrated areas. In the aspect of organizational form, four social organizations have transformed into social enterprises, three are farmers' specialized cooperatives, and the rest are enterprises. The assessment criteria are as follows (see Table 3).

C. Beijing Social Enterprise Certification

The Beijing social enterprise certification is organized and implemented by the Beijing Social Enterprise Development Promotion (BSEP), a nonprofit social organization approved and registered by the Beijing Civil Affairs Bureau. Since its establishment in 2018, BSEP has issued the *Beijing Social Enterprise Certification Measures (Trial)* and carried out the first certification under the guidance of the Social Work Committee of the Beijing Municipal Committee (SWC).³⁶ According to the document, Beijing social enterprises are legal entities that prioritize the pursuit of social benefits as their fundamental goal; continuously use commercial methods, products, or services to solve social problems; innovate public service provisions;

³⁶The Social Work Committee of the CPC Beijing Municipal Committee is an agency dispatched by the Beijing Municipal Committee, and the Municipal Civil Affairs Bureau is a constituent department of the municipal government. The Social Work Committee works together with the Civil Affairs Bureau as one office. In China, the municipal committee is part of the Party system, while the municipal government is part of the administrative system.

Table 2 Shunde government's accreditation criteria for social enterprises^a

No.	Dimension	Details
<i>Basic indicators</i>		
1	Institutional qualifications	Establishment duration: a. Enterprises should have been established for at least 1 year; OR b. Social enterprises transformed or launched by NPOs should have been established for six months; the continuous operation for at least 2 years (including the time as an NPO) Staffing: full-time salaried staff of at least 3 people
2	Credit status	No court enforcement and includes all types of illegal and untrustworthy behavior within three years prior to the application for certification
3	Compliance management	Payment of social insurance and tax on time
4	Social goals	Clarity of social objectives, priority of social objectives, no drift of social objectives
<i>Rating indicators</i>		
1	Management	Governance structure, transparency in governance, staff development
2	Social outcome	Clearly defined outcomes to address social issues, profit-sharing clauses for social objectives, profit distribution, asset lock
3	Finance and sustainability	Financial profile compliance, financial sustainability, market competitiveness
4	Innovativeness	Operational innovation, technological innovation
5	Social impact	Regional, social, and industry influence; transformative capacity of the external environment
6	Party building	Establishing party organizations by unit or industry or region ^b

^aData provided by SSIC. See *The Fourth Shunde Social Enterprise Certification Handbook (2020)*. www.ss-ic.org.cn accessed 17 January 2022

^bThe Central Committee issued a provisional draft document calling upon private enterprises with three or more Party members to establish a branch (dang zhibu 党支部) immediately and enterprises with fewer than three members to establish joint branches (lianhe dang zhibu 联合党支部), drawing together members from different workplaces. Those with more than 50 Party members were enjoined to establish either general Party branch committees (zong zhibu weiyuanhui 总支部委员会) or basic Party committees (jiceng weiyuanhui 基层委员会). Enterprises with too few Party members and no opportunities to join or establish joint branches were to link up with the local Communist Youth League or local trade unions and await further guidance on Party building. See Thornton (2017), pp. 1092–1116

and achieve measurable social results. Organizations applying for Beijing certification need to meet the following conditions: first, they have been registered in Beijing for more than one year according to law; second, they have a full-time salaried team of not less than three people; and, third, they have a sound financial system and an institution that implements independent accounting. These organizations include all kinds of enterprises, social associations, civil nonenterprise units, foundations, rural collective economic organizations, farmers' professional cooperatives, and other units. A total of 46 social enterprises passed the first certification, and 19 organizations passed the second certification, making a total of 65. In terms of organizational

Table 3 Chengdu government's accreditation criteria for social enterprises

No.	Dimension	Details
<i>Basic indicators</i>		
1	Institutional qualifications	Same as Shunde
2	Credit status	Same as Shunde
3	Compliance management	Same as Shunde
4	Social goals	Same as Shunde
<i>Rating indicators</i>		
1	Management	Well-established mechanisms, transparency in governance, stable and efficient team
2	Social participation	Extensive mobilization of all types of social forces
3	Social outcome	Profit-sharing clauses for social objectives, asset lock
4	Finance and sustainability	Well-defined and valuable products or services; market competitiveness; financial profile compliance, financial sustainability, capability to access external resources
5	Innovativeness	Operational innovation, technological innovation, innovative product
6	Industry impact	A clear social impact (service coverage), a clear influence in their field
7	Party building	Same as Shunde

forms, 45 organizations belong to enterprises; the remaining belong to social organizations, including 15 civil nonenterprise units; and five are social associations. Beijing social enterprises mainly cover the following service fields: ecological protection, culture and education, elderly care and disability, community development, and public welfare support. Their evaluation criteria are shown in Table 4.

3.2.3 Conclusion About Indigenous Social Enterprise Certification

In terms of quantity, China Charity Fair and CSESC have conducted five sessions of social enterprise certifications, certifying a total of 297 social enterprises; Shunde, Chengdu, and Beijing have certified 32, 72, and 65 in their respective areas. By combining data based on industrial and local government certifications and removing overlapping organizations, it was found that as of August 2021, a total of 414 organizations in the mainland were certified under the indigenous social enterprise certification system, spreading carpet-like across 25 provinces/municipalities directly across the country (see Fig. 6). The top three provinces are Sichuan (117), Guangdong (103), and Beijing (91). With regard to the legal forms, the two most common ones are social organizations and enterprises. Social organizations are registered in civil affairs departments, including civil nonenterprise units and social associations, while enterprises are registered in industrial and commercial departments. 305 of the social enterprises are business entities, representing 73.7%; 104 are

Table 4 Beijing government's accreditation criteria for social enterprises

No.	Dimension	Details
<i>Basic indicators</i>		
1	Mission	With the fundamental goal of prioritizing the pursuit of social benefits, it has specific and well-defined social goals and has mechanisms to ensure the stability of its social goals
2	Registration information	Legal entity registered in Beijing for more than one year according to law, with relevant qualified tax and social security payment records
3	Credit record	Legal entities and their organizational managers have no bad credit records in the past three years
4	Management	At least three full-time salaried staff, a sound financial system, independent accounting, and a scientific and standardized management
<i>Rating indicators</i>		
1	Social participation	Actively integrate social resources, widely mobilize all kinds of social forces to participate in solving social problems, and carry out various Party-building activities to form social synergy
2	Social outcome	Measurable evidence of market growth and social value the SE has created
3	Finance and sustainability	Provide a valuable product or service, have a well-defined business model, achieve financial sustainability and profitability
4	Innovativeness	Using market mechanisms, modern information technology, and other innovative means and methods to effectively promote the solution of social pain points and difficulties, as well as primary-level governance
5	Industry influence	To have a certain social impact on the field and be recognized by the industry

social organizations; and five are specialized farmers cooperatives. However, it is important to note that, in practice, some social enterprises are strategically registered as “two brands”—both as companies and as civil nonenterprise units, with two organizational entities. According to *the China Social Enterprise and Social Investment Landscape Report 2019*, 5.1% of the SEs surveyed have more than one legal form.³⁷

Table 5 compares different indigenous social enterprise certification systems. Both industrial certification and local government certification require that the applicant organization has been established and has operated for one year, with at least three full-time salaried employees and good credit status, and pays social insurance and taxes on time. Regarding the scope of certified organizations, the requirements in Beijing are the loosest, and the applicant organization includes various companies. Industrial certification contains only limited liability companies, civil nonenterprise units and social associations, as well as mutual economic

³⁷ For further information about the current situation of Chinese social enterprises, see *the China Social Enterprise and Social Investment Landscape Report 2019 (Chinese Abbreviated Version)*. <http://www.naradafoundation.org/Uploads/file/20190415/5cb43bf85e07f.pdf> accessed 17 January 2022.



Fig. 6 The distribution of certified social enterprises in China

organizations. Shunde and Chengdu require that the applicant organization must be a company or a farmer's specialized cooperative and exclude social organizations. Whether it is an industrial certification or a local government certification, despite slight differences in some indicators, the important core indicators remain the same, such as mission priority, profit distribution, asset lock-in, credit status, innovation, and so on. Even though there are no specified demands toward profit distribution and asset lock-in, the accrediting agencies suggest that a portion of the annual profit should be allocated to support social objectives and members or shareholders give or transfer their remaining property on a voluntary basis to social enterprises, community foundations, and charitable organizations with similar objectives. In summary, social enterprises can generate positive social and environmental impacts through a viable business approach, thus integrating the philanthropy spirit with entrepreneurship.

Table 5 A comparison of social enterprise accreditation systems in China

Type	Area	Time	Accrediting Agency	Legal form	Quantity	Business income	Profit distribution	Asset lock-in	Certification dimensions
Industrial certification	Mainland	2015	CCF & CSESC	Ltd., social association, CRNE, mutual economic organizations	297	Normally $\geq 50\%$	Not specified	Not specified	Social mission, social enterprise's stakeholder value creation and profit distribution, environment and sustainable development
Local certification	Shunde	2015	SCSI & CSESC	All types of company, SFC	32	Normally $\geq 50\%$	Same as above	Not specified	Basic indicators: institutional qualifications, credit status, compliance management, social goals Ranking indicators: management, social outcome, finance & sustainability, innovativeness, social impact, Party building
	Chengdu	2018	CMSA & CSESC	Ltd., company limited by shares, SFC	72	Normally $\geq 60\%$	Same as above	Not specified	Basic indicators: same as Shunde Ranking indicators: one more dimension of social participation than Shunde
	Beijing	2018	SWC & BSEP	Not specified	65	$\geq 30\%$ (1 star) $\geq 50\%$ (2 stars) $\geq 80\%$ (3 stars) ^a	Same as above	Not specified	Basic indicators: mission, registration information, credit record, management Ranking indicators: social participation, social outcome, finance & sustainability, innovativeness, industry influence

^aBased on the Beijing social enterprise certification manual, Beijing social enterprises are divided into three levels: one star, two stars, and three stars. The percentage of business income is one indicator that affects the grading of social enterprises. For further information about the current situation of Chinese social enterprises, see the *Beijing Social Enterprise Certification Manual 2021*

4 Laws and Policies on Social Enterprises in China

4.1 Hierarchy of Legal Force in China

In this paper, laws, regulations, and rules are collectively described as policies. According to the relevant provisions of *the Legislation Law of the People's Republic of China* and *the Constitution of the People's Republic of China*, the hierarchy of legal force in China can be divided into five levels (see Table 6). The first level is the Constitution adopted by the National People's Congress and its Standing Committee. The Constitution is the fundamental law of the PRC and has the highest legal force. The second level is the laws adopted by the National People's Congress and its Standing Committee. The third level is the administrative rules and regulations made by the State Council according to the Constitution and laws. Generally, they include regulations, rules, measures, etc. The fourth level is the local laws adopted by the local people's congresses and their standing committees and the departmental regulations of the State Council promulgated in the form of ministerial decrees by the State Council departments. The fifth level is local government rules, normally called regulations or measures, issued by local governments in the form of government decrees in accordance with laws, administrative regulations, and the local laws and regulations of the region. In addition, binding documents (Notices, Opinions and Guidance, etc.), which are issued by various authorities (legislative, administrative, and the Communist Party) at both national and local levels, are important sources of policies and have certain regulative force. However, they are not formal legal documents, so their legal force is the lowest.

Regarding the policy environment of social enterprises in China, first, social enterprises use existing legal forms, mainly enterprises, CNUOs, or SFCs, and therefore, social enterprises are regulated and protected by relevant laws and regulations. Second, the special policies for social enterprises are only found in local government regulations (the fifth level), and the country has not yet formulated laws, administrative regulations, and departmental regulations at the national level. Third, some departmental regulations currently issued at the national level would be beneficial for promoting the prosperity of social enterprises.

Table 6 The hierarchy of legal force in China^a

Level 1	Constitution promulgated by National People's Congress	National
Level 2	Laws promulgated by National People's Congress	National
Level 3	Regulations Issued by the State Council	National
Level 4	a. Local laws and regulations issued by provincial congresses b. Rules issued by ministries of the State Council	Local national
Level 5	Rules issued by local governments and their departments	Local

^aSee Ye (2021), pp. 4–5

4.2 National Laws and Regulations

4.2.1 The Regulation for Civil Nonenterprise Units

The State Council promulgated *The Interim Management Regulation for the Registration of Civil Non-enterprise Units* (Level 3) in 1998. It regulates the registration and supervision management of CNU. According to the regulation, social enterprises that adopt the form of CNU are restricted by the principle of nondistribution. Any organization or individual shall not embezzle, privately distribute, or misappropriate the assets of a CNU.³⁸ The legitimate income of a CNU must be used for the activities specified in its charter. In terms of registration, it also designates the Civil Affairs Department as the registration authority for CNU. However, before filing the registration application, the CNU's founders must first secure the consent of a "Professional Sponsoring Unit" (PSU), which is the relevant regulatory authority for the area in which the organization works.³⁹ This is called the "dual-management system" of nonprofits.⁴⁰

From 2011 to 2016, Beijing, Shanghai, Guangzhou, and other local governments piloted the implementation of the direct registration system. In August 2016, the General Office of the Central Committee of the Communist Party of China (CPC) and the General Office of the State Council issued the *Opinions on Reforming the Management System of Social Organizations to Promote the Healthy and Orderly Development of Social Organizations*, which clearly states that social organizations in the categories of industrial associations, science and technology, public welfare and charity, and urban and rural community services can register directly at the civil affairs department. In addition, according to the *Charity Law* promulgated on March 16, 2016, a CNU may apply to its registered civil affairs department for its recognition as a philanthropic organization, but it needs to meet the following conditions: (1) have a charitable mission as defined by law; (2) not be established for profit; (3) have a qualified name, residence, articles of association, property, governance structure, and personnel; and (4) meet other requirements, including a maximum administrative fee and minimum charitable expenditure thresholds.⁴¹ In short, social enterprises registered as private nonprofits need to meet more regulatory requirements than for-profit enterprises, such as restrictions on dividends, disclosure obligations, and a cap on the charity's administrative costs.

³⁸See *the Interim Management Regulation for the Registration of civil non-enterprise units* of October 25, 1998, Article 21.

³⁹See *the Interim Management Regulation for the Registration of civil non-enterprise units* of October 25, 1998, Article 8.

⁴⁰See Ma (2002), pp. 305–328.

⁴¹See *the Charity Law* of September 1, 2016, Article 8, 9, 10.

4.2.2 The Company Law

The Company Law was first enacted in 1993 and has been amended four times since then. Except for foreign-invested companies, which are governed by a separate law, the Company Law defines two types of companies: limited liability companies (LLCs) and companies limited by shares (CLSs). The LLC is the most common legal status among certified social enterprises. The shareholders of an LLC are liable to the company to the extent of the capital contribution they have subscribed and those of a CLS to the extent of their shares. The main differences between the two are as follows:

- The number of shareholders: an LLC is limited to less than 50 shareholders; a CLS, on the other hand, must have 2200 promoters, and there is no limit to the number of shareholders.
- Differences in the form of equity expression: the total equity of an LLC is not divided into equal amounts, and the equity of shareholders is expressed through the proportion of their subscribed capital. The shareholders are entitled to rights and liabilities in proportion to their subscribed capital when voting and repaying debts. In contrast, the entire capital of a CLS is divided into equal amounts, and shareholders receive dividends based on the number of shares they hold.
- Method of establishment: LLCs can only raise funds from the promoters and cannot raise funds or issue shares to the public. CLSs, meanwhile, can not only adopt the methods of establishment of an LLC but also raise funds publicly from society and be listed for financing.
- Information disclosure: the production, operation, and financial status of LLCs are only required to be disclosed to shareholders for their inspection during the period stipulated in the articles of the company. CLSs, on the other hand, are required to publish their financial status on a regular basis, and listed companies are also required to announce their financial status to the public through public media.

A critical issue for social enterprises is the balancing of the shareholders' right to obtain a return on their investment and the pursuit of social goals. Under the *Company Law*,⁴² shareholders of LLCs may reach a consensus among themselves to distribute dividends, not according to the amount of each shareholder's paid-in capital. In local social enterprise certification in China, profit distribution is not used as a decisive indicator for the recognition of social enterprises, but accrediting agencies will assign social enterprises to different levels based on different profit distribution ratios. In terms of profit distribution indicators, both industry certification and local certification encourage companies to voluntarily invest a portion of their annual after-tax profits to support community development, social welfare, philanthropy, designated community foundations, corporate development, or their social goals. In contrast to CNUs, social enterprises operating as a company are not

⁴²See the *Company Law* of October 26, 2018, Article 34.

legally prohibited from distributing profits. Social enterprises with LLCs status can make more flexible profit distributions, and they can choose to receive a lower profit distribution rate to balance the company's financial return and social mission. Therefore, Chinese LLCs are more likely to meet the requirements of the dual mission attributes of social enterprises.

4.2.3 Law on Specialized Farmers Cooperatives

The *Law of the People's Republic of China on Specialized Farmers Cooperatives* was first promulgated in 2006 and then amended in 2017. The Law defines specialized farmers cooperatives as mutual-help economic organizations joined voluntarily and managed in a democratic manner by the producers and operators of the same kinds of farm products or by the providers or users of or the services for the same kinds of agricultural production and operation.⁴³ SFCs need to register at the administrations for industry and commerce.⁴⁴ The assets of a cooperative include members' capital contributions by their members, common reserve funds, subsidies received directly from the government, donations, and other legitimately acquired assets.⁴⁵

The newly revised law has relaxed members' capital contribution requirement; i.e., members can now make capital contributions in money or nonmonetary property, such as in-kind, intellectual property rights, land management rights, forest rights, etc. This nonmonetary property can be monetized by currency and transferred according to law.⁴⁶ In a word, this revision in the law helps to increase the enthusiasm of farmers' investment. In terms of profit distribution, the Law stipulates: "the surplus of the year after making up for losses and withdrawing the provident fund shall be the distributable surplus of the cooperatives." This profit distribution system, which is mainly based on the volume (amount) of the transactions affected between the members and the cooperative, is fundamentally different from companies based on capital contribution. The total amount returned shall not be less than 60% of the surplus. After returning the amount, the remaining part is distributed to the members in proportion to the amount of their capital contribution and the shares of common reserve funds recorded in the members' accounts, as well as the average

⁴³ See *Law of the People's Republic of China on Specialized farmers cooperatives* of July 1, 2018, article 2.

⁴⁴ See *Law of the People's Republic of China on Specialized farmers cooperatives* of July 1, 2018, article 16.

⁴⁵ See *Law of the People's Republic of China on Specialized farmers cooperatives* of July 1, 2018, article 5.

⁴⁶ See *Law of the People's Republic of China on Specialized farmers cooperatives* of July 1, 2018, article 13.

quantified shares of the assets accumulated from subsidies directly given by the government and donations made by other persons to the cooperative.⁴⁷

Since members of SFCs are both investors and beneficiaries, they have less tension in pursuing financial and social goals. Therefore, as long as the operation of SFCs complies with their legal requirements, there should be no legal obstacle for them to become social enterprises. At present, China promotes the development of SFCs through financial support, tax incentives,⁴⁸ science and technology, and human resources, as well as industrial policy guidance.

4.3 Local Policies

Local governments in China have issued specific policies to support social enterprises. The *Opinions on Strengthening and Innovating Social Management and Promoting Social Development Comprehensively*, issued during the Ninth Plenary Session of the Tenth CPC Beijing Committee in 2011, is the first official normative document that mentions “social enterprises.” An enabling policy environment is a necessary condition for the rapid development of social enterprises in a country or region. In this paper, we have sorted out the policies mainly related to social enterprises. The current status of social enterprise policies in China is as follows (see Table 7).

With regard to policy strategies, some local governments are aware of the importance of social enterprises in innovating and participating in social governance. Therefore, the prosperity of social enterprises becomes one of the priorities in local governments’ development plans. For example, in 2011, the *Outline of Social Construction Planning for the 12th Five-Year Plan of Beijing* included “actively supporting social enterprises” as a special section. In 2016, the *Beijing Municipal Social Governance Plan for the 13th Five-Year Plan* explicitly proposed to strongly develop social enterprises, focusing on serving people’s livelihood and public welfare. In 2011, the Shunde District government issued the *Opinions on Promoting Comprehensive Reform of the Social Regime and Strengthening Social Construction*, which proposed to guide and support the enterprises in fulfilling their social responsibilities and support social enterprises as well. In the document *Outline of Deepening Comprehensive Reform Planning in Shunde District (2013–2015)*, this government pointed out even more clearly that they would formulate social

⁴⁷See *Law of the People’s Republic of China on Specialized farmers cooperatives* of July 1, 2018, article 44.

⁴⁸The Ministry of Finance and State Taxation Administration issued a policy notice on July 15, 2008, proposing that the sales of agricultural products produced by members of SFCs shall be treated as sales of self-produced agricultural products by agricultural producers and exempted from VAT. For further information about Chinese social organizations, see the website at: <http://www.chinatax.gov.cn/n810341/n810765/n812171/n812700/c1191626/content.html> Accessed 18 September 2021.

Table 7 The local policies of social enterprises in China

Region	Times	Policy	Issuing unit
Beijing	2011	Opinions on Strengthening and Innovating Social Management and Promoting Social Development Comprehensively	Beijing Government
	2011	Outline of Social Construction Planning for the 12th Five-Year Plan of Beijing	Ibid
	2016	Beijing Municipal Social Governance Plan for the 13th Five-Year Plan	Ibid
	2018	Beijing Social Enterprise Certification Measures (Trial)	BSEP
	2019	Beijing Social Enterprise Certification Measures (2019)	BSEP
Chengdu	2017	Opinions on Further Promoting the Development and Governance of Urban and Rural Communities to Build High-Quality Harmonious and Livable Living Communities	Chengdu Government
	2018	Opinions on Fostering Social Enterprises for Community Development and Governance	Ibid
	2018	Implementation Opinions on Fostering the Development of Social Enterprises by Utilizing the Functions of Industrial and Commercial Administration	CMSA
	2018	Implementation Opinions on Fostering Social Enterprises for Community Development and Governance	The Government of Jinniu District
	2018	Several Policies to Promote Social Enterprise Development in Jinniu District (Trial)	Ibid
	2018	Chenghua District Social Enterprise Incubation Support Measures (Trial)	The Government of Chenghua District
	2019	Measures for the Evaluation and Management of Social Enterprises in Chengdu	CMSA
	2019	Opinions on Fostering Social Enterprises for Community Development and Governance	The Government of Wuhou District
	2019	Measures for Supporting Social Enterprises in Wuhou District, Chengdu (Trial)	Ibid
	2019	Measures to Support the Cultivation of Social Enterprises in Chengdu Pidu District (Trial)	The Government of Pidu District
	2019	Measures on the Use of Special Incentive Funds for Urban and Rural Community Development and Governance to Foster the Development of Social Enterprises (Trial)	The Government of Wenjiang District
	2020	Implementation Plan for Fostering Social Enterprises for Community Development and Governance	The Government of Jianyang City
	2020	Measures to Support the Cultivation of Social Enterprises in Jianyang City (Trial)	Ibid
2020	Measures to Support Social Enterprise Incubation in Dayi County (Trial)	The Government of Dayi County	

(continued)

Table 7 (continued)

Region	Times	Policy	Issuing unit
	2020	Support Measures on Fostering the Development of Social Enterprises (Trial)	The Government of Xinjin District
	2020	Support Measures on Fostering the Development of Social Enterprises (Trial)	The Government of Chongzhou City
	2021	Implementation Measures for Fostering the Development of Community Social Enterprises	The Government of Wuhou District
Shunde	2014	Outline of Deepening Comprehensive Reform Planning in Shunde District (2013–2015)	The Government of Shunde District
	2016	Shunde Social Enterprise Incubation Support Programme (Revised)	Shunde Social Innovation Center
Shenzhen	2017	Several Opinions of Futian District on Creating a Highland for Social Impact Investment	The Government of Futian District
	2018	Support Measures for Building a Highland of Social Impact Investment	Ibid

enterprise standards and policies, actively cultivate social entrepreneurs, guide social capital to establish social enterprises, and so on. The Chengdu municipal government, on the other hand, has issued a policy specifically for social enterprises—*Opinions on Fostering Social Enterprises for Community Development and Governance*—to encourage social forces to set up social enterprises. This is of leading and exemplary significance in promoting the healthy development of social enterprises nationwide.

Regarding policy tools, in accordance with the classification by Rothwell et al. (1985), there are supply-side tools, demand-side tools, and environmental tools for social enterprises.⁴⁹

Supply-side policy tools are considered push factors for the construction and development of social enterprises, i.e., the government enhances their capabilities through infrastructure construction, capacity building, talent support, and financial investment. In terms of infrastructure construction, local governments actively promote the construction of collaborative social enterprise platforms, such as the BSEP, promoted by the SWC; the SSIC, established under the guidance of the Shunde District Social Work Committee; and the Chengdu Social Enterprise Integrated Service Platform, established by the Chengdu Market Supervisory Authority. For capacity building, these collaborative platforms provide certification counseling, professional training, brand communication, business development, networking, and cooperation services. In terms of talent support, Chengdu and Shunde have introduced relevant policies. For example, the Chengdu government provides financial support to high-level professionals working in social enterprises and allows them to enjoy convenience in talent apartments, children’s schooling, and health care cov-

⁴⁹See Rothwell (1985), pp. 113–130.

erage. As for capital investment, Chengdu provides seed money,⁵⁰ financial incentives, and subsidies for certified social enterprises, while the Shunde District government provides business support funds and financing guarantees.

Demand-side tools are considered pull factors. Governments have used these tools to reduce market barriers to the implementation of social enterprise through certification systems and service procurement. Firstly, social enterprise certification has been carried out in Chengdu, Beijing, and Shunde, and accredited social enterprises in Chengdu can use the word “social enterprise” in their corporate names. Given that there is no specific legal form for social enterprises in China, this officially recognized certification is beneficial for them to obtain public recognition and external financing. Secondly, the governments have made more efforts to purchase the services and products provided by social enterprises and add social enterprises to the list of government purchase candidates. Social enterprises enjoy the same policy support to social organizations regarding the government purchasing procedure, the purchasing standard, and related rights and responsibilities in the purchasing process.

Environmental tools refer to the external impact of policies on social enterprises. The government creates an enabling environment for social enterprises through regulation, financial support, tax incentives, and other policies for growth. Firstly, local governments monitor accredited social enterprises. For example, Chengdu has established a system of information disclosure and a withdrawal system to prevent social enterprises’ mission drift. Secondly, local governments give financial support to social enterprises. In 2008, the Shanghai Civil Affairs Bureau started the practice of venture philanthropy, a type of impact investment that takes techniques from venture capital financing to achieving philanthropic goals. After Shanghai, many local governments around China have followed this practice. In addition to investing in social organizations, the government also chooses social enterprises as investment targets. Shenzhen Futian District issued the *Support Measures for Building a Highland of Social Impact Investment* in 2018, supporting the issuance of social impact bonds and the establishment of a special fund for social impact investments. This has created a favorable financing environment. For social enterprises that obtain “the Growth Loan” of Wuhou District,⁵¹ the Wuhou government gives a 10% loan interest subsidy based on the benchmark loan interest rate of the People’s Bank of China during the same period (the total amount of each enterprise per year shall not

⁵⁰In Wuhou District, for the social enterprises identified by the Chengdu Market Supervisory Authority, the Wuhou government gives one-time financial support amounting to 100,000 RMB. For further information about Chinese social organizations, see the *Measures for Supporting Social Enterprises in Wuhou District, Chengdu(trial)* of July 1, 2019.

⁵¹In 2015, the Bureau of Economy, Technology and Information Technology of Wuhou District, Chengdu Productivity Promotion Center, and Chengdu SME Financing Guarantee Company took the lead in launching the “Growth Loan” in Chengdu. The three parties share the risk to solve the problem of difficult financing for SMEs. The “Growth Loan” has convenient procedures and low-interest rates and is gradually tilted to small and medium-sized enterprises in the start-up period.

exceed 100,000 yuan). Thirdly, local policies provide tax incentives. Although the tax incentives for social organizations or enterprises introduced by the state are still applicable, tax incentives specifically for social enterprises are not common. At present, only the *Measures for Supporting Social Enterprises in Wuhou District, Chengdu*, have mentioned tax support; i.e., for the first two years after certification, social enterprises will be given a refund of the actual tax paid in Wuhou District.

It has been pointed out that the Chengdu government plays a triple role in promoting social enterprises, i.e., as a referee, sponsor, and coach (see Fig. 7).⁵² However, the governments of Beijing and Shunde District also play the same role. First, as a referee, the governments establish an enabling institutional environment by constructing a certification system, an information disclosure platform, and a social enterprise delisting mechanism. As a sponsor, the governments provide financial support to social enterprises through seed money, tax breaks, subsidies, procurement priority, and social investment. As a coach, the government, firstly, establishes a social enterprise incubation platform through technical support and a competitive purchase mechanism; secondly, it establishes a database for quasi-social enterprises and provides them with capacity-building services, such as registration and certification counseling, business model sorting, capacity building, and brand communication according to their different stages of development; finally, it links resources from all walks of life to help social enterprises with product matching (see Fig. 7).

It is worth noting that Chengdu is the first city in China to promote the development of social enterprises at the municipal level. Compared with Beijing and Shunde District, the Chengdu government has the strongest policy support system; not only has it issued special policies, but currently, nine districts (counties) in Chengdu have, one after another, issued policies to support social enterprises. In addition, Chengdu is the first city to facilitate the development of community-based social enterprises (CBSEs).⁵³ In 2021, the Urban and Rural Community Development and Governance Committee of the Chengdu Municipal Committee issued *Several Measures to Deepen Urban and Rural Communities to Reduce Burdens and Increase Efficiency*, which mentions the importance of improving the mechanism for fostering CBSEs and formulating policies on supervision and management. This policy also encourages urban communities to set up CBSEs managed by residents' committees, with

⁵²See Hua (2021), pp. 1–12.

⁵³In the literature, CBSEs are defined as independent, not-for-private-profit organizations that are owned and/or managed by community members and highly committed to delivering long-term benefits to local people. See Pearce (2003); Peredo and Chrisman (2006); Somerville and McElwee (2011); Bailey (2012). In China, CESEs have the above characteristics, but they are set up by the residents' committee. In China, the residents' committee as a form of neighborhood organization provides a good linking mechanism between the bureaucracy and the ordinary citizens. See MOK (1988), pp. 164–169.

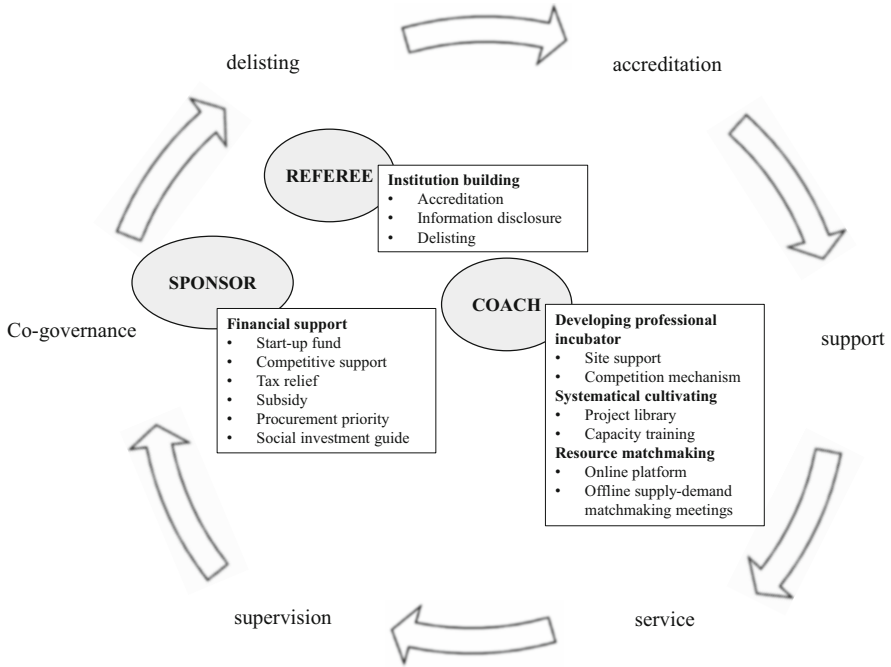


Fig. 7 The roles and actions of the governments in promoting SE development (see Hua (2021), pp. 1–12)

mixed ownership of state-owned capital and social capital.⁵⁴ In September 2021, the Community Development and Governance Committee of Wuhou District, together with the Organization Department of District Committee, the District Civil Affairs Bureau, and the District Market Supervision Bureau, issued the *Implementation Measures on Fostering and Developing Community-Based Social Enterprises (Trial)* to further foster the development of CBSEs, revitalize community resources, and promote the sustainable development of communities.

4.4 National Policies

At the national level, more and more attention is being paid to market forces participating in public services. In 2013, the General Office of the State Council issued the *Guiding Opinions on the Purchase of Services by the Government from Social Forces*, which proposed that entities purchasing services from the government

⁵⁴Several Measures to Deepen Urban and Rural Communities to Reduce Burdens and Increase Efficiency of January 29, 2021, Article 12.

include not only social organizations registered with the civil affairs department but also enterprises registered with the business administration department. This relaxation will provide more opportunities for social enterprises with diverse legal forms. In 2015, the General Office of the State Council forwarded the *Guiding Opinions on Promoting Government-Social Capital Cooperation in Public Services* issued by the Ministry of Finance, the Development and Reform Commission, and the People's Bank of China, explicitly requiring a reform and innovation of public service supply mechanisms, enabling market to play a major role in resource allocation, and guiding and encouraging social capital to actively participate in public service supply. In 2017, the General Office of the State Council issued the *Opinions on Further Stimulating the Vitality of Investment in the Social Sector*, highlighting the exploration of investment opportunities in the social sector, and the stimulation of investment vitality in the fields of healthcare, pensions, education, culture and sports. On January 1, 2021, the *Management Measures for Government Procurement to Promote the Development of Small and Medium Enterprises*, jointly issued by the Ministry of Finance and the Ministry of Industry and Information Technology, was officially implemented. According to the policy, the responsible budget units need to specifically allocate procurement shares for small and medium enterprises (SMEs). Firstly, small procurement projects (goods and service procurement projects below two million RMB and engineering procurement projects below four million RMB) are in principle reserved for SMEs. Secondly, for procurement items exceeding the abovementioned amount, more than 30% of the total budget of that part of the procurement item is reserved exclusively for SMEs.⁵⁵ Most social enterprises in China are SMEs, and the introduction of this policy is beneficial for social enterprises to receive financial support from the government. In short, the above policies provide a good macropolicy environment for social enterprises.

In addition, the introduction of China's innovation policies in the fields of rural revitalization, elderly care, medical care, environmental protection, culture, and disability assistance will have a positive impact on the innovation practices of social enterprises. For example, to facilitate rural development, the Central Committee of the CPC and the State Council released the *Strategic Plan for Rural Revitalization (2018–2022)* in September 2018 to make a phased plan for the implementation of the rural revitalization strategy. On February 21, 2021, the central government's no. 1 document, the *Opinions on Accelerating Agricultural and Rural Modernization by Comprehensively Promoting Rural Revitalization*, pointed out that for the nation to be revived, the countryside must be revitalized. Rural revitalization has the dual objectives: economic development and social welfare supply. This provides opportunities for social entrepreneurship which helps villagers discover rural values and realize value co-creation through empowerment methods.⁵⁶ Social enterprises in the countryside can both promote the sustainable development of the rural

⁵⁵See the *Management Measures for Government Procurement to Promote the Development of Small and Medium Enterprises* of January 1, 2021, Article 8.

⁵⁶See Liu et al. (2018), pp. 77–88.

economy and maintain the supply of public services in backward areas. Therefore, they have advantages in solving rural social problems, especially in areas of poverty reduction, public service, and the revitalization of marginal communities. In the area of elderly care, China will implement the national strategy to actively cope with the aging population during the 14th Five-Year Plan period. It will also actively develop the silver economy, promote the synergistic development of the elderly care business and the elderly care industry, and cultivate new business models for the elderly. In 2019, the General Office of the State Council once again issued the “Opinions on Promoting the Development of Senior Care Services,” which proposes to give loan support to individuals and small and medium-sized enterprises that are engaged in the elderly service industry. It also advocates “medical care integration” and the Internet Plus elderly care model. In a word, these policies mentioned above will guide social enterprises to explore new directions.

5 Analysis of the Legal System

First of all, there is a context-specific source of the emergence of social enterprises in China. Over the past decade or so, social enterprises have taken root under the government-driven reform of the welfare system, the rapid development of civil society, the dramatic growth of the market economy, and the introduction of international ideas. For example, social welfare enterprises, farmers’ specialized cooperatives, and reemployment programs specifically were born under the welfare system reform and became the earliest prototypes of social enterprises. These organizations concealed the genes of social enterprises. Meanwhile, the rapidly growing social organizations in China have laid the foundation for the development of social enterprises. Guided by the spirit of entrepreneurship and innovation, they have been prompted to transform into social enterprises, thus expanding the cohort of social entrepreneurs. Moreover, the immersion of Confucianism and the attention of corporate social responsibility have created an atmosphere of “good business,” providing a constant impetus for the emergence of social enterprises. Last but not least, the global social enterprise movement has not only popularized the concept of social enterprises in China but also improved the acceptability of the social enterprise concept, leading a group of Chinese social entrepreneurs to systematically solve social problems through commercial approaches.

Secondly, various legal forms of social enterprises have been developed around the world, such as the community interest companies of the United Kingdom, low-profit limited liability companies, and benefit corporations of the US. However, unlike other countries, the Chinese government has not yet designed a specific legal form for social enterprises, and they mainly follow the established legal forms, such as enterprises, civil nonenterprise units, social associations, and farmers’ specialized cooperatives. Depending on the legal form they choose, social

enterprises have different characteristics in terms of their ownership, tax-exempt status, profit distribution, and governance models.⁵⁷ It is important to note that social enterprises in China are not given a unique status by their legal identity, but rather through industry certification or certification by local governments. As a result, the requirements for the legal form vary from one local government to another, as well as the fact that there are a significant number of social enterprises that have not yet awakened or been discovered. However, from a macroperspective, the state's emphasis on the participation of market forces in public services and the introduction of China's innovative policies in areas such as rural revitalization, elderly care, healthcare, environmental protection, culture, and disability assistance will have a positive impact on the practice of social enterprise innovation.

Thirdly, the Chinese government is still cautious about introducing specific social enterprise policies and legislation at the national level. According to Yu (2020),⁵⁸ the conditions for developing national level policies are not ready yet. The ambiguity of the concept of social enterprises and the diversity of the legal forms have led to greater coordination among government departments, increased complexity of management, and greater difficulty in connecting with existing policies. In turn, this affects the state's understanding and attitude toward social enterprises to a certain extent. Meanwhile, there are no widely used social impact assessment methods for evaluating the social and economic benefits that are brought by social enterprises. Pushing the commercial operation of nonprofit organizations without a tried-and-true assessment approach may bring new regulatory challenges and policy risks, particularly in light of the Chinese government's and the public's growing concerns about the credibility and transparency of charitable organizations. Overall, compared to Western societies and many other Asian countries, Chinese social enterprises still lag behind in terms of their scale and impact. Social enterprises in China are concentrated in developed regions that have relatively high levels of economic development and strong purchasing power of social services. Their development is slow in under-developed regions. Therefore, it may seem premature to start a new policy at the national level.

Lastly, as far as local policies are concerned, supply-side, demand-side, and environmental policy tools are not sufficiently applied. Only municipal- or district-level authorities are trying to explore social enterprise policies. The government's support has not yet risen to the level of national strategy. As a result, social enterprises have limited access to policy resources, such as human, material, and financial resources.⁵⁹ Meanwhile, no perfect supervision system has been established. At present, domestic social enterprises mainly exist as social organizations and enterprises, and the government manages and supervises them according to different laws. However, social enterprises integrate social and economic benefits, which is different from social organizations and enterprises. The absence of a unified legal system may encourage inadequate legal supervision and social enterprises' mission

⁵⁷ See Yu (2019), pp. 51–53.

⁵⁸ See Yu (2019), pp. 51–53.

⁵⁹ See Li (2018), pp. 32–38.

drift. Also, the incentive mechanism for social enterprises is not sound. There are fewer tax incentive, financing incentive, and talent incentive policies for social enterprises. Moreover, existing policies restrict the development of social enterprises. For instance, some social enterprises' legal form is the CUN. However, the rules for CUNs, according to Xu (2017), have severely hampered the development of social enterprises and have also hampered the conversion of these organizations into social enterprises. These rules include no property rights for investors, no profit distribution, inability to obtain bank loans, and prohibition of establishing branches.

6 The Future of Social Enterprise Policies

The development of social enterprises urgently needs policy support and legal protection from governments. First, governments need to make comprehensive planning, promote the collaboration and integration among the constituent entities in the ecosystem, and ensure the systemic and complete policy system. Second, governments shall strengthen policy development of social enterprises. In regions where policies are relatively well-developed, higher-level governments should make more effort to develop social enterprise policies. Horizontally, local governments need to strengthen exchanges with other local governments, publicize the advantages of social enterprises, and promote the governmental practice of social enterprises to more places. Third, they need to strengthen research work on social enterprise policies. Local governments also need to organize multiple social forces to study existing policies and adjust policies that are not helpful for the development of social enterprises. At the same time, they need to study and formulate local laws and regulations on social enterprises. Fourth, they have to clarify the legal status of social enterprises. Governments shall consider integrating social enterprises into the existing legal system, and improve the supervision mechanism of social enterprises at the same time. Fifth, they need to improve incentive policies. For example, governments may provide incentives to social enterprises through favorable tax regulations and manpower policies. They may also encourage financial institutions to enhance their support to social enterprises under the guidance of policies and regulations.

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Social Enterprises and Benefit Corporations in Colombia



Francisco Reyes Villamizar

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1 Introduction

Colombian corporate law has been at the forefront of Latin American systems for the last decade. In 2008, it introduced the simplified corporation (SC), becoming the first country in the region to adopt a hybrid company form. This business entity, which was inspired by the American closely held corporation and the French *Société par Actions Simplifiée* (SAS), was so successful that in 2017 it led to the adoption of the Model Law on Simplified Corporations by the Organization of American States.¹ Such an auspicious beginning paved the way for the Argentine law on the SC of

¹Uruguayan law for the promotion of entrepreneurship 19,820, published on September 27, 2019.

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2017,² the Uruguayan SC of 2019,³ and the Ecuadorian SC of 2020.⁴ These laws are the direct heirs of the Colombian initiative for the SC. The Colombian legal system triggered an incipient harmonization of corporate law in Latin America for the first time in this region. The Colombian legislator has also been a pioneer in the enactment of norms related to benefit corporations (referred to under the law as BIC companies). These types of hybrid business entities were introduced by Law 1901 of June 18, 2018.

As will be explained later, before the legislation on BIC companies, the Colombian legal system had zealously defended the shareholder wealth maximization principle. In fact, the possibilities of investing resources in nonprofit activities were subject to significant legal restrictions, as developed by doctrine and case law.

In the international context, it should be pointed out that the idea of allowing commercial companies to engage in unregulated nonprofit activities is a relatively recent phenomenon. However, until a few decades ago, most countries maintained a strict standard related to the principle of “maximizing the economic interests of shareholders.”

The critique concerning the theories that focus exclusively on the principle of profit maximization has given rise to a new way of thinking, in which the concept of the company as a profit-driven organization has given rise to the idea of the business corporation also as a social institution. Thus, companies are expected to act according to principles and rules of procedure that are right for the community.

Similarly, renowned author Michael Porter makes a categorical assertion by stating that “The purpose of the corporation must be redefined as creating shared value, not just profit per se. This will drive the next wave of innovation and productivity growth in the global economy. It will also reshape capitalism and its relationship to society. Perhaps most important of all, learning how to create shared value is our best chance to legitimize business again.”⁵

It is precisely in this context that the idea of BIC companies, also known internationally as B Corps, arises. Their activity, as will be seen next, aims not only at obtaining distributable profits among its shareholders or partners but also at creating common interest benefits.

² Argentine law to support entrepreneurial capital, number 27,349 of March 29, 2017.

³ Uruguayan law for the promotion of entrepreneurship 19,820, published on September 27, 2019.

⁴ Ecuadorian Entrepreneurship and Innovation Law (Official Registry No. 151- Friday, February 28, 2020).

⁵ Porter and Kramer (2011).

2 Content of the Colombian Law of BIC Companies

Colombian legislation on BIC companies adopts simple criteria that are devoid of formalities for the adoption of this type of business. In truth, the laconic nature of Law 1901 of 2018 (only ten articles) makes it relatively easy to apply it. As can be seen below, the obligations that arise for shareholders, officers, and directors do not represent significant transaction costs, so that it can be said that it is a reasonable and, in general, a well-structured regulation. Its main precepts are analyzed next.

2.1 *No Need for a Specific Type of Business Entity*

It must first be noted that the Colombian legal system did not typify benefit companies as a specific type of business entity. In this sense, BIC companies are not, strictly speaking, a different type of company, if compared with the business entities provided for in the Commercial Code and other complementary regulations. That is why in article 1 of Law 1901, it is cited: “Any existing or future business company of any type established by law, may voluntarily adopt the status of a “Benefit and Collective Interest Company.”⁶ Thus, in article 9 of the same law, it is clearly stated that “in matters not provided for in this law, BIC companies will be governed by the provisions contained in the bylaws, as well as per the rules applicable to each type of company.” Hence, the entire legal system contained in the Second Book of the Commercial Code,⁷ Law 222 of 1995,⁸ and, if appropriate, Law 1258 of 2008⁹ are applicable to BIC companies.

Additionally, as can be seen in the aforementioned rule, there is no restriction as to the type of economic activities in which the company may engage. There is no restriction either regarding its civil or commercial nature or its nature as a publicly held or closely held corporation. Hence, the corporate purpose of a company of this nature can be extended to industrial, commercial, or service activities. It is worth asking, however, whether companies that engage in activities subject to a special legal system can adopt the modality of a collective benefit and interest company. Thus, for example, it is doubtful to consider that a financial entity, trust company, insurance company, or even stock brokerage company can assume the aforementioned nature. Indeed, the restrictive provisions that govern the operation of these

⁶The basic company types in Colombia are the partnership (Sociedad colectiva), the limited partnership (sociedades en comandita simple y por acciones), the limited liability company (Sociedad de responsabilidad limitada), the corporation (Sociedad anónima) and the simplified corporation (Sociedad por acciones simplificada).

⁷General Governance of companies.

⁸Ley de reforma al régimen de sociedades y concursus (Reform law of the companies and insolvency).

⁹Law on Limited Partnerships.

entities, the protection of resources from private savings, and other considerations of public order could be incompatible with the *semi-lucrative* purpose of BIC companies. In this matter, it will be necessary to await the pronouncement from the regulatory authorities, as well as the regulations that may be issued by the government.

However, as mentioned before, it seems clear in light of article 1 of the quoted law that a listed company can adopt the nature of a BIC company. Certainly, if the by-laws of a company listed in the securities and intermediaries register are amended, its nature could be altered so that it could assume the nature of a BIC company.¹⁰ For this purpose, the company obviously must adopt the status of a publicly held corporation and must comply with all the requirements and regulations of listed companies.

2.2 *Legal Nature of BIC Companies*

The second article of the regulation establishes the legal nature of BIC companies. For this purpose, the law defines what a commercial benefit and collective interest company is. In this sense, the regulation refers to “those companies that are registered in accordance with the current legislation, which, in addition to the benefit and interest of their shareholders, will act in the interest of the community and the environment.” This provision highlights the hybrid nature of these entities. This precise aspect reveals the importance of these entities. In commercial or civil companies, charitable activities are only viable to the extent that there is a determinable relationship with the corporate purpose or economic operations that the company is engaged in. However, in BIC companies, there is considerable leeway to carry out such acts for the common benefit.

The starting point for this analysis is based on the basic concept of a—civil or commercial—company, understood as a for-profit institution. The very definition of a company in article 98 of the Colombian Commercial Code is sufficiently clear on this matter. As provided in this article, by virtue of a company contract, “two or more persons are obliged to make a contribution in money, in work or in kind, in order to distribute among themselves the profits obtained in the company’s business activity.”

A share of the company's profits constitutes the main compensation received by shareholders in return for their capital contributions to the business entity. Therefore, it must be emphasized that the very purpose of a contract, according to the terms of the aforementioned article 98, consists in the distribution of profits derived from the undertaking of business activities, as laid out in the company’s purpose clause. The

¹⁰In accordance with the Colombian current regulations, any company that intends to make a public offering of securities to undetermined persons or to more than 100 persons must be registered in the National Registry of Securities and Intermediaries (Cf. Statute of the Securities Market).

legal right vested in each shareholder to receive corporate profits represents the necessary *quid pro quo* for whatever contributions they make to the corporation. This economic benefit is usually referred to as a *subjective lucrative motive*, which is the ultimate trade-off for the shareholders. Such economic benefit is based on the effective distribution that is made among the shareholders, in accordance with the balance sheets at the end of the year, as they are approved by the relevant corporate body (shareholders' meeting). This feature, aside from characterizing civil and commercial companies, distinguishes this business model from other business organizations in which the economic benefits obtained are not intended to be effectively distributed among their members. Good examples of this type of entities are the private law associations regulated in the Civil Code, such as certain associations, foundations, and other legal entities characterized by the nonprofit involvement of the revenues obtained resulting from their economic operations.¹¹ In this case, the possibility that the business activity may yield positive results does not conflict with profit since such economic benefits cannot be legally distributed.¹² The benefits that are obtained in the organization of cooperatives, represented in discounts and other advantages of an economic content, can be considered a manifestation of *mutuality* in which there is no legal room for profit distribution.¹³ Therefore, it must be emphasized that the simple reduction in the amount of certain obligations of the associate, or some benefits obtained from the cooperative, cannot be understood as profits.

Obviously, the difference between for profit and non for profit entities is at the core of the legal structure of civil and commercial companies, as it is expressed in the Commercial Code and in additional regulations. In particular, reference should be made to the capacity system that the law grants to companies, traditionally delimited by the so-called *law of speciality*. On this matter, the existing regulations in Colombia are contained in the Commercial Code. For example, article 99 provides:

The capacity of the company will be limited to the development of the company or activity foreseen in the company's purpose clause. Acts directly related to the business purpose and those whose objective is to exercise rights or fulfill obligations, legally or conventionally derived from the existence and activity of the company, shall be understood to be included in the company's purpose.

¹¹Therefore, the activities that a company carries out in the exercise of its corporate purpose must also be aimed at obtaining income that can generate distributable profits. The Superintendency of Companies has been explicit on this aspect, stating the following: "In the partnership contract all associates have a common vocation towards obtaining profits, since it is profit that constitutes the motive that induces the partners to celebrate it (art. 98, inc. 1 of the C. de Co.). This being the case, all the activities or operations of the company must be aimed at obtaining profits [...] not being possible for them to carry out free acts regularly or permanently" (Official Letter SL-25275, of December 12, 1989).

¹²On this matter, Vincent Chuliá's opinion is illustrative, as he believes that "the cooperative would not ultimately have to obtain a distributable social benefit, nor would its economic operation give rise to its existence; while this type of benefit does exist and the corporation has that lucrative purpose in the strict sense ..." (cited by Paniagua Zurera (1997, p. 304).

¹³Law 454 of 1998 and Decree 1401 of 1999, relative to the legal system applicable to cooperatives.

Likewise, article 110, section 4, of the same Code states:

The commercial company will be constituted by public deed in which it will be stated: [. . .] The corporate purpose, that is, the company or business of the company, making a clear and complete statement of the main activities. The stipulation by virtue of which the corporate purpose extends to activities stated in an indeterminate way or that do not have a direct relationship with it will be ineffective.

And article 5, section 5, of Law 1258 of 2008 provides:

The simplified corporation will be created by means of a contract or unilateral act that is recorded in a private document, registered in the Mercantile Registry of the Chamber of Commerce of the place where the company establishes its main domicile, in which at least the following shall be stated: [. . .] A clear and complete statement of the main activities, unless it is stated that the company may carry out any legal commercial or civil activity. If nothing is expressed in the articles of incorporation, it will be understood that the company may carry out any lawful activity.

It is well known that according to traditional company law, the *ultra vires* doctrine is applicable to all companies. In accordance with this doctrine, a company lacks the legal capacity to carry out acts or contracts that are beyond its corporate purpose.¹⁴ In accordance with general company law rules, any legal act carried out under such circumstances (*ultra vires*) suffers from nullity due to the lack of capacity of the subject performing the act.¹⁵ This limitation on the company's capacity is aimed at protecting the partners or shareholders because—at least in theory—it allows controlling the destination of the contributions made to the company's capital.¹⁶ Under this concept, the company can request to nullify those *ultra vires* acts carried out by its administrators (officers and directors) through a declaration that the company lacked sufficient capacity to perform them. Thus, it is possible to

¹⁴Insofar as companies are only bound by operations that correspond to their corporate purpose and in accordance with the *ultra vires* doctrine, administrators will be liable for acts not provided for in the corporate purpose and that cause damage to third parties. These matters are not the responsibility of the Superintendency, given its nature as an administrative body, but will be heard by the ordinary courts (Superintendency of Companies, Official Letter OA-19021 of November 27, 1979). However, the Superintendency can sanction administrators when they perform *ultra vires* acts (in this sense, see, Judgment of September 10, 1998 delivered by the Administrative Court of Cundinamarca).

¹⁵According to the detailed explanation of Gervasio Colombes (1972, p. 105) “The expression *ultra vires* designates a legal system of scope variable in doctrine and positive law. It can, however, be characterized in its broadest application by saying that the activity indicated in the constitutive act represents a limit, not only to the power of the administrators, but also to the capacity of the corporation itself, determining as a consequence that acts foreign to the corporate purpose are irredeemably null, even when compliance with them has been decided by the unanimous agreement of the partners.”

¹⁶In the words of the Superintendency of Companies, “it is stated that the limit imposed on administrators in the corporate purpose is precisely due to a concern that human and capital resources are invested, used or allocated in those activities agreed within the corporate purpose, in such a way that the contributions of the associates are not diverted or distracted in activities foreign to the intention expressed in the partnership agreement” (Resolution 320-2279, of September 22, 1995).

challenge the *ultra vires* acts carried out by a company's administrators by demonstrating its lack of capacity to carry them out. This situation takes place even in those instances in which the same shareholders have authorized the execution of the corresponding legal business. The laws under which the simplified corporation is governed, contained in Law 1258 of 2008, authorize the undetermined corporate purpose, so that no authorization is required to engage the company in any kind of legal economic activity (number 5 of article 5, *ibid.*). This system of unlimited purpose clause constitutes an efficient mechanism to exclude annoying litigation derived from lack of capacity (*ultra vires*), with which a guarantee is also set up for third parties that contract with the company. Third parties can be assured that any transaction entered into by the company is valid and binding. This unlimited purpose clause also gives rise to a high level of certainty and predictability regarding the validity of the legal businesses which the company engages in.

However, even in the case of simplified corporations, since the company maintains its civil or commercial nature the object is restricted to for-profit activities (as opposed to nonprofit entities, such as foundations or associations). Hence, both in traditional companies (such as regular corporations and limited liability companies) as well as in simplified corporations, participation in nonprofit activities continues to be severely restricted, due to the capacity limitation defined by the principle of specificity. Even in the case of simplified corporations with an undetermined purpose, it is evident that the activities must tend to create profit for their shareholders. Such conclusion is derived, unequivocally, from the notion of *economic activity*, referred to in article 5 of Law 1258, cited above.

Based on legal provisions contained in the Commercial Code, the doctrine of the Superintendency of Companies of Colombia has always limited and restricted the scope of charitable activities, such as donations, based on criteria such as their proportionality and relationship with the corporate purpose. In a relatively recent pronouncement, the entity pointed out, for example, that "the shareholders' assembly can order donations. But it should be noted that except in the case of a unanimous decision in this regard by all the shares corresponding to the subscribed capital, such determination does not by any means exclude the possibility of a challenge procedure by dissenting and absent partners, by tax auditors and even by the administrators themselves, if they find that a gratuitous act of this nature exceeds the limits of the corporate contract and, to that extent, does not comply with the legal and statutory prescriptions" (C.Co. articles 190 and 191).

The relationship between the type of activities that can be undertaken by a company and the wording in the purpose clause entails a question of fact, which must be determined in each specific case and is not limited to the tax advantages that may ensue for any given company. Indeed, for the "development" of the company or the operations—such as those that are legally included, those that are directly involved in the corporate purpose, or those whose purpose is to exercise rights or fulfill obligations derived from the existence and company's operations—there may be many instances that explain and justify engaging in nonprofit endeavors. It must also be added that companies, especially although not only corporations, have a social visibility and importance that explains their participation in community

programs and activities that are not directly related to the main activities planned in their respective objects (social, educational, artistic, research programs, etc.). A genuine and disinterested altruistic or solidary purpose can be added to the pragmatic goodness derived from the concern of their controllers to be perceived by the community in a favorable way.

A determination as to whether generosity or calculation constitute the sole or determining reason is ineffective, since it is enough to verify whether the act of liberality is directly related to the development of the company's purpose. It is obviously understood that these are lawful acts regarding their objective or cause in agreement with the rules of commercial competition. In this vein, it cannot be ruled out that there are free acts, such as donations, in which a direct relationship of such nature can be established. For example, when donations are made to those affected by a tragedy that affects workers in the company or the area in which its activity is carried out in a distinguishable way, as in the regions where supplies are acquired or labor is intensively employed.

After the issuance of the rules on benefit and collective interest companies, the circumstances just mentioned are no longer an obstacle for the company to carry out nonprofit activities, without major obstacles. In particular, it should be noted that the degree of affinity that it shares with the corporate purpose is completely resolved with the simple company name. Thus, it will not be necessary to demonstrate a connection with the economic operations that the company is engaged in so it can carry out activities that are not aimed at creating profit for its shareholders. Nor is it essential that there be a criterion of proportionality between what is spent on activities of collective interest and the economic benefits that the company obtains for carrying out such activities. For example, a BIC company could validly allocate 80% of its resources to investments that have a beneficial impact on the environment but only 20% to commercial acts, from which the company derives economic benefits for its shareholders. In this example, the charitable activities could not be considered *ultra vires*, and therefore, their invalidity would not be actionable due to the company's lack of capacity to carry them out.

Based on the foregoing analysis, it can be argued that the concept of the company achieves a wider scope,¹⁷ by facilitating the allocation of its resources, at least partially, to activities that may have social repercussions. It is, without a doubt, a development of what has come to be called conscious capitalism (or environmental, social, and governance responsible companies). This concept makes it possible to overcome the narrow space delimited by the principle of maximizing the interests of shareholders, to achieve a wider scope. That is why the by-laws of BIC companies allow for decisions that cover the interests of third parties (stakeholders) to be included in the company's plans, in addition to those that are inherent to the partners or shareholders. Thus, for example, corporate decisions can be adopted that grant benefits to workers, pensioners, consumers, suppliers, and, in general, members of the communities where the company operates.

¹⁷For some, this type of action has come to be called shared value. See Porter and Kramer (2011).

In light of the foregoing explanation, the evident benefit that arises from BIC companies consists of the possibility of acting legitimately both in lucrative and non-profit purposes. Before the advent of this legislation, the activities of benefit and collective interest companies were not legally viable, due to the restrictions derived from the essential element of profit sharing, the principle of specificity and the doctrine of the *ultra vires*. Certainly, the principle that governs the Commercial Code and other complementary regulations is the maximization of the economic benefits enjoyed by shareholders.

2.3 Tax System

The provisions in the second paragraph of article 2 of the Colombian law on BIC companies state that “companies that adopt the BIC designation still will have to comply with the obligations of the regular rates on income tax and its supplemental taxes, the common rates on sales and other national, departmental and municipal tax obligations.” This provision reflects concerns about the possible use of BICs as an instrument to avoid tax duties. The problem lies in the possibility of the company allocating a substantial part of its economic resources to activities that are exempt from income tax or subject to tax deductions. Hence, it is essential that the sums invested in these types of *exempt* activities are fully justified in accordance with the current tax laws.

In all other aspects, it can be pointed out that there is no difference in the tax treatment given to BIC companies. Thus, unlike other legal systems in which there are tax incentives for the creation and operation of these companies, the Colombian legal system adopts, for now, a criterion of tax neutrality for these entities. That is to say, they have the same tax burden as companies that are exclusively for profit.

2.4 Additional Features of BICs

The choice of this type of company presupposes not only the obligation to include those activities in the corporate purpose from which it is intended to create benefits for the community or related to the collective interest. Also, the formality of incorporating the words “Benefit and Collective Interest” or the abbreviation BIC into the company reason or name must be observed.

Law 1901 of 2018 includes a detailed list of some of the general facets that characterize BIC companies, in relation to employees, the community, creditors, suppliers, and the environment, among others. Indeed, in paragraph of article 2 of the aforementioned law, it is stated that benefit and collective interest companies (BICs) have the following characteristics, “without prejudice to the fact that within their mission they develop other inherent attributes to its essence of corporate social responsibility”:

1. They establish a reasonable salary for their workers and analyze the salary differences between their most and least paid employees to establish fairness standards.
2. They establish subsidies to train and develop their workers professionally and offer professional reorientation programs to employees whose employment contract has been terminated.
3. They create options for workers to participate in the company, through the acquisition of shares. Additionally, they expand the health plans and wellness benefits of their employees and design strategies for mental and physical health nutrition, aiming for the balance between work and private life of their workers.
4. They create a manual for their employees, to explain the values and expectations of the company.
5. They provide employment options that give workers flexibility in the working day and create telework options, without affecting the remuneration of their workers.
6. They create job options for the structurally unemployed population, such as youth at risk, homeless individuals, reintegrated or people who have been released from prison.
7. They expand the diversity in the composition of the boards of directors, management, executive and supply teams, in order to include in them people belonging to different cultures, ethnic minorities, religions, and those with different sexual orientations, heterogeneous physical capacities and diversity of genre.
8. They encourage volunteer activities and create alliances with foundations that support social works in the interest of the community.
9. They acquire goods or contract services from companies of local origin or that belong to women and minorities. In addition, they give preference in the execution of contracts to suppliers of goods and services that implement equitable and environmentally based standards.
10. Annually, they carry out environmental audits on efficiency in the use of energy, water and waste and disseminate the results to the general public and train their employees in the social and environmental mission of the company.
11. They monitor greenhouse gas emissions generated by business activity. They implement waste recycling or reuse programs. They progressively increase the renewable energy sources used by the company and motivate their suppliers to carry out their own environmental assessments and audits in relation to the use of electricity and water, waste generation, greenhouse gas emissions and the use of renewable energies.
12. They use energy efficient lighting systems and provide incentives to workers to use environmentally sustainable means of transport on their way to work.
13. They disclose the financial statements of the company to their workers.
14. They express the mission of the company in the various documents of the company.
15. They implement fair trade practices and promote programs for suppliers to become collective owners in the company, in order to help them to get out of poverty.

It is clear that this rule is not inclusive. Thus, it is possible that any other charitable activity that the shareholders consider useful or necessary can be included in the BIC by-laws. This norm alludes to the imperative nature in the writing of this paragraph. Indeed, the provision states that “Commercial Benefit and Collective Interest Companies (“BIC”) **will have**, among others, the following characteristics...”. An exegetical interpretation of this provision could lead to a conclusion that all BIC companies are required to incorporate into their by-laws all the charitable activities that have been described above.

It seems, however, that such a strict reading of the aforementioned rule could discourage the creation of this class of entities. Certainly, the obligation to commit to the 15 activities referred to above would make many entrepreneurs think twice about

adopting this business modality. A systematic interpretation is appropriate in order to reconcile the requirement imposed on the company to carry out some benefit and collective interest activities, with the State interest of encouraging the creation of this type of companies. As is evident, the practical performance of all the aforementioned activities would be so onerous that it would surely leave the company without any opportunity to create profit for its associates. In light of the above, it seems clear that the rule discussed could not be interpreted exegetically. In our opinion, therefore, the inclusion of any of these activities in the by-laws would suffice to make a company assume the form of a BIC company. The Colombian government has reasonably interpreted these provisions. So only one activity out of each of the five ESG “dimensions” provided in Law 1901 of 2018 needs to be mandatorily undertaken.

2.5 *Acquisition and Loss of the Status of a BIC Company*

As indicated at the beginning of the chapter, BIC companies can be created *ex novo* if the associates adopt this system at the time of the incorporation of the company or *ex post* through a statutory reform in which the BIC structure is adopted. Law 1901 of 2018 is sufficiently clear on this point. Article 3 states, in effect, that “to adopt the status of BIC company or to terminate it, a statutory amendment adopted by the majority provided for in the law or in the statutes for the amendments of the social contract will be required.” Using this standard, the essentially voluntary nature of this business modality is emphasized. It is clear that the adoption of the BIC company does not imply the transformation of the company. Based on the aforementioned, the choice of a Benefit and Collective Interest Company does not imply a change in the type of business association adopted *ab initio*. For this reason, the mandatory provisions set forth in the Commercial Code for *conversions*, which include a special type of shareholders’ meeting (article 13 of Law 222 of 1995) are not applied. The obligation to fulfill legal conditions for the amendment of the company’s by-laws (or charter) include an inspection right granted to shareholders during the 15 business days that precede the shareholders’ meeting (*ibid.*). Since the adoption of a BIC does not entail a *conversion* those requirements are not applied either, nor the special balance sheet for the reform to the company’s by-laws (article 170 of the Commercial Code), nor the right of withdrawal for absentees and dissidents (article 12 of Law 222, cited). Thus, the shareholders’ decision to move to the BIC framework implies only a by-law reform not subject to specific individual rights or guarantees.

It is obvious that in the case of the creation of BIC companies *ex novo*, the unanimous consent of the company’s shareholders (original investors) is required. As there are no dissidents and there is a commonality of purpose between the partners or shareholders, the risks of internal conflict arising from the hybrid nature of the company are mitigated. The situation is quite different when the character of a BIC company is adopted after the establishment of the company, though this

happens less frequently. The decision rendered by the shareholders' meeting to abide by the legal framework of a benefit and collective interest company raises certain concerns regarding the minority shareholders or partners. In accordance with the law, such decision is subject to a majority equal to that provided for the amendment of the company's by-laws. And, obviously, such a decision is not always approved by unanimous consent. Instead it can be adopted frequently by the vote of an absolute majority. Therefore, it is likely that absent or dissenting shareholders could attempt to challenge the adoption of a BIC.

Obviously, such resolutions of the assembly or shareholders are subject to a majority voting rule. In accordance with the provisions of article 188 of the Commercial Code, all valid resolutions adopted by the highest corporate body, in observance of the rules on the calling of meetings, quorums, and majorities, are binding on all shareholders. It is normally assumed that the majority expresses what has come *to be called the corporate interest*. Hence, both those who vote in favor and those who oppose the determination or do not attend the meeting are equally bound by the decision adopted by the corporate body.

Naturally, as with all the resolutions adopted by the highest corporate body, those who are absent or dissenting have the right to challenge the resolutions that have been adopted. The action to challenge the resolution of the assembly or shareholders may be brought on the grounds provided for under article 190 of the Commercial Code:

Decisions taken during a meeting held in contravention of the provisions of Article 186 [lack of convocation or quorum or performance outside the registered office without the presence of a universal quorum] will be ineffective; Those that are adopted without the number of votes provided by the statutes or laws, or exceeding the limits of the social contract, will be absolutely null; and those that are not of a general nature, in accordance with the provisions of article 188, will be unenforceable to absent or dissident members.

Additionally, resolutions adopted by the highest corporate body may be questioned when they imply an abuse by the majority. In general, there is reprehensible abuse "when a subjective right is exercised with the intention of causing damage or for a purpose other than that for which the objective right has provided for its use." This point is explained by the great French scholar Louis Josserand (1999, p. 5):

Modern law and especially contemporary law have developed a much more comprehensive idea of the abuse of right. It is abusive any act that, for its motives and for its purpose, goes against destiny, against the function of the Law that is exercised; the purely intentional criterion tends to be replaced by a functional criterion, derived from the spirit of Law, and from the function entrusted to it.

Article 43 of Law 1258 of 2008 states:

Shareholders must exercise the right to vote in the interest of the company. A vote exercised for the purpose of causing harm to the company or other shareholders or to obtain for oneself or for a third unjustified advantage, as well as a vote from which it may be detrimental to the company or to the other shareholders, will be considered abusive. Whoever abuses their shareholder rights in the determinations adopted at the meeting will be liable for the damages

caused, notwithstanding that the Superintendency of Companies may declare the absolute nullity of the determination adopted, due to the illegality of the object.

The Colombian Superintendency of Companies has stated that the abuse of right constitutes an exceptional mechanism whose actions must be duly accredited during the process. In this regard, the entity, in the exercise of jurisdictional functions, has highlighted what is transcribed below:

This Office has also made reference to the high burden of proof that must be met by those who propose a legal action for abuse of majority. In these circumstances, it is not enough to allege that the decisions approved in a meeting of the assembly were contrary to the subjective interests of a minority shareholder. To prove that an abuse occurred, it must be shown that the actions of the majority were motivated by an illegitimate purpose. This would occur, for example, if the right to vote was exercised with the deliberate intent to cause harm to the minority shareholder. [...] The Firm does not have evidence to verify that the majority shareholders of Jannas Business Group (Simplified Corporation, SC) acted abusively when approving the capitalization aimed by this procedure. First, the plaintiff did not provide sufficient evidence to dispute the economic justification used by the defendants to approve the capitalization under study [...]. Second, the primary issue [...] was carried out subject to the right of first refusal [...] the Office found no indications that the majority had decided to issue shares knowing that Mr. Rodríguez lacked sufficient resources to exercise their right of first refusal” (Order issued in the case of Alexander Rodríguez against Jannas Grupo Empresarial SSC and others).

2.6 Governance of BIC

Law 222 of 1995 contains the basic rules concerning the liability of directors and officers of a company (also referred to as administrators). This statute establishes the definition of those officials who are considered administrators for the purpose of the application of fiduciary duties of conduct (good faith, loyalty, and care). Based on this definition, the aforementioned duties of conduct are developed in detail, the responsibility system that corresponds to them is indicated, and the individual or derivative suit that proceed in case of violation of the legal framework are indicated thereby.

Colombian law does not explicitly provide that fiduciary duties are applicable to the relationship between administrators and shareholders (as it occurs in other legal systems). However,¹⁸ there are provisions in the current legislation that allow for a

¹⁸ Thus, for example, Portuguese legislation goes beyond the precept adopted in Colombia. When referring to the duty of care, art. 64 of the Code of Commercial Companies (decree-law 262 of 1986) provides that “managers, administrators or directors of a company must act with the diligence of a reasonable and orderly manager, in the interests of the company, taking into account the interests of shareholders and workers” (See Neto, 1988, p. 460). Against this trend, Rodríguez Azuero (1998, p. 58) has manifested itself in Colombia, noting that it is striking that art. 22 of Law 222 of 1995 “note that the actions of the representative will be carried out in the interests of the company, but taking into account the interests of the associates, since the administrators must fundamentally watch over the interests of the legal person that is, for legal mandate, essentially

broad interpretation of such duties. For instance, according to article 23 of Law 222 of 1995, the actions of the administrators “shall be carried out in the interests of the company, **taking into account the interests of its associates.**” That article denotes the legislative intent to apply the rule to situations involving disloyalty to shareholders. This requirement does not in any way detract from the premise that the main interest that administrators must defend is that of the company (in the traditional framework of exclusively profit-making companies). However, there is no negative connotation in the fact that the administrator has the duty to consider the situation of all or some of the shareholders at the time of making decisions, the adoption of which may cause them harm.¹⁹

One of the great legal innovations introduced by Law 1901 on BIC companies lies precisely in the possibility that the company’s managers can consider interests different from those of the company and the shareholders. Thus, in effect, according to the literal wording of article 4 of the Law, “In addition to the rules provided for liability in Law 222 of 1995, the administrators of BIC companies must take into account the interest of the company, that of its partners or shareholders and the benefit and collective interest that has been defined in its bylaws.” This rule allows the resolutions adopted by the company’s administrative bodies (board of directors) to contemplate nonprofit activities, such as those indicated in the aforementioned provision of article 2 of Law 1901.

In light of the above-quoted article it is clear that there was a change in the legal system governing the liability of directors and officers. In truth, the managers of the social enterprise will not be subject to liability for the fact of carrying out acts that are not oriented to favor, exclusively, the interests of the shareholders or partners. Thus, to the extent that administrators act within the scope provided for in the by-laws (both in lucrative activities and in those that are not), they will be protected from possible liability vis-à-vis the company, its shareholders, and third parties.

2.7 *Special Report*

In addition to obligations imposed on administrators by virtue of the provisions of Law 222 of 1995 and, in particular, the duty of legal representatives to prepare a management report pursuant to the terms of article 47, *ibid.*, the law on BIC

different from that of the partners”. The aforementioned UK company regime establishes the principle called “enlightened shareholders value”, which allows the interests of the associates to be taken into account in the determinations of the Board of Directors.

¹⁹In accordance with the case law established by the Superintendency of Companies of Colombia, “the norms that govern the actions of the administrators seek to promote a delicate balance between the autonomy that such subjects must have to conduct social business and the responsibility that must be attributed to them by inadequate compliance with this management” (Superintendency of Companies. Judgment No. 800-52 of September 1, 2014).

companies establishes the need for a special report to be prepared regarding the beneficial activities the company developed during the year. According to the text of article 5 of Law 1901:

The legal representative of the BIC company will prepare and present to the highest corporate body a report on the impact of the management of the respective company, in which they will report on the activities of benefit and collective interest developed by the company. This information must be included in the year-end report, which is presented to the highest corporate body.

The usefulness of this report is clear. Primarily, it is useful for associates, who will be able to evaluate the nonprofit activity of the company during the accounting period reviewed. In effect, while the management report referred to in Law 222 allows them to examine the conduct of the administrators in relation to the lucrative businesses of the company, the report prepared pursuant to Law 1901 provides them with information on the benefit and collective interest acts performed by the company within the same accounting cycle. The report will include, among other things, the percentages of investment made in various activities and the profitability of the company itself.

Also, the special report referred to in article 5, cited above, has significant use to government control authorities, such as the Superintendency of Companies and, especially, tax authorities. As already explained above, the risk of charitable activities becoming fictitious sources of tax exemptions and deductions justifies the need for management reports concerning the scope and extent of the company's activities.

In order for the report to enjoy sufficient publicity, the second paragraph of article 5 of the BIC Law requires that it "must be published on the company's website for consultation by the public." In the event that the company does not have a website, the aforementioned report "must be available at the registered office and will be sent to whoever so requests in writing by means of a communication addressed to the legal representative of the BIC company" (ibid).

2.8 *Stand-Alone Standard*

BIC companies must be understood in the framework of an international movement in which several countries have issued legislation on them, and various private organizations have developed independent standards for the reporting of information related to the activities engaged in by these companies. The existence of these standards greatly facilitates the homogenization and reliability of the data provided to shareholders and third parties.

Due to the above, it is implied, in Law 1901, that the management report should be subject to independent standards. Article 6 of the BIC Law establishes, in effect, that the independent standard adopted by BIC companies must adhere to the following principles:

- (a) Recognition. This principle refers to the fact that the standard must be recognized for being used to define, report and evaluate the activity of companies in relation to the community and the environment;
- (b) Comprehensive character. The concept refers to the fact that, in the evaluation and reporting methodology, the effects of the activity of the BIC company in relation to the activities of benefit and collective interest must be analyzed;
- (c) Independence. The concept refers to the evaluation and reporting methodology that must be developed by a public, private or mixed, national or foreign entity which is not controlled by the BIC Company, nor by its parent companies or subsidiaries;
- (d) Reliability. This refers to the fact that the standard must be prepared by an entity that has experience in evaluating the impact of the companies' activity on the community and the environment and that it must be based on methodologies that include an examination from different perspectives;
- (e) Transparency. It means that the information used with the independent standards, as well as that relative to the entities that elaborate them, must be published for the knowledge of the public.

It is evident that the standards for reporting information regarding BIC companies are dynamic in nature since they are periodically modified. Certainly, the international entities in charge of preparing them must continually modify such guidelines to keep them up to date.

There should be quality control regarding the standards that BIC companies can use to prepare their management reports. Precisely for this reason, in Law 1901, it is stated that the Superintendency of Companies has the power to create a list of independent criteria, according to which compliance with the five principles indicated above can be determined. The Superintendency of Companies, through Resolution 200-004394 of October 18, 2018 defines the independent standards to be used by BIC companies, because they comply with the principles set forth in article 5 of the Law. In accordance with the aforementioned administrative act, the standards accepted in Colombia for the aforementioned purposes are the following:

1. The B Corporation Type B Company Certification.
2. The GRI Standards of the Global Reporting Initiative.
3. The ISO 26000 standard for Corporate Social Responsibility of the International Organization for Standardization.
4. The United Nations Guide to the Sustainable Development Goals (SDG Compass), the World Business Council for Sustainable Development and the GR.15.

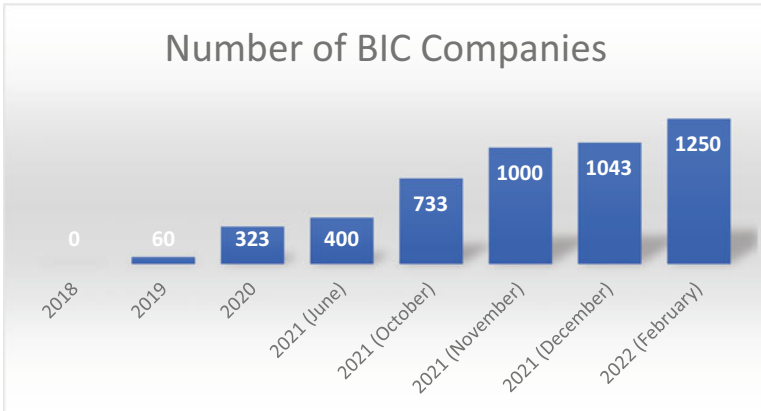


Fig. 1 Number of BIC companies. Source: Colombian Superintendence of Companies (2022)

3 Conclusion

As of March 2021, there were 62 companies in Colombia certified by System B.²⁰ Among them are restaurant chain Crepes & Waffles and Finaktiva, a financial entity specializing in granting loans to new ventures. However, the certifications held by these companies do not necessarily mean that they have adopted the model of the benefit and collective interest companies. To the extent that these companies act as profit-making companies, a problem could arise regarding their ability to carry out activities of benefit and collective interest. As indicated at the beginning, there are criteria in connection with the corporate purpose, proportionality, and capacity of the society to prevent, in general, a civil or commercial society allocating a substantial part of its resources to non-profit activities. Thus, any shareholder or, even, creditor could request the nullity of such activities based on the ultra vires theory.

Hence, it is reasonable to demand that such companies (certified as B companies) adopt the modality of benefit and collective interest companies in accordance with the provisions of Law 1901 of 2018. If shareholders have an interest in the development of these activities, they could not do so without complying with the rules set forth in the aforementioned law on BIC Companies. It is the Superintendency of Companies that has the power to intervene and prevent the illegal acts of B companies that have not adopted the BIC company model. It remains to be seen if there will be a convergence between Colombian BIC companies and the few corporations that have been certified by System B in this country.

²⁰See “Empresas B, comunidad que va más allá de las finanzas”, Bogotá, Portafolio, March 19, 2021: (<https://www.portafolio.co/negocios/empresas/empresas-b-comunidad-que-va-mas-alla-de-las-finanzas-550242>).

In any event, it is clear that Colombian legislation has adopted a highly flexible model for benefit and collective interest companies, which does not imply high transaction costs for entrepreneurs who wish to adopt it. The adoption of all the advantages of a BIC is facilitated by the fact that it is not a specific type of company (requiring conversion to take advantage of its features).

That is probably the reason why the model of BIC companies has been so successful in Colombia. As can be seen from the statistical data provided in Fig. 1, the growth of this business model has been exponential within the last few years.

One of the main advantages of BIC companies consists of the possibility of acting legitimately in lucrative and non-profit spheres. Before the advent of this legislation, the activities of benefit and collective interest were not legally viable, due to the restrictions derived from the essential element of profit sharing, the specialty theory and the *ultra vires* concept. Certainly, the principle that governs the Commercial Code and other complementary regulations is the maximization of the economic benefits received by shareholders.

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Social Enterprises and B-Corps in Ecuador



Esteban Ortiz and José Ignacio Morejón

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1 Introduction

In recent years, Ecuador has experienced a growing interest in issues related to environmental, social, and governance (ESG) factors. Ecuador became the first country in the world to recognize the inalienable rights of nature in its Constitution in 2008.¹

The Constitution of the Republic of Ecuador recognizes in Article 71:

¹According to Farith Simon (2013), “there are three of these rights (in articles 71 and 72): (1) full respect for its existence; (2) maintenance and regeneration of its life cycles, structure, functions and evolutionary processes; and, (3) the right to restoration, as an autonomous right to which individuals and groups have the right to be compensated in the event of environmental damage.”

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[N]ature or Pacha Mama, where life is reproduced and fulfilled, has the right to have its existence fully respected and the maintenance and regeneration of its vital cycles, structure, functions, and evolutionary processes [...].

Article 10, paragraph 2, of the Constitution establishes that:

Nature will be subject to those rights recognized by the Constitution.

Although this subject is under discussion worldwide, with some perceiving it as a nonsensical novelty and others placing a revolutionary value on it,² it is clear that, overall, the country's legal system has raised awareness of these issues.

In addition to recognizing the rights of nature, the same normative body establishes it in Article 3, Section 5:

[T]hey are primary duties of the State: (...) 5. Planning national development, eradicating poverty, promoting sustainable development, and the equitable redistribution of resources and wealth to access good living

Article 395, Section 1, of the Constitution of the Republic of Ecuador states:

The Constitution recognizes the following environmental principles: 1. The State shall guarantee a sustainable development model that is environmentally balanced and respectful of cultural diversity. The model will conserve biodiversity and the natural regeneration capacity of ecosystems, and ensure the fulfillment of the needs of present and future generations.

Such recognition has sparked a debate in the country regarding sustainable development and the relation of productive systems with society and the environment. In addition to the 2008 Constitution of the Republic, 22 national laws recognize or include the concept of "social responsibility."³ A study carried out by Miguel Saltos (op. cit.) shows that 70% of business leaders have shown a *favorable predisposition* to these innovations. Ecuadorian companies have adopted *corporate social responsibility* (CSR), philanthropy, and shared value, and these innovations have become tools for major transformations related to creating value.

Ecuador took a very important step by recognizing BIC companies as part of its legal system, being one of the few countries that have effectively incorporated these companies into its legislation. Ecuador recognized "Benefit Corporations" in its legal system using an unorthodox legislative strategy. First, it did so through an administrative resolution, called the instructions sheet, on commercial benefit and collective interest companies⁴ (BIC companies), which was issued by the Superintendency of Companies, Securities, and Insurance (SCSI). This Resolution is a fully

²Likewise, Farith Simon comments, "the constitutional recognition of Nature as a legal entity has aroused more than enthusiastic adherence in the legal world. However, the favorable reaction is not unanimous. Several voices consider this as a statement with more of a rhetorical, than a true practical, impact, as its effect is potentially less than that which would be achieved by improving environmental protection standards." Ibidem.

³See Saltos Orrala and Velázquez Ávila (2019, p. 4).

⁴Instructions on Benefit and Collective Interest companies; Resolution No. SCVS-INC-DNCDN-2019-0021, December 6, 2019, published in Official Gazette No. 107, December 24, 2019.

valid administrative act issued by the highest-ranked entity that controls and regulates companies in the country. It recognizes five areas: governance, environment, workers, customers, and community, in which companies could adapt their statuses to achieve positive material impacts. This is legally feasible as the Resolution did not create a new category for which a legal reform through legislative power is needed. Thus, any company, either a limited liability company (LLC) or a corporation could adopt this category and maintain its societal structure. The efforts of local lawyer that led this process bet on a practical solution rather than the traditional process of creating a new bill on a subject that is not properly understood. As such, the SCSJ issued an *erga omnes*⁵ norm that expressly recognized BIC corporations and installed the concept in the business and legal ecosystem, aiming to create a larger and more mature leading coalition to advocate for the concept. The Resolution created a legal possibility for any company to adopt this BIC status.⁶

In January 2022, the legislature approved the first Entrepreneurship and Innovation Law. Its provisions included an amendment to the Corporation Act, which includes a chapter that expressly recognizes BIC corporations. Ecuador acknowledges BIC corporations, both in the instructions sheet and in the Law. Through its regulatory recognition, Ecuador became the fourth country in the world to join the list of nations that recognize this specific type of corporation.

As part of a bigger system change, this process was powered by Sistema B Ecuador, a local part of a movement that serves people using business as a force for good. There are 21 certified B Corps:⁷

A mini-market for organic products; a dairy company; a brand of chocolates that sells in about 30 countries; an incubator and accelerator of social enterprises; and a family farm that sells eggs, strawberries, avocados, spinach, and other foods grown and harvested without chemicals, fertilizers or additives.⁸

Certified B Corps and BIC corporations are building a solid local movement of purpose-driven businesses that aim to solve specific social and environmental problems and prioritize impact assessments, stakeholder governance, and transparency.

⁵It is important to consider that the jurisdiction of the Superintendency of Companies, Securities, and Insurance (SCSJ) is limited to the companies it controls. In other words, the *erga omnes* character has general applications for all active and inactive companies in Ecuador.

⁶Entrepreneurship and Innovation Law.

⁷The certification process is different from that of company incorporation. As of the date on this note, written on (09/16/2020), the SCSJ registers 73 companies constituted under this framework, which, according to our regulations, must be subsequently certified during this step.

⁸Information obtained from the following link: <https://www.revistalideres.ec/lideres/empresas-evolucion-enfoque-negocios-sostenibilidad.html>.

2 Current Reality of Companies in Ecuador

Ecuador closed 2019 with 91,370 active companies, according to the data from the SCSI. According to official data, the majority of companies in the great universe of companies incorporated in Ecuador are micro-, small, or medium-sized companies (MSMEs). In Ecuador, during the fiscal year 2018,⁹ 35,226 microenterprises were reported (companies with one to nine workers or with an income less than \$100,000.00). This amount represents 56% of the companies reported within that fiscal year. Small companies (having 10 to 49 workers or with income between \$100,001.00 and \$1,000,000.00) comprised 29.2% of the total number of companies reported in the same year. With regard to medium-sized companies (having 50 to 199 workers or with a reported income between \$1,000,001.00 and \$ 5,000,000.00), the number rose to 6551, representing 10.4% of the companies reported in 2018.

The universe of MSMEs represents 95.6% of active mercantile companies reported in Ecuador during the 2018 fiscal year, compared to a mere 4.4% of large companies. This corporate reality in Ecuador shows that the overwhelming majority of companies that boost the country's business economy are family companies or small and medium-sized enterprises (SMEs).

3 *Sistema B* in the Equator

In 2014, when *Sistema B* was not yet established as an institution, two companies in Ecuador achieved the certified B Corp status: *Impaqto* and *Coinnovar*. These companies operate in the service industry, focusing on the social and impact ecosystems, and promoted the creation of an advocacy group for the B Corp certification of more local companies. By 2015, two more companies, including *Pacari*, received certification. In August 2018, *Sistema B Ecuador* (SBEC) acquired its legal status and was formally institutionalized under Ecuadorian laws, becoming a nonprofit institution. *Sistema B Corporation* was founded by Yolanda Kakabadse, Sandra Reed, María Auxiliadora Villacrés, Santiago Ribadeneira, and José Ignacio Morejón. To date, its governance model is composed of an administration committee comprising nine members, who act as the board of directors, and an executive directorate with an executive and operational team. The SBEC approach is an ecosystem-based movement to transform Ecuadorian corporate law, advocating for stakeholder governance and transparency.

⁹NdelA: the companies provide statistical data related to economic factors during their annual presentation of information. This obligation to the SCSI should be complied with by April of the following year (in this case, the information for 2019 must be submitted in April 2020). At the time of preparation of this article, and due to the publication of the book, we do not have updated information. However, we estimate that the statistical information does not differ much from that of 2018.

4 Raising Awareness and Preparing the Groundwork in Ecuador

The purpose of Sistema B Ecuador is *to promote and facilitate the creation of the necessary conditions so that more and more B Corps and for profit entities with a purpose are constituted and developed. This would generate the positive material impact which results from their business models in the country, while serving a movement of people using business as a force for good.*¹⁰ In this context—while understanding the importance of preparing the national legal framework, even before the formal constitution of the Corporation—the advocacy group of Sistema B Ecuador organized the First Conference on Legal Innovation in Ecuador at University San Francisco de Quito in March 2018. This entailed two days of keynote conferences, in which more than 68 local lawyers received training on issues related to B Corp certification and BIC corporations for the first time. It was a collaborative project in which the authors of this chapter participated as speakers and trainers, along with local lawyers, in collaboration with William Clark and Pérez, Bustamante y Ponce, the biggest and one of the most respected law firms in the country. In addition, several regional icons of environmental law, led by Kakabadse, were added, including Pedro Tarak, Jorge Caillaux, Manuel Pulgar Vidal, Rafael Asenjo, and Juan Dumas, among others. This conference catalyzed the academic and professional formation of a community of lawyers that would later design, advocate, and join efforts to achieve the recognition of BIC companies in the country.

It is important to emphasize the collaborative dynamics that existed among conference speakers to generate academic content for a topic that had never been discussed before at a technical level in Ecuador. The content originated from existing public materials generated by Academia B and Derecho Innova: specifically, a booklet titled “Launching Sistema B.” Modules were then presented to address specific subjects, led by specialists from Pérez Bustamante y Ponce law firm. Thereafter, a Q & A section was included in the agenda, in which participants raised initial key questions that would later strengthen the strategy. These questions include the following: what would be the legal and corporate implication of BIC Corps’ recognition in Ecuadorian law? What effect would this recognition have on the current labor, tax, corporate, environmental, and investment law? What differentiates certified B Corps from BIC Corps? When should an enterprise become a certified B Corp or a BIC Corp?

From this first training and awareness effort, *Sistema B* Ecuador continued its campaign to position the concept in different business and public forums. Simultaneously, the SCSI team prepared the instructive for the recognition of BIC Corps and presented a draft of the BIC Law at the Economic Commission of the National Assembly for debate. Both texts have the same basis and content with very few variations. The text that incorporated a chapter in the Companies Law was later

¹⁰Information was obtained from the following link: <https://www.sistemab.org/sobre/>.

included in the Entrepreneurship and Innovation bill project, which was finally approved in January 2022. Both legal texts now set the mandatory compliance standard for BIC Corps in the country.

5 The Current Situation

To date, there are 21 certified and four pending B Corps, comprising companies from five provinces in the national territory and from 11 different industries, reaching more than 1200 workers and with more than 5000 suppliers (including 1800 small suppliers from vulnerable populations) and ranging from small businesses to large companies. Since the BIC legal framework was enforced, more than 750 BIC companies have been registered.

Popular interest in types of companies that prioritize a sense of purpose is increasing as their relevance goes beyond certification or differentiation in the market tied to a marketing strategy. The real relevance of BIC or certified B Corps is related to the social and environmental situation in a country. As observed, the range is so wide that it extends from the conceptual recognition of the importance of interdependence in the Ecuadorian political constitution between people and the planet to the clearly perceived positive effects that rigorous stakeholder governance had during the social turmoil during the October 2019 demonstrations¹¹ and the COVID-19 pandemic. The need to rethink the role of companies as agents for change in society and the socioeconomic system is increasingly evident as an easy-to-understand message in the Ecuadorian corporate ecosystem. Today, the concept of companies, whether multinational, familial, or local, implementing tools, adopting legal frameworks, and addressing governance and transparency is perceived by many as a must. It enables proper management to impact people and the planet, while leading successful business models and going beyond traditional compliance indicators, like the number of jobs created and the payment of taxes, to alleviate poverty and regenerate ecosystems, among other impacts of business models.

¹¹ However, despite the companies in the country having difficulties in developing their activities, there was no impact on the B Companies. Interestingly, workers defended their workplaces against the possibility of vandalism, and others walked up to 5 hours to reach their workplaces. Suppliers did not fail to deliver products, and they were all committed to defending the companies. These measurements were among the certified companies, and, in all of them, the trend was the same.

In October 2019, a revolt led by social and indigenous movements took place in Ecuador. The protests, against the decision of the National Government to withdraw gasoline subsidies, paralyzed the country. Owing to the National Strike that lasted about two weeks, products could hardly be supplied to cities and companies regularly. At the national level, there was looting, closing of commercial premises, seizing of industries, and difficulty for workers to access their workplaces, etc. However, despite companies in the country experiencing losses while trying to develop their activities, there was no impact on B-Companies.

The local Movement B is now thriving locally as it is made up of not only certified B Corps but also other economic players from the private sector, such as BIC Corps, the government, the SCSI, the executive function through the Vice Presidency of the Republic, and SERCOP (National Public Procurement Service). All these institutions and organizations use and encourage the adoption of standards and tools, such as the *B Impact Assessment*, to diagnose the generation of impacts, positive business models, and commercial activities that are good for people, the planet, and profit. Now a strong group of for-profit entities manages these impacts and identifies gaps and opportunities for improvement in an ESG framework.

The greatest challenge will likely be converting these concepts into specific incentives in order to transform companies that bet not only on the intention to be moved by purpose but also on a binding commitment to evaluate their social and environmental performance at a statutory level. They move toward continuous improvement by incorporating triple impacts and key performance indicators (KPIs) and/or an integral approach, with which they measure the success of their management.

Ecuador currently has two regulations that are of different hierarchies but of great importance, which seek to promote business sustainability by generating a social purpose that extends beyond maximizing the operating profits of companies.

6 Current Regulations: A Two-Way Play

To ensure the adoption of a regulation that addresses this type of company, Ecuador aimed at two different regulatory objectives: (i) administrative resolution and (ii) law.

On the one hand, the SCSI approved the instructions sheet for the commercial companies of benefit and collective interest (BIC companies) through a valid administrative act issued on December 6, 2019. This act's normative force is recognized in the Constitution and in the Ecuadorian legal system. On the other hand, work was done so that the Entrepreneurship and Innovation Law would incorporate a reform to the Companies Law, which recognizes BIC companies. Every law has its regulations, and the Superintendency is regulated through administrative resolutions. Therefore, they are not incompatible but complementary norms. Both regulations are valid, legal, and legitimate, and they recognize benefit and collective interest companies (B companies) and benefit and collective interest mercantile companies (BIC companies) as options for entrepreneurs with a conscience.

6.1 *Instruction Sheet on Commercial Benefit and Collective Interest Corporations (BICs)*

The SCSI is a technical body for the supervision, auditing, intervention, and control of economic, social, and environmental activities and of the services provided by public and private entities, with the purpose that these activities and services be subject to the legal system and serve the general interest.

While exercising its corporate control attributions, the Companies Law details the powers of the Superintendency to promote the necessary tools to develop, on the one hand, the profit motive of commercial companies and, on the other, the sustainable and inclusive development that a BIC Corp should observe, complying with governance, social, and environmental standards.

To this end, Article 433 of the Companies Act empowers the Superintendent of Companies, Securities, and Insurance to issue regulations and resolutions it deems necessary for the good governance, supervision, and control of companies. This is complemented by Article 438, literal b), of the same Law, which states that it is the responsibility of the Superintendent of Companies, Securities, and Insurance to issue the necessary regulations for the operation of an institution, in addition to the rules necessary for the application of the Law to companies legally constituted and subject to its control.

This power to issue secondary regulations (*erga omnes*) on issues related to the powers established in the Law described above is detailed in the Constitution of the Republic and in the Companies Law:

Constitution of the Republic of Ecuador: Art. 425: The hierarchical order of application of the norms will be as follows: The Constitution; international treaties and conventions; organic laws; ordinary laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other acts and decisions of the public powers. In case of conflict between norms of different hierarchies, the Constitutional Court, judges, administrative authorities and servants, and public servants, will resolve it by applying the higher hierarchical norm. The normative hierarchy will consider, where appropriate, the principle of competence, especially the ownership of the exclusive powers of the decentralized autonomous governments.

In addition, the same Companies Law establishes that this Superintendency will regulate its application.

As explained, the SCSI has full power and ability to issue this type of regulation. This is one of the most important powers of the Control Body since it establishes the guidelines for companies to develop their business activity in accordance with local legislation.

This type of rule is issued through an administrative act. As such, parliamentary debate or votes are not needed for its approval, as the process of law requires. The technical criterion of the supervisory authority is enough to issue a regulation for which it is fully competent. This can be replicated this way in other jurisdictions with control entity or administrative authority that has similar powers and characteristics.

Even if the reform to the Companies Act had not been approved, this Instruction has the same scope of competence as the Law. That is, the Companies Law regulates the 91,370 active companies in the country, which could become BIC companies, according to the Law. However, the Instructions regulate the same number of companies as these are under the control of the SCSI.

6.2 *BIC Law*

Article 281, Section 5, of the Constitution of the Republic of Ecuador determines that the state will be responsible for, among other policies, “establishing preferential financing mechanisms for small and medium producers, thus it facilitates the acquisition of means of production.” Article 284, Section 2, of the aforementioned supreme rule indicates that the economic policy will have, among others, the objective of “encouraging national production, systemic productivity, and competitiveness; the accumulation of scientific and technological knowledge; strategic insertion in the world economy; and complementary productive activities in regional integration.” Under this constitutional order, it should be specified that the Entrepreneurship and Innovation Law establishes a regulatory framework that encourages “the creation, development, growth, and expansion of entrepreneurship projects at the national level,”¹² seeking, among other purposes, “to promote the formalization of entrepreneurs and increasing their production and capitalization.”¹³ Under the need to promote entrepreneurship at the national level and improve economic integration, the Entrepreneurship and Innovation Law included a new section in the Companies Law recognizing companies with benefits and collective interests.

This reform to the Companies Law, included in the Entrepreneurship and Innovation Law, complements and elevates, to the rank of law, what the Instructions issued by the SCSI previously issued, reinforcing the intention of regulating the mechanisms that companies have to generate that impact locally.

6.3 *Content of Both Standards*

Ecuador has been receptive to this type of initiative, and B lawyers have been working on this project since 2018. For this reason, the first draft of the BIC Company Recognition Instructions project was prepared and presented to the Superintendent of Companies in September 2018. This document, initially prepared by Esteban Ortiz, Paul Noboa, Gabriela Cruz, and José Ignacio Morejón, was based on

¹²Entrepreneurship and Innovation Law, article 1.

¹³Entrepreneurship and Innovation Law, article 2, literal k.

the North American legislation that was later *adapted*¹⁴ until a norm with international standards suitable for the needs and normative characteristics of the country was obtained.

The content of the regulations of Instructions was discussed within the Superintendency of Companies throughout 2019 through presentations to the authorities and internal work on regulatory purification. On December 6, 2019, the Superintendent of Companies, Securities, and Insurance and Víctor Anchundia Places signed the first standard that recognized BIC companies in the country.

In parallel, the Quito Companies Administration and the Economic Commission in charge of discussing the draft Law on Entrepreneurship and Innovation worked on the text of what would be the chapter that reforms the Companies Law. This reform included two extremely important chapters: the Simplified Stock Company (SAS) and the Collective Benefit and Interest Company (BIC Company). The same team prepared both texts; therefore, if the texts in the Instructions and the Law are compared to date, there are almost no differences.

6.3.1 Characteristics to Be a BIC Company

One of the most important characteristics included in the Ecuadorian regulations has to do with the imperative that to be a BIC company, a company must modify its statute and consider positive material, social, and environmental impacts as a contractual obligation that must be fulfilled by the administrators.

To adopt a BIC society status, and thus develop operational activities to benefit partners or shareholders' interests and become obliged to generate a positive material impact while pursuing the interest of society and the environment, companies controlled by the SCSL must resolve this through the general assembly of shareholders, with a majority representing at least two-thirds of the company's capital.

According to Ecuadorian Company's Law, the company's corporate purpose must be reformed and at least incorporate in the statute specific activities through which these companies will comply with the obligation to generate positive social or environmental impacts. To be valid, this statutory reform must comply with the formalities established in the Law for any corporate act. These positive material impacts will be measurable, verifiable, and evaluated in accordance with international standards and established based on the Ecuadorian standard.

The standard clause adopted by all certified B Corps and BICs reads as follows:

Its purpose, which should seek a positive material impact on society and the environment, considered as a whole (which will be evaluated taking into consideration the standards of an

¹⁴Neologism refers, in this case, to the adaptation of the imported norms to the local regulations in order to (i) maintain sense and context based on our legal system; (ii) that can be applied; (iii) that adapt to the rest of the legal system; and, (iv) that add the necessary rules that our system requires for its validity. In addition, in this process, contributions are made to improve the standard or its context.

independent third party specialized in the matter), is [a single economic activity, which may include all stages of production and marketing of said activity].

However, in addition to reforming the statute related to a company's corporate purpose, it is also essential to reform it in order to expand the fiduciary duty of administrators concerning stakeholder governance since to achieve the objectives incorporated in the object, they must ensure compliance with the activities provided for in the statute, in one or more areas.

6.3.2 Expansion of the Fiduciary Duty of Administrators and Judicial Requirement of the Duty of Due Consideration

The expansion of the fiduciary duty is of utmost importance to prevent distracting the administrator or legal representative of a company from their obligation to generate the positive material impact established in the statute.

When carrying out or executing any activity related to the obligation to create a positive material impact on society and the environment, the administrators, managers, and directors of a BIC company must consider the effects of their actions or omissions on the following:

1. Partners or shareholders
2. Workforce and, more specifically, workers, its subsidiaries, and its suppliers
3. Clients and consumers
4. Community
5. Local and global environment
6. Company's performance in the short, medium, and long term; and
7. Ability to fulfill its corporate purpose

The liability action against administrators who breach the obligation to create a positive material impact on society and the environment will be brought by the company that has a prior agreement with the general assembly of shareholders, in accordance with Article 272 of the Companies Act.

As stated, the statute must also be modified, or a specific clause must be incorporated that establishes the regulatory powers of the administrator. The standard clause that all certified B corporations are suggested to incorporate into their by-laws reads as follows:

In the performance of its powers, the legal representative must take into account in any decision or action, the effects of said decision or action with respect to: (i) the [shareholders / partners]; (ii) the workers and workforce of the company, its subsidiaries and its suppliers; (iii) the clients and consumers of the company; (iv) the community; (v) the local and global environment; (vi) the performance of the company in the short and long term; and (vii) the company's ability to fulfill its corporate purpose.

6.3.3 Impact Management Reporting by Independent Standards

The legal representative of a BIC Corp must, while choosing the most appropriate standards, annually prepare a management impact report, giving an account of the activities carried out to comply with the obligation to create a positive material impact on society and the environment. This report must be written by an independent and specialized entity in the corresponding fields and presented to the general assembly of shareholders for its knowledge and approval.

This report is to be prepared under independent, internationally recognized standards, such as the following:

- Those recognized in the B Impact Assessment
- GRI
- ISO 2600
- SDG COMPASS
- WBSG
- AA100 (Relationship, RS de Accountability)

Although these standards are established in the regulations as a reference, this is not an exhaustive classification. Companies may choose to use any reference to prepare their annual report, as long as they have international recognition.

The independent standard for the preparation of the management impact report may be subject to audit by competent authorities and must observe at least some or all of the following characteristics:

- (a) **Understandability:** the reports will provide complete and clear information on the activity carried out to fulfill the obligation to generate a positive impact on society and the environment. The evaluation and reporting methodology must analyze the effects of the said activity.
- (b) **Independence:** the evaluation and reporting methodology must be developed by an entity that is not controlled by the BIC Corp or its parent companies or subsidiaries. The evaluation must be carried out by an entity that does not maintain contractual ties, or at the level of ownership, management, credit responsibility, or results with the BIC Corp.
- (c) **Reliability:** positive material impacts mentioned in the reports will be measured, verified, and evaluated by an entity that has experience in evaluating the impact of the companies' activity on the community and the environment and will use methodologies that include an examination from different perspectives, actors, standards, and indicators.
- (d) **Transparency:** the information of the independent evaluation standards will be made known to the public as they must be uploaded to the BIC Corp website and considered by the control authority.

6.3.4 Areas of Material Positive Impact

The obligation to create a positive material impact on society and the environment may cover one or more of the following areas of impact: governance, workers, community, customers, and the environment. Consequently, the administrators of a BIC must ensure compliance with the activities provided for in the statute, in one or more said areas, to achieve the specific objectives incorporated in its corporate purpose.

Governance

The area of impact on governance is related to the corporate governance of companies. For such purposes, the administrators of a society of benefit and collective interest may consider, among others, the following aspects:

1. The interests of the company and its partners or shareholders
2. The short-, medium- and long-term consequences of decisions related to the operational activity of the company they represent
3. The maintenance and protection of the reputation of the company
4. The need to treat fairly and equitably all partners or shareholders; and
5. The expansion of the diversity of the administrative and supervisory composition of the company

Workers

The area of impact on working capital will allow the administrators of a BIC company to consider the interests of their workers and, among others, the following aspects:

1. The establishment of a reasonable remuneration to analyze salary gaps and establish equitable standards in the perception of remuneration
2. The establishment of subsidies to train and professionally develop their working capital
3. To promote the participation of workers in the company, either through the acquisition of shares or participations, or their intervention in the administrative bodies of the company
4. To determine flexibility alternatives for workers' working hours, teleworking, or others, without affecting their remuneration
5. To disseminate, among its workers, the financial statements of the company

Community

The community impact area will allow administrators to consider, among others, the following aspects:

1. The need to foster social relations with the company's creditors, suppliers, and clients
2. The impact of social operations on the community
3. The effect of the operations of the company and its subsidiaries, if any, on the local, regional, national, and even international economy
4. The incentive for volunteer activities and the creation of alliances with foundations that support social works in the interest of the community, as part of its social responsibility policy
5. The focus of priority on the contracting of services or the acquisition of goods of local origin or that belong to enterprises developed by women or ethnic minorities

Customers

The customer impact area will allow administrators to address a social or environmental problem through, or for, their customers, considering, among other things, the following:

1. Provision of electricity or products that provide electricity, potable water, affordable housing, and other infrastructure
2. Products or services that allow people to focus on income-generating activities, such as computer software, financial tool, mobile technology, or services that optimize/enhance business activities;
3. Products or services that improve the delivery of health services, health outcomes, and healthy living, such as medications and preventive health services
4. Products and services that have an educational focus, such as schools, textbooks, media, and independent arts, or that preserve the local culture, such as artisan crafts
5. Business products or services that have a commercial mission focused on having a positive social impact

Environment

Among others, the area of impact on the environment will allow the administrators of a benefit and collective interest company to consider the following:

1. Respect for the rights of nature, enshrined in the Constitution of the Republic
2. The impact of its operations on the environment
3. The supervision of greenhouse gas emissions
4. The promotion of recycling or waste reuse programs

5. The increase in the use of renewable energy sources and the implementation of energy efficiency measures

7 Conclusion

Owing to this regulatory recognition, Ecuador became the fourth country in the world to recognize benefit and collective interest societies in its legislation. However, at the administrative act level, it is the first in the world to innovate with this tool, which may be useful for other countries that have difficulties approving it in the legislative chamber. This way, these types of companies will be recognized through secondary regulations.

While it is true that this mechanism worked well in Ecuador, we believe that it may also work in countries with similar systems.

Regarding the business aspects, there is a long way to go; however, these types of concepts are well received by the community, and more companies are seeking to generate positive material impacts. Currently, we have approved a very useful regulation that will allow BIC Corps to take possession as companies that use the power of the market to solve social and environmental problems and earn money.

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The Suitability of French Law to B Corp



David Hiez

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1 Introduction

B Corp has been launched more than ten years ago in North America and it has gained all the continents. France has also welcome B Corp (see Fig. 1), whereas its regulatory landscape is very different from common law. Therefore, it is very stimulating to examine the development of B Corps in this country. It can be done with various angles, and it will be done in that work through the traditional dogmatic methodology.

As a starting point, however, some data are important to have in mind:

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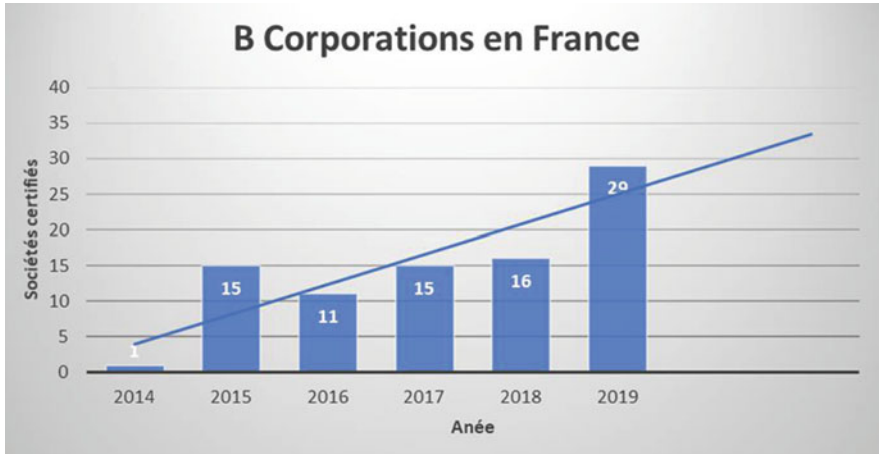


Fig. 1 Evolution of the number of B Corps per year

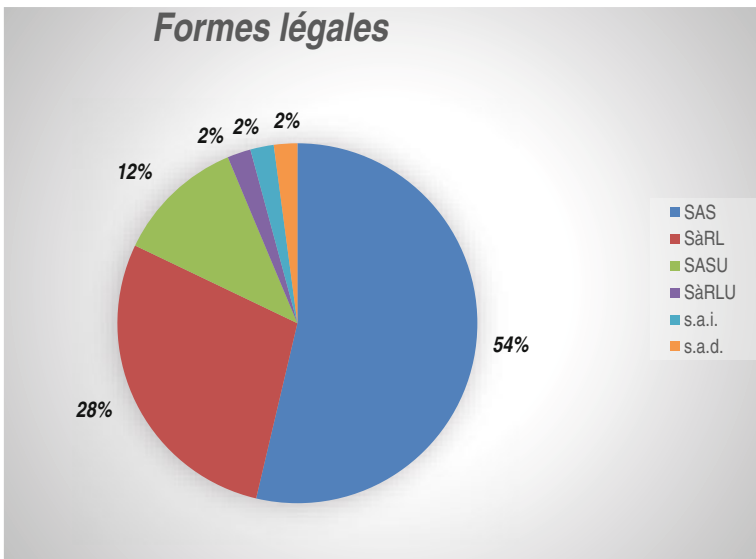


Fig. 2 B Corps and their legal form

Few words are useful to lighten these data. Firstly, about the legal form of B-Corp enterprises (see Fig. 2), it may be noticed that all the labelled enterprises are companies, and no association or mutual. Unfortunately, there was no sufficient time to inquire about the reason for the limitation. Two hypotheses seem plausible: associations or mutual do not need such label to emphasize their social goal, or these enterprises are not connected to networks in which such a label is meaningful; these two explanations are compatible. It must be noticed, however, that the figures are not

present for cooperatives: as they are registered on the company registry depending on the legal kind of company they adopt, their cooperative nature does not appear there; however, it is sure that some of the labelled enterprises are cooperatives.

Secondly, about the progression of the number of labelled companies. first B-Corp enterprise appeared in 2014 and the development has increased since 2017.¹ The first labels appeared lately compared to North America but increased quickly. The delay to label enterprises as B Corp is not surprising, since the objective need is smaller than in North America, precisely because company law is more friendly in France for the social goals pursued by B Corp. But the subsequent evolution would require further investigations to assess the impact of the legal reforms occurred since 2014. Unfortunately, it is far too early to conduct such research. One can only notice that the first purpose enterprises have been registered in 2019 (see below), and that could be a challenging process for B Corp.

The legal framework for B Corp is mainly established through company law, but enterprises don't necessarily use the legal form of company, so that other kinds cannot be fully neglected. However, the focus is to be put on company law, lightened by the perspective of competing legal forms. From a long-run perspective, French company law has always been characterized by a tension between profit maximization and social purpose (1). Since few years, the equilibrium has been modified by legal reforms (2) and the situation of B Corp could be severely impacted.

2 Tensions in Company Law

French company law has not evolved developed with a univocal orientation since the codification period. Its core has concentrated the essential of debates (Sect. 2.1), but in the margin has always existed original enterprises today gathered into social and solidarity economy (Sect. 2.2).

2.1 *The Continuous Concern for the Social Dimension*

Because of the various scandals that occurred during the revolutionary period after 1789, the Commercial Code of 1807² was restrictive when it comes to the establishment of companies, especially in the case of limited liability ones.³ The Code did not pay too much attention to companies, which were not considered at that time as prominent means to carry out business. The most common companies were

¹<https://www.carenews.com/fr/news/12986-b-corp-qui-sont-les-demieres-entreprises-francaises-labellisees>.

²Halpérin (2012), p. 35.

³Cozian et al. (2011), n°496.

regulated under the Civil Code, and public limited companies were rare and subject to public authorization. That authorization was the footprint of the public interest of the activities pursued by the company, reason why the company was supported by the state and received the special treatment to call for wide financing. This strict regulation was notably motivated by the wish to protect small investors from bankruptcy. That rigueur stimulated the recourse to public joint stock companies, freely established.⁴

A major change occurred with the enactment of the Law of 1867,⁵ which was the starting point for the development of companies and the true birth of company law in France. Its major innovation was the removal of the required authorization for the creation of a public limited company and the recognition of civil personality for companies. This has been completed by the case law. In 1981, the supreme court declared that civil societies were necessarily but implicitly considered legal persons, though the law did not explicitly state so.⁶ The next important milestone is the introduction into French law of limited liability companies in 1925, generalizing the use of companies for the running of any kind of business. This period is surely the moment of the establishment of the legal framework of capitalism.⁷ But, even during that first moment, some critics already arose.

While the legal framework of capitalism was arising, the awareness of the so-called social question developed. This has characterized the elaboration of the industrial legislation which became the labour law. After the Second World War, some authors concentrated their research into that new branch, and the key concept of the discipline was thematized through the enterprise.⁸ The picture of a boss owner of the factory and contracting with its employees was contested. The number of the employees made that solution less and less meaningful and the idea of a community around the factory has become more and more strong. The boss lost the position of individual contractor and became the manager of the enterprise, having therefore his powers limited by his function into the enterprise. The notion of enterprise quickly evaded from labour law to be generalized.⁹ Truly, the adoption of the notion of enterprise is particularly significant in tax law. But the question gained company law, where it has been claimed that the public limited company could actually be a legal frame for the enterprise.¹⁰

In parallel with this dissemination of the notion of enterprise, the theoretical struggle between the contractual and the institutional conception of the company deployed in the 1960s and 1970s. This latter conception has been notably related to

⁴Cozian et al. (2011), n°905.

⁵Act 24 July 1867, “*Bulletin des Lois*” 1867 n° 1513.

⁶Cass. Req., 3 February 1891, *Dalloz périodique* 1891 I. 337; Sirey 1892 I. 73, Meynial.

⁷Ripert (1951).

⁸Durand (1947), p. 54.

⁹Despax (1958), pp. 439–441.

¹⁰Paillusseau (1967).

the Rennes school¹¹ (École de Rennes). The development of the institutional conception of the company is not rebased on the major reform of company law in 1967,¹² characterised by a higher number of mandatory provisions. But this conception could also rely on some cases, or cases that state the superiority of the interest of the company,¹³ Indeed, the institutional analysis fits perfectly with the notion of enterprise and this has been notably studied through the concept of enterprises interest (*intérêt de l'entreprise*).¹⁴ Indeed, the company shows the same diversity of stakeholders as the enterprise in labour law: minority shareholders, creditors, clients, community. Compared to the company, the enterprise's weakness is its lack of legal personality; however, more and more provisions (labour law, insolvency law, competition law) refer to the enterprise in order to ensure that the provisions it do not apply only to the companies but to any enterprise, regardless of its legal form adopted.

As such, these debates and evolutions do not concern the B Corp. However, these different points are surely connected. Through the notion of enterprise, or by the defence of the institutional conception of company, the goal has always been to disconnect the company from the proprietary and contractual conception and, in other words, from the single shareholders. Therefore, through the adaptation of the decision process or by allowing a judicial control, other considerations than profit maximization have been facilitated.

Influenced by the Anglo-Saxon evolutions, this institutional approach has been strongly challenged since the 1990s and the power of the shareholders have been continuously reinforced. The first step has been the development of shareholder' agreement besides the by-laws.¹⁵ But this was not enough; the doctrine claims for the necessity to give the power back to the shareholders¹⁶ and the legislator amended the governance of the company to strengthen the control of shareholders on the managers, notably with the act named *nouvelles réglementations économiques* (NRE).¹⁷ Conceptually, some authors elaborated a severe criticism of the whole discussion of a common interest of the company distinct from the interest of the collectivity of shareholders.¹⁸ However, despite some uncertainties about their extension, the case laws referring to the enterprise's interest or the common interest of the company have never been reversed. Therefore, the general trend has never been formally opposed to a long run consideration into the management of the companies, and no

¹¹ Champaud (2013).

¹² Décret n°67-236 du 23 mars 1967 (le "Décret") sur les sociétés commerciales.

¹³ For an example: the famous case Fruehauf: Court of appeal of Paris, 22 May 1976, J.C.P. 1965, II. 14274bis; Dalloz, Jur., 147.

¹⁴ For a summary: Pirovano (1997), p. 189.

¹⁵ Monsallier (1998).

¹⁶ L'Hélias (1997).

¹⁷ Loi du 15 Mai 2001 n° 2001-420 relative aux nouvelles réglementations économiques.

¹⁸ Schmidt (2004).

case law has never been ruled that would oppose the inclusion of social and environmental considerations for the determination of the strategy of the enterprise.

2.2 *The Social and Solidarity Economy Enterprises*

For several decades, the legal ecosystem has been rather favourable for social and solidarity economy, and this has opened a way to the entrepreneurs wishing to pursue a not mainly profit maximization purpose. Long before the birth of the notion of social and solidarity economy and its institutionalization, the enterprises nowadays included in that area existed and flourished.¹⁹ The cooperatives and the mutual appeared during the nineteenth century and could rely on a suitable legislation. Associations were in a first stage severely controlled because of the reluctance enforced by the revolution against the intermediary bodies.²⁰ The legislation was liberalized in 1901²¹ with a free establishment, but the economic activity of associations developed only after the Second World War. The 1901 act being silent about that point, the case law has been very open to it²² and actually no limitation was laid down.²³ The conflicts between associations and capitalist enterprises decreased, but about taxation. An equilibrium has been found with the general idea that associations remain absolutely free to run any economic activity, but if they do it in a similar way as capitalist enterprises they are taxed likewise. The modernization of tax treatment of associations started in 1998; one may find a synthesis of the solutions into the circular of the 18th December 2006.²⁴ That liberal and pragmatic approach has allowed a strong development of associations, which represent actually three quarters of the activity of social and solidarity economy enterprises. The foundations remain rather marginal in the French context.

The social and solidarity economy is a concept that has been developed to describe the coalition established firstly by cooperatives and mutuals, joined later on by associations running an economy activity.²⁵ After the victory of the left wing in 1981, the second left succeeded in claiming for an acknowledgement of social and solidarity economy, and an inter-ministerial delegation for social economy was established.²⁶ With some up and down, the orientation has never been cut down,

¹⁹Gueslin (1987).

²⁰Mescheriakoff et al. (1996), pp. 20 f.

²¹L. 1st July 1901: “*Loi relative au contrat d’association*”.

²²Hallouin (2001).

²³Hallouin (2001), pp. 117 f.

²⁴Tax instruction 4 H-5-06 N°208 of 18 December 2006 regarding the tax system applicable to the non-profit associations

²⁵Duverger (2014), pp. 334 f.

²⁶Decree 15th December 1981 JO n°81-1125.

and gained a new stage with the adoption of an act on social and solidarity economy in 2014.²⁷

The 2014 act did not amend the nature of the diverse legal forms related to social and solidarity economy but gave them a higher clarity and visibility. It offered a clear alternative to the model of the capitalist enterprise.²⁸ It provides a definition for the social and solidarity economy:

The social and solidarity economy is a mode of undertaking and economic development suitable with all domains of human activity, that is supported by the private legal persons which comply with the following conditions:

1. another purpose that the exclusive distribution of profits;
2. a democratic governance, defined and regulated by the by-laws, stating information and participation, whose expression is not only related to the subscription of capital or the financial contributions, of shareholders, employees, and stakeholders to the outcomes of the enterprise;
3. a management complying with the following principles:
 - (a) the profits are mainly allocated to the objective of maintenance and development of the activity of the enterprise;
 - (b) the mandatory reserves are indivisible and may not be distributed.

As such, this does not concern B-Corp companies, but it is important into the legal framework. Indeed, the social and solidarity economy organizations often oppose to corporate social responsibility, considering either that it is a mock engagement, or at least that the social and environmental colour given to a company does not modify its capitalist nature. In this context, the emphasis put on the social and solidarity economy could appear disfavourable for B Corp. However, the number of B Corp never stopped. And the election of a new president in 2017 opened up a new era.

3 The Recent Reform of Company Law Considering the Pursuit of Social and Environmental Purposes

The French company law has been amended in 2019²⁹ with the major goal to reinforce the involvement of enterprises into the society, i.e. to emphasize their social dimension.³⁰ As such, this does not consist in the adoption of the B-Corp model, which remains a soft law corporate social responsibility mechanism.³¹ However, B Corps have always been mentioned in various research works and

²⁷Decree 1st July 2014 L. 2014-756; Hiez (2015), pp. 147 f.

²⁸Hiez (2012), pp. 671 f.

²⁹L. n°2019-486, 22nd of May 2019 on growth and transformation of enterprises, Official Journal of the 23rd of May, arts. 67 et seq.

³⁰Le Nabasque (2019), p. 33.; Lienhard (2019).

³¹Tchotourian (2018), pp. 211–219.

reports even before the reform.³² Substantially, the reform amended some provisions of the Civil Code and adapted other ones related to public limited liability companies. On one hand, it reinforces the societal dimension of all companies; on the other hand, it facilitates the possibility for an enterprise to go further and get a kind of official label for its engagement.

3.1 The Reinforcement of the Social Dimension of All Companies

The concern for the inclusion of nonfinancial matters into the management of the company is not absolutely new, and the French legislator passed an act already in 2001³³ providing that the report addressed by the board to the general meeting should contain some information about the way the company takes into account the social and environmental consequences of its activity.³⁴ However, this requirement is limited to listed companies. The provision has been amended several times and progressively completed. Actually, depending on several thresholds, these information are completed by nonfinancial indicators, information about corruption, tax evasion, the consequences of its activity and of the use of goods and services it produces on climate change, its societal engagements for sustainable development, the circular economy, the struggle against food waste. Moreover, some companies have to obtain a report from an independent and accredited organization about these points.³⁵ Because of the very exigent thresholds, this ambitious mechanism is not very efficient so far.

For several years, it has been proposed to modify the definition of company in article 1832 of the Civil Code.³⁶ Indeed, article 1832 states grossly that a company is a contract through which the contractors share something in order to distribute among them the profit that may result. In other words, the only purpose of a company was to make and distribute profits. Literally, the definition has been softened since its origin in 1804, notably in 1978³⁷ in order to extend the object of the company to the enjoyment of the savings realized by the shareholders thanks to the company. The change is theoretically important, because the distribution of profits, distinct from the enjoyment of savings, had been the key element to distinguish companies and associations after the adoption of the act on associations in 1901.³⁸ The solution has been stated in a case about a cooperative bank and the court qualified the cooperative

³²Levillain (2017); Segrestin et al. (2015).

³³Loi du 15 Mai 2001 n° 2001-420 relative aux nouvelles régulations économiques.

³⁴At that time: [C.com.](#), art. L.225-102-1 line 4. This provision is now: [C.com.](#) art. L.225-100-1.

³⁵[C.com.](#), art. L.102-1.

³⁶Hurstel (2009), p. 12.

³⁷L. n°78-9, 4 Jan. 1978 amending Title IX of Book III of the Civil Code.

³⁸L. 1st July 1901 on the contract of association.

as an association and not a company,³⁹ solution that has been finally reversed by the law.⁴⁰ However, in practice, the amendment of article 1832 in 1978 did not have a significant influence, since the qualification of company or association is nearly always stated by the law.

The extension of the object of the company is not infinite, and some authors raised the point that, actually, the company law would not allow a social goal.⁴¹ Therefore, a company that would not aim at distributing profits or savings would be void. And the author claims that it is obsolete to oblige a person with a social project to use the shape of philanthropy instead of company if the entrepreneur wishes to rely on the tools established through centuries for companies. To avoid that restrictive solution, it was proposed to amend article 1832 and to make the distribution of profits or savings one possibility and to add another one: to finance or achieve an activity corresponding to a social need.⁴² Actually, the proposal to redraft article 1832 has not been successful, and most authors do not insist on such modification anymore.⁴³ This is a strong difference between the American and French context; no case has stated a liability for a manager who would have pursued another purpose than distributing profits.

Similarly to the case law and the traditional company law doctrine, the debate on the so-called PACTE Act has been centered on the social interest stated into article 1833. Before the reform of 2019, article 1833 provided that companies are constituted for the common interest of the partners. This issue has been debated for decades. Some authors claim that the common interest of the shareholders limits the interest to be considered, by excluding other interests. Other authors insist on the fact that the provision aims at forbidding the company to be established in the single interest of one shareholder and that nothing prevents from taking into account other interests related to some stakeholders.⁴⁴ The promoters of an inclusion of stakeholders, or at least the necessity to pay attention to them, highlight the notion of social interest, i.e. the interest of the company itself. A case in the 1960s⁴⁵ is worth mentioning, in which a decision of a company was challenged because it was detrimental to the interest of such company, being targeted only to the interest of one shareholder.

In the last decades, the case law has developed the notion of social interest or interest of the company, notably as a condition to admit the fault of a manager or its removal, or a condition to declare a decision or a contract void.⁴⁶ With the PACTE

³⁹ Manigod, Court of Cassation, United Chambers, of 11 March 1914. <https://www.legifrance.gouv.fr>.

⁴⁰ L. n°47-1775, art. 1.

⁴¹ Hurstel (2009), p. 97.

⁴² Hurstel (2009), p. 100.

⁴³ Couret (2017), p. 222.; Poracchia (2019), p. 40.

⁴⁴ Pirovano (1997), pp. 189–196.; Schmidt (1995), pp. 488 f.

⁴⁵ Paris, 22 mai 1965, Fruehauf, JCP 1965, II, 14274 bis, concl. Nepveu; D. 1968. 147, R. Contin.

⁴⁶ Poracchia (2019), p. 40.

Act, a new line has been added to article 1833, which states that the company is managed also in its social interest, taking into account the social and environmental issues of its activity. It is admitted that the last part of the sentence is not an element of social interest but an additional consideration. The precision is important, since the decisions must comply with the social interest, whereas the social and environmental considerations only have to be taken into account in the decision process. Surely, this shows the necessary social concern of the company, but its concrete consequences are slight, since it is possible to take these issues into consideration and to hold an opposite decision. To sum up, the new provision does not substantially change the positive law but reinforces the so-called enterprise doctrine,⁴⁷ which claims that the company has to take into consideration the interest of its stakeholders. This point is important, notably because the provision is applicable to all companies; moreover, the law extends the obligation to take account of social and environmental issues to most enterprises that are not company.⁴⁸ Since the reform, some authors pointed out a difficulty related to the tax law⁴⁹ since it is unclear if a decision inspired by the inclusion of social or environmental consideration could not be treated by the tax administration as an anormal decision (*acte anormal de gestion*) with the detrimental tax consequences for the enterprise. However, the reform goes beyond the amendment of article 1833, with some optional provisions for some enterprises.

3.2 The Adoption of Special Provisions for Peculiar Enterprises

Apart from the general obligation stated in article 1833 of the Civil Code, the Act of 2019 contains two other innovations: the possibility for any company to adopt a “raison d’être” and for a public limited liability company to register as a mission enterprise. These two sets of provisions mitigate the opposition between the social and solidarity economy and the notion of company.⁵⁰ Therefore, it is necessary to assess the coherence of the whole legal framework.

3.2.1 The Possibility to Adopt “Raison d’être”

Some enterprises may wish to go further than others in the pursuit of their social goal or to make it more visible. Whereas the pursuit and distribution of profits is related to having (*l’avoir*), the enterprises are also motioned by being (*l’être*), and all of their

⁴⁷Champaud (2011).

⁴⁸Hiez (2019a).

⁴⁹Nouel and Martin (2021).

⁵⁰Hiez (2019b), pp. 929–945.

stakeholders may profit of the emphasis on it. This has been stated into article 1835 of the Civil Code, related to the content of the by-laws. Besides the contribution of each shareholder, the form of the company, its object, its denomination, its legal seat, its capital, its term and the modalities of its functioning, the provision has been completed: the by-laws may precise a “raison d’être,” constituted of principles that the company adopts and for the respect of which it allocates some means for the achievement of its activity. The expression “raison d’être” is difficult to grasp and far more difficult to translate. Of course, it relies on the opposition of being and having, but it refers as well to the idea of a rationale, the reason why. In substance, the new sentence in the provision provides two elements: the principles and the means to achieve them. An author specialist in the topic considers that it is the values carried on by the company and that it engages to perform in the achievement of its activity.⁵¹

The “raison d’être” may be stated into the by-laws, that is the explicit solution provided by the new act. As such, the solution is not new, nothing prevented previously the drafters to include such a provision into the by-laws; the point is not contested, and that makes a major difference with US law. However, by its official recognition into the act and the definition of its content, this initiative is facilitated. Moreover, any company may choose to insert the “raison d’être” out of its by-laws, for example in its internal regulation. Actually, the most important is not the document in which the “raison d’être” is stated, but its intensity. Indeed, if the article 1835 precise that the “raison d’être” consists in some principles, the company is absolutely free to determine them, and depending on the principles the obligations for the company will be more or less heavy. The latitude is lower for the determination of the means allocated to the performance of the principles; surely, the company will precise which means it will allocate, but any insufficiency could be sanctioned. The freedom to precise the means aims only at adapting them to the principles.

The last question is about the consequences of the adoption of a “raison d’être”, i.e. the possible sanctions in case of the infringement of the provision included in the by-laws. Firstly, the company may be liable if it did not perform the obligations it engaged through the “raison d’être”; the claim could be made, not only by a natural person victim of the infringement of the obligation, but also by an association, struggling against such damage, since they are allowed to sue with the only condition that the claim is in the scope of their social object.⁵² It must be precise that the violation of the “raison d’être” cannot make a decision held by the company void.⁵³ Apart from the company, the managers of the company may also be liable in the case of a violation of the by-laws or in the event of fault on the part of management. Nevertheless, the conditions of this action are rather strict and it will not be easily successful. The most common sanction for faulting managers could be their removal.

⁵¹ Parléani (2019), p. 575.

⁵² Parléani (2019), ns° 29 s.

⁵³ C.civ., art. 1844-10.

3.2.2 The Purpose Companies

In its amendment of the company law, the Act of 2019 created a new optional registration for the commercial companies, Considered as an additional element for the company wishing to highlight its social involvement. They may register as a purpose company.⁵⁴ This registration is optional and is conditioned upon several additional obligations, both substantial and procedural. Substantially, it is required that the company provide a “raison d’être” in its by-laws and also social and environmental objectives for the achievement of its activity. This is completed by some procedural adjustments aimed at the control of the achievement of its purpose. Firstly, the company must set up a new organ, the purpose committee, distinct from the existing organs, in which at least one employee must be member, aimed at following up the achievement of the mission, and which will make a report to the general meeting; this committee may obtain all the documents required to the accomplishment of its mission. If the company has less than 50 employees, the purpose committee may be replaced by a purpose referee, who may be an employee. But that follow-up is completed by a control performed by an external and independent organ; this organ will make a report joined to the report of the purpose committee. When these conditions are met, the company registers its quality of purpose company on the trade and company register. If any of the conditions are not met, or if the report shows that the purpose is not achieved, the public prosecutor and any interested person may ask for the removal of the quality of purpose company and the prohibition to mention that quality in any document of the company.⁵⁵

3.3 *A Short Comparison Between Purpose Companies and Social and Solidarity Enterprises*

At a first glance, one may wonder why to deal with social and solidarity economy in a paper focusing on B corporation. Indeed, on one hand social and solidarity economy enterprises usually consider both movements as different; on the other hand B-Lab does not refer to social and solidarity economy. However, the new Act of 2019 raises the question since it could put both categories of enterprises in competition. Traditionally, the B Corp belongs to the soft law approach, since all its process is external to the state: assessment, label, control. In its substance, the mission company is close to B Corps; the major feature of the act of 2019 that distinguishes it from B Corp approach is its utilization of hard law: The definition is provided by law and the registration is achieved by public bodies. In that respect, beyond differences, the PACTE Act and the 2014 Act on social and solidarity

⁵⁴ C.com., art. L.210-10.C.com., art. L.210-12.

⁵⁵ C.com., art. L.210-11.

economy are comparable, and the task of the doctrine is to enlighten the way they are connected.

This requirement is far more necessary when one considers that some social and solidarity economy enterprises decided to launch the procedure to get the qualification of purpose companies for themselves, in addition to their inclusion into social and solidarity economy. This raises the question of whether purpose enterprises and social and solidarity economy enterprises are similar and, if not, whether the former are more attractive than the latter. As a starting point, it must be noted that both the “raison d’être” and the purpose company are inapplicable to associations and foundations. In the French context, in which associations and foundations may run economic activities without any limitation, the rationale for this inapplication is questionable. Concerning other social and solidarity economy enterprises, they are all allowed to adopt a “raison d’être,” but only cooperatives and mutual enterprises may qualify as purpose companies.⁵⁶

About the concrete distinction, it must be developed about both the substance and the procedure. The substance of the purpose company refers to the principles each enterprise adopts and the means it allocates to their achievement,⁵⁷ as well as the social and environmental objectives it fixed.⁵⁸ By contrast, the substance of the social and solidarity economy enterprises consists in their democratic governance, their limited profitability, and their predominant allocation of profits to the enterprise itself, at least partly through the creation of some indivisible reserves.⁵⁹ The requirements for both enterprises appear to be totally different—not opposite but on different levels. Another requirement for social and solidarity economy appears closer to the purpose company: the social utility, required for any social and solidarity economy and enterprise, is more comparable to the requirement of purpose company.⁶⁰ The elements of the social utility and of social and environmental issues are not identic, but they share both a same orientation and function.

The procedure set up in the two hypotheses are very different as well. For the social and solidarity economy enterprises, the procedure flows from and relies on the substance of their definition, since it is connected with the democratic governance, and consists mainly in the direct or indirect control of the enterprise by its users. As such, there is no specific control on the achievement of the proper object of the social and solidarity economy enterprise, notably because the object of the enterprise and its structure are strongly connected. By contrast, the social and environmental issues in a purpose company derogate or nuance the core object of the company, so that it is necessary to establish a suitable control in order to ensure its achievement. To sum up, the social and solidarity economy enterprises are structurally and substantially

⁵⁶Hiez (2019b).

⁵⁷C.com., art. L.210-10 al. 2.

⁵⁸*Ibidem*, al. 3.

⁵⁹L. n°2014-856, 31st July 2014 art. 1.

⁶⁰L. n°2014-856, 31st July 2014, art. 2.

original, whereas the purpose companies are essentially companies which object is nuanced and the structure adapted.

An important question must be asked after that quick comparison between the new adaptations of companies and the social and solidarity economy enterprises: Are B Corp and SSE enterprises compatible and, maybe, comparable? The answer is the same as for purpose companies. In other words, a social and solidarity economy enterprise may easily qualify as a B Corp. This does not mean that being a social and solidarity economy enterprise entails ipso facto the qualification as B Corp. Despite the proximity of the substantial conditions to be a B Corp and the social utility of the social and solidarity economy, they do not match exactly, and the major focus of a B Corp on this purpose reinforces its importance. However, there is no contradiction between the B Corp and the social and solidarity economy enterprises. By the way, some of the latter decided to be labelled as B Corp or qualified as purpose company. This questions the importance attributed by each enterprise to its inclusion in the social and solidarity economy. At least, it shows that the policy makers, and maybe the employees and clients, pay less attention to it; it would be more marketable and energizing to be part of the B-Corp network. Indeed, the contrast is high between 2014 and 2019 and the view of the government and the legislator on the social and solidarity economy has severely evolved. Whereas in 2014 the social and solidarity economy was considered in its alternative dimension, what has been translated into the law through the reinforcement of major social and solidarity economy principles, the new government has multiplied attacks towards the social and solidarity economy, limited by the opposition of the Sénat.⁶¹ The new attention is focused on the social enterprises, even if their existence in France is only discursive, since no provision deals specifically with them, and on capitalist enterprises with a social and environmental focus. This is not a national specificity, but it is mainly related, in France, to the political context.

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⁶¹ Hiez (2019a), p. 425.

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Social Purposes in German Corporate Law and Benefit Corporations in Germany



Gerald Spindler

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1 Introduction

The financial market crisis in 2008 and the ongoing climate crisis have led to a reassessment of corporate goals and to a strengthening of interests other than those of shareholders. Social, environmental, or human rights aspects are today essential when it comes to discussing corporate ethics. The short-term maximization of profits is not anymore the only goal to achieve for the management (and the corporation); rather, sustainability and long-term effects, including the interests of stakeholders, need also be taken into account. What has been for a long time regarded as irreconcilable—profit orientation on one hand and the respect of stakeholder interests on the other—is now being viewed as compatible. On both sides of the Atlantic, different movements strive to integrate profit maximization and stakeholder interests, such as environmental protection or human rights.

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2 The US Model of Benefit Corporation

The European Union has recently adopted a thorough corporate social responsibility (CSR) report system,¹ obliging every stock-listed company to render an account of its activities in different social and public interest areas. In the United States, the idea of the so-called benefit corporation is spreading across the country, instigating different corporate law reforms in US states, following more or less the business corporation law model (*Model Benefit Corporation Legislation*,² written by William H. Clark³ and part of the project of the B Lab foundation).⁴ The B Lab foundation acts as the certifying organization,⁵ but unlike other institutions, they do not focus on a product or a service but on the entire corporation and the whole range of their products and services as being “a good citizen/corporation”.⁶ The first specific act on benefit corporations was adopted in 2010 in Maryland,⁷ and then subsequently in a number of other US states.⁸ Also, Delaware, as one of the most relevant US states when it comes to corporate law, adopted the public benefit corporation in 2013.⁹ Shared characteristic of all these legislations is the combination of a for-profit organization whose intention is also to produce a public benefit “and to operate in a responsible and sustainable public benefit or public benefits manner.”¹⁰ In their white paper on the need for and rationale of benefit corporations, Clark and Vranka¹¹ emphasize that consumers, investors, and the public are demanding new organizational forms that combine profit and stakeholder orientation and reverse the traditional shareholder value paradigms.¹² The background for this reasoning is the—assumed—strong directive of (Delaware) courts for directors (and corporations) to maximize shareholder value,¹³ referring to such famous decisions as *Dodge v. Ford*

¹ Directive 2014/95/EU of the European Parliament and of the Council, 2014, p. 1.

² See <<https://benefitcorp.org/attorneys/model-legislation>>. Accessed 16 September 2019.

³ See Clark et al. (2012), p. 817 Fn.: “Mr. Clark drafted all of the benefit corporation legislation that has been enacted or introduced as of the publication of this article.”

⁴ Hamermesh et al. (2017), p. 321; Houlahan et al. (2017), p. 299.

⁵ See <<https://bcorporation.net/>> for an overview. Accessed 10 September 2019.

⁶ See also Möslein and Mittwoch (2016), p. 407.

⁷ Maryland Senate Bill 690, 2010.

⁸ See the overview: “State by State Status of Legislation” by Benefit Corporation <<http://benefitcorp.net/policymakers/state-by-state-status>>. Accessed 10 September 2019.

⁹ See Dorff (2017), p. 77; Murray (2014), p. 345.

¹⁰ Del. Code Tit. 8 Chap. 1, § 362(a).

¹¹ See Clark et al. (2013); repeatedly and in more detail Clark et al. (2012).

¹² Clark et al. (2013), pp. 2 et seq.; Clark et al. (2012), pp. 819 et seq.

¹³ Clark et al. (2013), pp. 7 et seq.

*Motor Co.*¹⁴ and *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*¹⁵ Even though corporate constituency statutes may modify this strong orientation on shareholder value, they cannot abolish it completely since they can only allow to consider stakeholders' interests, but not oblige directors to pursue such interests.¹⁶

Hence, the principal rules on benefit corporations address corporate purpose, the accountability of directors, transparency, as well as the enforcement of benefits. According to Sec. 201(a) of the model law, a corporation has to pursue a general public benefit, which is specified in Sec. 102 of the model law. Its charter may indicate other public benefits (Sec. 201(b) of the model law), including the examples listed in Sec. 102, such as services for low-paid employees or communities, environmental protection, the enhancement of public health, or the fostering of science and/or arts. The model law emphasizes¹⁷ the obligations of directors in Sec. 301(a) (1), who should respect the impact of their decisions not only upon shareholders but upon all stakeholders such as employees, the environment, and the public etc. None of these interest groups, however, is dominant or has to be preferred (Sec. 301(a) (3) of the model law)—notwithstanding the charter which may state that one of these interest groups is to be preferential.

To achieve transparency, the corporation has to annually publish on its website a benefit report (Sec. 401), a copy of which shall be provided to all shareholders. However, the model law does not provide for mandatory auditing (in contrast to the CSR provisions of the EU¹⁸). The model law allows for the position of a benefit director or officer but without making it mandatory (Secs. 302, 303).

The enforcement of the benefit purpose is left to the corporation and its shareholders, who can file a derivative suit if they own at least 2% of the outstanding shares of the benefit company. Those who are supposed to benefit from the corporations purpose (the stakeholders), however, are not able to enforce its

¹⁴*Dodge v. Ford Motor Co.* (Mich. 1919): "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes."

¹⁵*Revlon, Inc. v. MacAndrews & Forbes Holdings* (Del. 1986): "[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress [. . .]."

¹⁶See Clark et al. (2013), pp. 9 et seq.

¹⁷Benefit Corporation (2017) m.n. 567: "This section is at the heart of what it means to be a benefit corporation"; Clark et al. (2013), p. 15: "These provisions address corporate purpose, accountability and transparency [. . .]."

¹⁸Art. 19a Paragraph 5 of the Directive 2013/34/EU of the European Parliament and of the Council, 2013.

pursuance by the company, Sec. 305(c).¹⁹ Moreover, directors have no obligation towards third parties, Sec. 301(d) MBCL.²⁰

The enforcement issue is considered to be one of the main criticism points,²¹ in particular the lack of enforcement rights of beneficiaries against the corporation to pursue its social etc. purposes.²² Hence, authors suggest the introduction of claims for stakeholders²³ or state supervision²⁴ or a mandatory *stakeholder advisory board*.²⁵

Another weak point lies in the quality of benefit reports²⁶ which often do not contain necessary information or are used more or less as marketing instruments.²⁷ This is not surprising, however, as misleading reports with a tendency towards *greenwashing* are not sanctioned.²⁸

3 The Setting in Germany

To understand the situation in Germany, we have to lay down the fundamentals of German corporate law, which differ quite substantially from those of the United States (and some other countries as well).

¹⁹See Benefit Corporation (2017), pp. 837 et seq.: “To reduce the possibility of nuisance suits, a shareholder or group of shareholders bringing a derivative suit must own at least 2% of the outstanding shares of the benefit corporation.”

²⁰Benefit Corporation (2017), pp. 579 et seq.: “Subsection (d) negates any enforceable duty of directors to non-shareholder constituents.”

²¹See Calsson (2012), p. 110: “[...] [T]here is no enforcement mechanism to ensure that corporations which fail to seek general public benefit do not latch on to the benefit corporation moniker and the developing marketplace for social enterprises.”; Reiser (2011), p. 611.

²²See Loewenstein (2017), p. 388: “[...] the persons with the greatest incentive to sue the benefit corporation – the beneficiaries of its specific public benefit – are expressly denied standing unless the articles or bylaws otherwise provide, and even then these persons would not be able to obtain monetary relief.”

²³See Padfield (2015), pp. 17 et seq.

²⁴With this in mind Hacker (2016), pp. 1772 et seq.: “State Attorney General Oversight and Enforcement”; furthermore CHO (2017), pp. 169 et seq. according to the “U.K. Office of the Regulator of Community Interest Companies (‘CIC Regulator’)”.

²⁵See Murray (2017a).

²⁶On that point, also with empirical evidence Murray (2015); Verheyden (2018).

²⁷See Murray (2014), p. 359: “significant puffery”; Manesh (2019), p. 657: “Fleckless Reporting Mandate”.

²⁸See Ball (2016), p. 963; for an overview about the term “greenwashing” see Hacker (2016), pp. 1757 et seq.; from a law and economics perspective: Cherry (2014).

3.1 Corporations in Germany

Germany knows of different types of corporations, including, mainly, the limited liability company (Gesellschaft mit beschränkter Haftung (GmbH)) and the stock corporation (Aktiengesellschaft (AG)). The GmbH cannot be listed on a stock exchange but benefits from a very liberal regime regarding corporate governance, in particular with respect to the rights and obligations of shareholders and directors. In contrast, the AG (which can be listed on a stock exchange) is characterized by a more or less strict mandatory legal framework, allowing the corporate charter to make only slight deviations. Moreover, directors of a GmbH are subject to the instructions of the shareholder majority, whereas, in the case of the AG, Sec. 76 of the Act on Stock Corporations (AktG) explicitly states that directors are shielded against instructions from shareholders, even declaring them liable for providing such instructions (Sec. 117 AktG).

Apart from these corporate forms, Germany acknowledges the registered cooperative which is a corporation for the purpose of fostering common or social interests (*eingetragene Genossenschaft*).

However, one special form of corporation is not recognized by German law: the benefit corporation; even more, there is scarcely any discussion about it.²⁹

Although the GmbH can be formed as a nonprofit corporation,³⁰ it is, however, not the same as a benefit corporation. This holds also true for the AG which can be designed as a nonprofit corporation as well even though this is not yet clarified by law.

3.2 Goals of Corporations and Obligations of Directors

In contrast to the Anglo-Saxon corporate law world the German law never knew a strict orientation on shareholder value or profit maximization—notwithstanding some efforts of academic literature in the 1990s³¹ which, however, has been rejected by the overwhelming majority, and, above all, by courts. In contrast, since 1976 the German High Federal Court has upheld that directors of a stock corporation (AG) have to pursue the “*Unternehmensinteresse*,” i.e., the interest of the enterprise, which is not the same as the interest of its shareholders. The “interest of the enterprise” encompasses the interest of all stakeholders, such as employees and the public.³² The background of this (at that time unusual) extension of the goals to be pursued is rooted in the German model of codetermination which is not known to

²⁹For exceptions see Fleischer (2019b); Möslin and Mittwoch (2016); Eifert (2017), pp. 184 et seq.

³⁰Fleischer (2018), p. 199.

³¹See Mülbart (1997).

³²Koch (2018a), p. 466; Röhrich and Schall (2016), p. 26; Schmidt (2002), pp. 804 et seq.; Habersack (2020a), pp. 633 et seq.

other jurisdiction. German stock corporation law follows a dualistic approach in which corporate governance is distributed between a management board and a supervisory council. The latter is partly, depending on the size of the corporation, staffed with representatives of employees. Since members of the supervisory council are subject to the same standards as directors of the management board with regard to the corporation's purpose, courts could not apply the usual standards to these representatives—as this would signify that representatives would have to pursue interests of shareholders in total contrast to the vote of employees. Hence, the “*Unternehmensinteresse*” refers to a standard for directors which encompasses all kind of interests of stakeholders, in particular of employees. This kind of benchmark is deeply rooted in German corporate law and goes even beyond the Weimar Republic to the First World War when first—and influencing—articles and books appeared about the “enterprise as such,” thus, decoupling the corporation from shareholder's interest. When the first German stock corporation law was adopted, Sec. 70 AktG (1937) noted that directors are not subject to the instructions of shareholders and have to run the corporation in the interest of “the general public.”³³ This rule was not integrated in the new German Stock Corporation Act, but was deemed by the legislator as a provision that went without saying.³⁴

The general principle of “*Unternehmensinteresse*” (interest of the enterprise) was even more boosted when Germany introduced for big enterprises (be it a stock corporation or a limited liability company) in 1976 the mandatory codetermination on the level of the supervisory council. According to the Codetermination Act, every big enterprise with more than 2,000 employees has to establish a supervisory council (if it is not already mandatory as for the stock corporation) whose members consist to the half of representatives of employees. It goes without saying that it is difficult to oblige representatives of employees to maximize shareholder value. Hence, it is no big surprise that the German High Federal Court officially acknowledged the concept of “*Unternehmensinteresse*” as an overall approach, integrating different interests, especially those of shareholders and employees.³⁵ However, it turned out that this “interest of enterprise” is hard to specify in particular cases, which gives a lot of leeway to directors.

Hence, according to the overwhelming opinion in German academic literature as well as court decisions, shareholder value maximization never has been adopted as a general rule³⁶ rather than a more or less opaque notion of “*Unternehmensinteresse*,” referencing to all kind of interest of stakeholders which could be considered by directors. However, directors are not obliged to give preference to any stakeholder interests or even to respect them; it is up to their discretion to balance all interests.³⁷

³³For a brief description of the historical development see Habersack (2020a), pp. 629 et seq.

³⁴Kropff (1965), p. 97; Koch (2015), p. 74; Kort (2015), p. 129.

³⁵Bayer (1975), p. 331.

³⁶For an adoption as a general rule: Mülbart (1997), pp. 158 et seq.; Zöllner (2003), p. 11; against an adoption Koch (2018a), p. 466; Kort (2015), pp. 118 et seq.; Rönnau (2009), pp. 261 et seq.; Mertens (2009), pp. 28 et seq.; Wiedemann (2011), p. 192; Semler (2010), p. 1394; Hüffer (2007), p. 356.

³⁷Koch (2018a), p. 469; Kort (2015), p. 145; Hopt (2002), p. 360.

Of course, this competence to balance various interests entails a danger of shielding directors against liability claims as they can always bring forward the argument that they merely respected other interests instead of maximizing company profits.³⁸

This general tendency toward a multiple -goal approach is now fostered by the new EU provisions on the corporate and social responsibility of corporations. These provisions aim at better transparency and reporting on the responsibility of corporations (and directors) concerning public interest, social and environmental responsibility, etc. Corporations must prepare a special report on their activities relating to environmental concerns, employee concerns, social concerns, the protection of human rights, and the combating of corruption and bribery.³⁹ These points are specified in Sec. 289c German Commercial Code (Handelsgesetzbuch (HGB)). For example, in the matter of environmental concerns, the report must contain information related to greenhouse gases, water consumption, air pollution, the use of renewable energy, and the protection of biological diversity (289c (2) No. 1 HGB). The information on human rights, for example, must include how human rights violations are avoided (289c (2) No. 4 HGB).⁴⁰ However, these reports are not audited. Furthermore, the report follows the comply or explain principle. If the corporation has no concept in one of the named matters, it must explain the divergence.⁴¹

This general principle of pursuing the “interest of the enterprise” (rather than mere shareholder value) is flanked by the business judgement rule enshrined in Sec. 93 (1) Stock Corporation Act (AktG). As well-known managerial decisions are out of scope of judicial control as long as these decisions are taken upon adequate information⁴² and managers use accepted methods.⁴³ However, decisions which are legally required are not covered by the business judgement rule.⁴⁴

In sum, managers/directors are, under German law, to a wide extent free to respect other interests than those of shareholders; however, they are not obliged to pursue these goals in all of their decisions.

3.3 Goals of Corporations and Provisions on Charters

Given the fact that German directors are more or less free to respect interests other than the shareholders’, it is quite important to determine how far the charter of a corporation can prescribe goals for its directors. Even in the case of limited liability companies, where directors are subject to the instructions of shareholders, the

³⁸Kuhner (2004), p. 255; Fleischer (2019a), p. 1083.

³⁹Mock (2017), p. 1199.

⁴⁰For detailed information about the report see Mock (2017).

⁴¹Velte (2017), p. 326; Sommer (2016), p. 292

⁴²ARAG / Garmenbeck (1997), p. 253; Freund (2015), p. 1422; Koch (2018b) vol. no 20.

⁴³Ott (2017), p. 171; Hopt and Roth (2015), p. 143.

⁴⁴Fleischer (2004), p. 690; Säcker (2008), p. 3316; Koch (2018b), p. 624.

company charter can play an eminent role. Under German corporate law the charter usually contains the abstract principles and the foundations of corporate governance such as membership, voting rights, etc. The charter also specifies the object of the corporation (such as to manufacture cars and the like). Moreover, the charter may also fix the goal for the corporation in such a way that directors must respect and pursue public benefit (such as environmental protection) or benefit for third parties.⁴⁵

Whereas the limited liability company enjoys a lot of freedom concerning the design of the charter, thus even allowing a nonprofit limited liability company (*gemeinnützige GmbH*)⁴⁶ the situation is different for the Stock Corporation Act. One of the peculiarities of the German corporate law system is that the charter of a stock corporation can only deviate from the provisions of the Stock Corporation Act if such provisions so allow. Hence, most of the norms under the Stock Corporation Act are mandatory (so-called *Satzungsstrenge*, Sec. 23(5) of the German Stock Corporation Act (AktG)). Thus, it is quite arguable whether the charter can change corporate goals from mere profit-orientation to an obligation to respect interests of stakeholders.⁴⁷ Indeed, the stock corporation can be founded for any purpose which is not forbidden,⁴⁸ that is why it is consequent to allow the corporation to pursue the interests of stakeholders—especially, as already pointed out, the common belief for German stock corporation law already acknowledges that the corporation has also to respect other purposes than pure profit maximization. Hence, it would not constitute a major deviation from the Stock Corporation Act if the charter would contain an explicit provision on the pursuance of public benefit goals.⁴⁹ However, such deviation has to be clear, and a change from a profit maximization to a public benefit goal needs the approval of all shareholders.⁵⁰

4 Discussion on Benefit Corporations in Germany

As already mentioned, German law does not explicitly recognize a corporate form for benefit corporations. Even more, there is scarcely any discussion of introducing such a new corporate form⁵¹ rather than modifying the existing limited liability

⁴⁵Pentz (2019), p. 648; Röhrich and Schall (2016), pp. 40, 44.

⁴⁶See Fleischer (2018), p. 199 with further ref.; furthermore Momberger (2015), pp. 87 et seq.; Ullrich (2011), p. 48; Eifert (2017), pp. 184 et seq.; Hüttemann (2018), pp. 93, 97.

⁴⁷For the possibility Lutter (2015), p. 189; Bachmann (2016), p. 60; Habersack (2020a), pp. 638 et seq.

⁴⁸Röhrich and Schall (2016), pp. 40, 42; Pentz (2019), p. 648; Bachmann (2016), p. 60; Ullrich (2011), p. 49.

⁴⁹See also Fleischer (2017), p. 514 for provisions in the charter about corporate social responsibility; Momberger (2015), pp. 95 et seq.

⁵⁰Koch (2018c), p. 1279; Limmer (2019), p. 319; Pentz (2019), p. 649; with further references: Momberger (2015), p. 89.

⁵¹For an exception see Fleischer (2019b), pp. 14 et seq.; Möslein and Mittwoch (2016); Möslein (2017), p. 179.

company—which is to some extent not surprising if we have a closer look on the specific needs to introduce such a new corporate form.

The core of the problem refers to the combination of a for-profit organization with the pursuit of benefit purposes as there may be numerous reasons not to opt for a nonprofit organization.⁵² As already mentioned, German corporate law differs from Anglo-Saxon corporate law in that it allows considering stakeholders' interests. However, there is no obligation on the part of directors to really pursue them if there is no explicit charter provision indicating such goals. Hence, some argue that, just like under Italian corporate law,⁵³ a new corporate form could fill that gap.⁵⁴ This could be in deed a strong argument to introduce such a new corporate form—if the German corporate law would not allow for a flexibility in charter provisions which it obviously does.

However, as shown German corporate law does not forbid charter provisions on benefit purposes, thus obliging directors to respect and to pursue benefit goals.⁵⁵ Even for the situation in the United States it has been argued that corporate law is flexible enough to take into account stakeholder's interests,⁵⁶ in particular in charter provisions under Delaware corporate law.⁵⁷

The only discussion about the introduction of a new legal form in Germany in order to respect stakeholder's interests is centered around a specific limited liability company named “steward ownership” (in German “GmbH in Verantwortungseigentum (VE-GmbH)”). Shareholders will not receive any payments out of profits etc., all assets should be locked in the company so that the relationship between power/money and the purpose of business should be disrupted in order to enhance long-term purposes, independence and stewardship.⁵⁸ Another essential aspect of this proposal is the restrictions concerning shareholders: only natural persons can be shareholders, and their shares are not easily transferable. Moreover, such a limited liability should refrain from belonging to a group of corporations. However, this new legal form does not require a specific nonprofit goal.

The aim of this new limited liability form is to enable also small enterprises to decouple profit maximization from short term interests—whereas already bigger enterprises can use the legal form of a foundation as a shareholder of a limited

⁵² See also Fleischer (2019b), pp. 14 et seq.

⁵³ Legge N° 208, 2015.

⁵⁴ See Fleischer (2019b), pp. 14 et seq.

⁵⁵ See also Habersack (2020a), pp. 638 et seq.

⁵⁶ See Heminway (2018), pp. 800 et seq.; Molk (2017), p. 7: “[M]any firms that have now converted to one of the new social enterprise forms first operated for many years as corporations. And they were able to do so because corporate law has long allowed corporations the flexibility to consider other constituents beyond investors.”

⁵⁷ See Bainbridge (2003), pp. 577 et seq.; Macey (2008), p. 179.

⁵⁸ Mainly promoted by the Stiftung Verantwortungseigentum (2020), https://stiftung-verantwortungseigentum.de/fileadmin/user_upload/sve_presskit_051020.pdf; see also <https://purpose-economy.org/en/>.

liability company or stock corporation such as being done by Robert Bosch GmbH or Zeiss AG. Exactly this fact that foundations are already used to pursue the goals declared by the promoters of the new legal entity forms ground for heavy criticism by corporate legal scholars.⁵⁹ In addition, the idea of asset lock seems to contradict chief corporate law principles (outside the legal form of a foundation) such as the prohibition to restrict sovereignty of shareholders.⁶⁰ Also the lack of an explicit nonprofit goal is criticized.⁶¹ Finally, the protection of creditors is at stake as shares cannot be used for enforcement of claims.⁶²

The authors of the first draft of this proposal for a company in steward ownership reacted to the criticism in a second draft by strengthening creditor protection (here introducing a claim for creditors to get guarantees of the company) and by explicitly establishing the choice for nonprofit goals.⁶³ Moreover, external auditors should supervise that asset locks are respected by shareholders and no circumvention takes place.⁶⁴ The asset lock is flanked by introducing a separate claim for nonprofit organizations against the company in case of their liquidation—in order to prevent misuse by one-man-companies.⁶⁵ Still central and crucial for the proposal is, however, the “eternal” asset lock which cannot be changed and overruled—not even by the charter and an unanimous vote by the shareholders.⁶⁶

Hence, the final debate is about how much branding a new approach for corporations would need. Some argue that such a new corporate form would create a strong signal for investors, consumers, and employees.⁶⁷ However, since the certification mechanism already provides for such a signal it should even following the original intentions of the “inventors” of the benefit corporation be not sufficient to simply found a benefit corporation; an additional auditing and certification process is obviously needed. Hence, it seems hard to find reasons why such a certification procedure should not also work with a specific charter containing the necessary benefit purposes and mechanisms as the relevant signal is the certificate and not the mere fact that a business is incorporated using a benefit corporation. How a new corporate form (beyond the certificate) should create an additional legitimation without a thorough control and monitoring is not clear.⁶⁸ Moreover, corporate law

⁵⁹ Grunewald and Hennrichs (2020), p. 1206; Habersack (2020b), p. 996; Reiff (2020), p. 1751.

⁶⁰ Habersack (2020b), p. 996; Reiff (2020), p. 1754.

⁶¹ Reiff (2020), p. 1754.

⁶² Grunewald and Hennrichs (2020), p. 1204.

⁶³ Sanders et al. (2021), p. 287.

⁶⁴ Sanders et al. (2021), p. 286.

⁶⁵ Sanders et al. (2021), p. 287.

⁶⁶ Criticized by Grunewald and Hennrichs (2020), p. 1202.

⁶⁷ See Murray (2017b), p. 446; Manesh (2019), p. 647 with the addition: “Benefit entity statutes facilitate this signaling function by providing socially minded businesses the statutory ‘benefit’ moniker to distinguish themselves from businesses organized as conventional corporations and LLCs, which are presumably less virtuous or altruistic.”

⁶⁸ See however Fleischer (2019b), pp. 15 et seq.; following Ebrahim et al. (2014), p. 86; furthermore Verheyden (2018), p. 50.

is already able to integrate stakeholder's interests into existing corporations by using a foundation as a shareholder.

However, one of the weak points of a mere certification model refers to enforcement mechanisms for third parties—which is obviously also true for existing benefit corporations. Here, unfair competition law as well as liability provisions for misleading information about a corporation may help; nevertheless, it will be difficult to prove for consumers or state agencies (environmental protection) that they suffered a harm whilst relying upon the benefit information of the corporation, in contrast to traditional certificates which refer to the quality of a product or a service. Thus, it would make more sense to decouple civil claims against the corporation from harm and damage and open the law for collective actions which can be pursued by consumer associations etc.

5 Summary

In conclusion, German corporate law does not know explicitly the benefit corporation but seems flexible enough to allow for charters which combine for-profit orientation with considering stakeholder's interests. There is no need to introduce a specific benefit corporation form as long as certification mechanisms are in force and have a significant impact on the market. Moreover, enforcement mechanisms have to be improved, in particular by allowing collective actions.

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Social Enterprises and Certified B Corporations in Hong Kong: Development, Key Lessons Learnt, and Ways Forward



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1 An Overview of Hong Kong’s Social Enterprise

Social enterprise is a form of hybrid organizations that aim to create social and commercial value (Battilana and Lee 2014), or businesses that aim to achieve social goals (Peredo and McLean 2006; Mair and Marti 2006). Social enterprise has many faces and has gained interests across different fields, from business and management (as hybrid organization and organizing), social work (as the application of business principles in social work practice), non-profit (as the marketization of non-profit organizations), economics (as the mobilization of private capital to create public good), public management and administration (as the new solution to traditional sector “inefficiencies”) (see a review by Chandra et al. 2021).

Compared to other countries and territories, Hong Kong is a relatively late comer to the practice of social enterprise and social entrepreneurship. To date, there is no official or legal definition for “social enterprise” (SE) in Hong Kong. In general, there is a common understanding in Hong Kong that an SE is defined ¹ as a “business to achieve specific social objectives” such as providing the services (for example, support service for the elderly) or products needed by the community, creating employment and training opportunities for the socially disadvantaged, protecting the environment, funding its other social services through the profits earned, etc. As such, the definition of SE in Hong Kong is quite consistent with international definitions above.

The idea of social enterprise in Hong Kong was born out of the innovative ideas of various actors towards the end of twentieth century (circa 1990s), long before it became popular and received formal government intervention. In its early days, social enterprises in Hong Kong emerged as small-scale cooperatives that were set up by non-profit organizations (NPOs), charitable organizations or labor unions. These organizations operated their own businesses to ensure financial sustainability while at the same time seeking to benefit disadvantaged groups in society (e.g., people with disabilities, families from lower social economic status, lone elderly with minimum economic means, etc.). Hong Kong’s social enterprise sector is also

¹See the definition here: <https://www.sehk.gov.hk/en/concept.html>.

unique as it became legitimate by the government endorsement (Chandra and Wong 2016).

1.1 The Rise of Prototypical Social Enterprise

A prototypical social enterprise emerged in this period—legally as an NPO—but technically embraced an innovative and unconventional business model called “Care on Call” (Ping On Chung or 平安鐘 in Chinese) and that was launched by Senior Citizen Home Safety Association (SCHSA) in 1997. This care call operation is a comprehensive 24/7 support service for the elderly, providing emergency aid, integrated care, around-the-clock vigilance service, health management, and day-to-day living assistance. Although SCHSA is a non-profit charitable organisation, “Care on Call” (平安鐘) started as a *self-financing model* since day one—thus making it de facto the first “social enterprise” in Hong Kong. Today, it remains one of the most established and most respected social enterprises in Hong Kong. The success of this SE has far reaching impact which has inspired and influenced public policy and how the government thinks about its role in the society and what it can do with the social enterprise sector in the twenty-first century.

1.2 The Crisis and Opportunities That Drive Social Enterprises

Partly in response to the 1997 Asian Financial Crisis and a growing burden in annual budget for social welfare (see also Chandra et al. 2021), at the turn of the twenty-first century, the Hong Kong government implemented welfare policy reform—among which one of its signature products was the *Lump Sum Grant Subvention System* (LSG), which still exists today. The goal of LSG was to enhance the efficiency and effectiveness, improve quality, encourage innovation, strengthen accountability, and provide flexibility for non-profit organizations, with a view to better meet the changing needs of the society. From this point, we witnessed an influx of *NPO-operated social enterprises* such as iBakery by Tung Wah Group of Hospitals (TWGHs), Green Ladies by St. James’ Settlement, Fullness Salon by Fullness Social Enterprise Society, Cafe330 by New Life Psychiatric Rehabilitation Association (Au 2014).

Driven by the efficiency and innovation spirit, the government launched the “*Enhancing Employment of People with Disabilities through Small Enterprise Project*”² (or “創業展才能”計劃 in Chinese) in 2001, which is still managed by

²See the 3E funding scheme here: https://www.swd.gov.hk/en/index/site_pubsvc/page_rehab/sub_listofserv/id_employment/id_enhancing/.

Social Work Department to date. The objective of the Project (also commonly known as the 3E's project) is to enhance the employment of people with disabilities through market-driven approach and creation of work opportunities for people with disabilities. Through seed money—of a maximum of HK\$3 million for three years—granted to NPOs, the Project supports the creation of “small enterprises” to enable people with disabilities to experience genuine employment in a caring and supportive work environment. Consequently, several government-subsidized shelter workshops under NPOs and charitable groups have converted themselves into self-sustained *social enterprises*.

In 2006, the government introduced another important funding scheme called the *Enhancing Self-Reliance*³ (ESR) *through District Partnership Programme* (or “伙伴倡自強”社區協作計劃 in Chinese) which provided seed grants for eligible organizations to set up or expand social enterprises that aim to provide job opportunities for the socially disadvantaged groups and/or product and services meeting their specific needs. ESR was set up with a view to achieve community self-reliance and social integration via project funding that typically last for three years and with the upper ceiling of HK\$3 million. ESR requires that the funded SEs to become commercially sustainable after the funding period ends. It also encourages innovative ideas with SE business model to fill the gaps in the community and market. This further spread the seeds of social innovation and social entrepreneurship concepts in the territory.

During the period of late-2000s to mid-2010s, social innovation and social entrepreneurship gained official endorsement by the government to drive the SE movement. The high-level Commission on Poverty—which was then led by Mrs Carrie Lam—and other government bodies helped establish the *Social Innovation and Entrepreneurship Development Fund* (SIE FUND) in 2013. SIE FUND as a funding body aims to contribute to alleviation of poverty and social exclusion through innovative approaches by facilitating cross-sectoral collaboration (e.g., business, academic, NPOs, and the public) and leveraging the social capital of intermediary organizations (e.g., Good Seed as intermediary organization, based at the Hong Kong Polytechnic University (PolyU), Food Support Flagship project with St. James Settlement as intermediary organization, and Community Housing Movement with Hong Kong Council of Social Services as intermediary). SIE FUND mainly offers funding (i.e., grants) to innovative projects and entrepreneurial businesses at various stages of development to achieve their stated aims.

1.3 Cross-Sectoral Collaboration for Social Enterprises

The SIE FUND's and other government' driven efforts to support SE were not futile, as they triggered the *business sector* joining the SE movement. SE was also felt like a

³See the ESR funding scheme here: <https://www.esr.gov.hk/en/index.html>.

fresh air for the stagnating corporate social responsibility (CSR) in Hong Kong during that time; SE became fashionable as a new channel to invest in CSR activities. For example, a growing number of large corporations started to sponsor or co-organize with the government, NGOs, charitable groups, and educational institutions to form funding programs (e.g., Wofoo Enterprise launched Wofoo Social Enterprise; Jockey Club and SIE FUND sponsored the “Good Seed” in the Hong Kong Polytechnic University), incubation platforms (e.g., SIE FUND and Hong Kong Council of Social Services that launched Impact Incubator), and venture philanthropy (e.g., Social Ventures Hong Kong) and impact investing organizations (e.g., Dream Impact by businessman Mr Y S Lam and partners). A closely related concept to CSR was *Creating Shared Value*⁴ (CSV) which has seen several large corporations collaborating with SIE FUND to deliver projects that alleviate poverty and social exclusion. Examples include Mass Transit Railway Corporation’s Youth Training Programme, IBM’s expert volunteering to support NPOs, and Stan Group’s revitalization of old buildings into co-working space to support new entrepreneurs.

Another key development for this period was the establishment of several major intermediaries and platforms as well as established higher learning institutions providing support to and connection among social enterprises. These include:

- *Hong Kong Social Enterprise Summit*—or HKSES, an annual forum that started in 2007—with the objective to advance social entrepreneurship and social innovation. Its main activities include organizing a flagship international symposium (featuring local and international speakers, delegates from the civic society, businesses, government and academic sectors from Hong Kong, Asia and beyond) and community engagement activities to expand the participation and reach towards a social innovation movement.
- *Social Enterprise Business Centre* or SEBC—a unit under the Hong Kong Council of Social Service (HKCSS)—which is sponsored by the government and a large corporation with a mission to support social enterprises and their beneficiaries, including SE hotline, capacity building program, consultation service and funding support. SEBC has a social enterprise directory with more than 600 members. SEBC regularly updates the newly minted social enterprises in its directory.
- *Academia and learning communities* across the eight University Grants Committee-funded higher learning institutions including—mainly The Hong Kong Polytechnic University, The University of Hong Kong, Chinese University of Hong Kong, and Hong Kong University of Science and Technology—as well as private institutions such as Tung Wah College. The dozens of courses as part of teaching and learning as well as competitions and academic research from these universities were critical to the propagation and creation new ideas of social enterprises and in stimulating public interesting including youths on the potential

⁴See SIEFUND’s details on CSV: <https://www.sie.gov.hk/en/resources/sv-cases/index.page#2>.

of social enterprises (see a report by Hazenberg et al. 2019, commissioned by the British Council).

Since 2010 onwards, there have been an influx of *private-operated social enterprises*—mostly funded by private capital that added to the diversity in the models and practices of social enterprises in Hong Kong. These include social enterprises such as Dialogue in the Dark (now Dialogue Experience)—a guided tour in the darkness that employs the visually impaired, LightBe—an innovative alternative housing solution, Diamond Cab—a specialty taxi social enterprise, Fullness Salon—a work integration social enterprise that works with deviant youths, Longevity Design—a renovation service social enterprise, to the Good Lab—consulting and training organizations for social enterprise. Quite interestingly are the growing number of youths who see social enterprise as a constructive way of tackling Hong Kong’s problems such as EldPathy—an elderly simulation program, InterCultural Education—a cultural and global awareness building programs for students, Green Price—an online social grocery store, and ReBooked bookshop—established by a 15-year-old student.

1.4 The State of the Art of Hong Kong’s Social Enterprises

To date, we are witnessing a significant development of the SE movement in Hong Kong. From just a few social enterprises in the 1990s, the number of social enterprises has grown to close to 500 in 2015 (South China Morning Post 2015), approaching 700⁵ in 2021 (SEBC 2021). The COVID-19 pandemic had negative effects on the survival of many smaller social enterprises and could have increased the mortality rate and decreased the total number of social enterprises (South China Morning Post 2020). A recent study by British Council (2020)—using a more relaxed assumptions of “social enterprise” where organizations self-reported whether they did good for the society—reported that there were 5700 social enterprises in Hong Kong. While this survey may have overestimated the actual number of social enterprises in Hong Kong, it shows a growing appetite and desire by smaller businesses to join the SE movement.

Overall, Hong Kong’s social enterprises can be characterized as “small scale” operations and their business models and operations have become heterogenous. One research reported that around 70% of the SEs in Hong Kong was small scale, employing less than 10 full-time staff (British Council Hong Kong 2020). Hong Kong’s social enterprises operations have also become more diversified. Their products ranged from mainly catering, food manufacturing and grocery retail in the initial stage to include technology-enabled services and consultancy. In terms of social issues addressed, the social enterprises covered primarily people with

⁵See SEBC website: [https://www.socialenterprise.org.hk/en/content/se-faq#:~:text=2\)%20How%20many%20social%20enterprises,as%20of%20Apr%20of%202021](https://www.socialenterprise.org.hk/en/content/se-faq#:~:text=2)%20How%20many%20social%20enterprises,as%20of%20Apr%20of%202021).

disabilities and experiencing poverty extending to environmental protection and responsible financing. A good proxy for this diversification is the SEBC directory, which has shown a growing number of categories of the social enterprises.

Given the lack of clarity of what classifies as “social enterprise,” an organization called Hong Kong General Chamber of Social Enterprise (HKGCSSE) was set up in 2009 and then offered the SE Endorsement Mark, known as *SEE Mark* in 2014. Organizations can apply for such endorsement—where their applications will be vetted according to certain standards in the endorsement. Up to the middle of 2020, more than 200 social enterprises have received such endorsement (HKGCSSE *SEE Mark*,⁶ 2020). As the appetite for social enterprises have been quite high in the past few years, it is not surprising that there are many social enterprises that are not documented officially thus are not included in the tally. Therefore, the actual number of social enterprises could be higher than that was reported. Moreover, there is also growing number of small businesses that claim to be “social enterprises”—which muddled up the idea of what constitutes a social enterprise.

As one local academic commented in a public lecture in 2022—despite the growth of social enterprises and the massive interest in SE, Hong Kong’s social enterprises still experienced a “*tomato problem*.” This was an analogy of the debate of whether a tomato is a fruit or vegetable (National Geographic 2015); which rings a bell on the perennial question or confusion of whether social enterprise is a business or charity. Interestingly, despite its nearly 15 years of history, social enterprises in Hong Kong remain not well understood by the public and there has been a strong perception, or association for a lack of a better term, that social enterprise is a kind of “non-profit organization.” This also shows that the “stickiness” of institutional origin of social enterprises in Hong Kong—that started off and were championed by NPOs—that shaped public perception of what social enterprise really is.

2 Lessons Learned from Hong Kong’s Social Enterprise Movement

Despite the very encouraging development of social enterprise movement in Hong Kong over the past two decades, there remain several pressing challenges. According to a report *The State of Social Enterprise in Hong Kong* sponsored by British Council Hong Kong (2020), the top four challenges faced by the social enterprises include: (1) *customer acquisition and market development*, (2) *access to financial support*, (3) *product/service development and innovation*, and (4) *talent acquisition and retention*. This suggests that—as hybrid organizations that integrates social and commercial value—social enterprises in Hong Kong faced greater problems with the *business aspects* but not with social aspects, or what Santos (2012) called value capture than value creation. This is not surprising because social

⁶See SEE Mark website for more details: https://seemark.hk/en_gb/introduction.

enterprises must compete in the “open market” against much more competitive small and medium business players. This also suggests that social enterprise as a multi-objective organization (Chandra et al. 2022) may not be able to optimize on all objectives but must make trade-offs to survive financially.

In the following, we sketch some lessons—encouraging and discouraging ones—that may offer useful points for the future direction of the practice of social entrepreneurship and for the development of the SE sector.

2.1 Encouraging Lessons

2.1.1 Socially Minded Business Entrepreneurs’ Participation

Dozens of socially minded businesspeople (e.g., Ka Kui Tse, Chi Hing Kee, Rebecca Choy Yung, Ada Wong, Patrick Cheung, Francis Ngai, Ricky Yu, Doris Leung, David Yeung, etc.) participated in promoting the SE movement. Rather than being constrained by the subvention practices and attitudes—a common mindset by many SEs founded by NPOs and charitable groups—these businessmen and women brought with them the entrepreneurial attitude and business skills to effectively fuel the development of the SE sector. For example, Hong Kong Social Entrepreneurship Forum (HKSEF) was formed in 2008 to promote the civic movement and subsequently become the host of the annual Social Enterprise Summit. Some of these individuals invested in and founded some of the most recognizable SEs in Hong Kong (e.g., Dialogue in the Dark, The Good Lab). Others were hired as top executives to run and successfully scale up certain SEs (e.g., Mental Care Connect). Other remarkable social enterprises set up by former businesspeople include Light Be and Diamond Cab. They adopt creative and innovative entrepreneurial mindset and practices to run their business and at the same time creating social impact, therefore setting a role-model for other SE founders and individuals aiming to launch and operate their social start-ups.

2.1.2 Capacity Builders Contributing to Professional Development

The SE sector in its infant stage needed strong actors for capacity building. Several training and consultancy firms were setup in early 2010s to boost the professional development of the partitioners. The pioneers were Education for Good, Fullness Social Enterprises Society, The Good Lab, and Social Ventures Hong Kong. They are involved in providing public education of the concepts of not only social enterprise and social innovation but also Certified B Corporation (to be discussed in the next section) and related concepts including Creating Shared Value. A more recent one includes the Social Impact Assessment capacity building training for NPOs and SE practitioners, offered by Fullness SE Group with funding from Hong Kong Jockey Club.

Tertiary education institutions also played a key role, with several institutions starting to introduce academic programs and courses on social innovation and entrepreneurship as early as 2013. The Hong Kong Polytechnic University (PolyU) launched the Centre for Social Policy and Social Entrepreneurship to conduct systematic and policy-relevant research to add the depth and rigor of the professionalism and knowledge. The Social Enterprise Endorsement (SEE) Mark developed by Hong Kong General Chamber of Social Enterprise has brought in the concept of standards and quality assurance that helps elevate the public awareness on and confidence of the SE sector.

2.1.3 Private Intermediaries and Platforms Enabling Agile and Flexible Support

In addition to the sizable government-sponsored platforms (e.g., Social Enterprise Business Centre by HKCSS), the emergence of privately funded and operated intermediaries has shown the importance of agile and flexible support to facilitate connection between social enterprises to investors or corporations.

2.2 Discouraging Lessons

2.2.1 Grants (and Related Key Performance Indicators KPIs as the Primary Support and Monitoring)

Evidence showed that if the SEs received the grants as the primary (or only) aid without other necessary entrepreneurial support (e.g., business coaching and mentoring, building business capabilities) to develop financial sustainability, the chances for their sustainable development are not promising. This is because a subvention approach may help the SE to launch and survive for a short period of time only—usually from 6 months up to two years—but does not stimulate entrepreneurial mindset to face the challenges in the real business world where the SEs operate and compete in.

2.2.2 Insufficient Business Acumen

A substantial number of SEs have too much skewed their focus to achieving social objectives—thus being “too social”—and have not paid sufficient efforts to acquire the necessary business knowledge and skills to ensure their financial sustainability. Two major gaps are highlighted here: (1) paying disproportionate attention to the solutions/products/services offered to the customers or beneficiaries instead of developing a “business model” covering channels, revenue, and costs, etc.;

(2) lacking the financial disciplines of business development, invoicing, cash-flow control, etc.

2.2.3 Bold Starter But Conservative Growth Driver

Most SE founders have demonstrated considerable bravery in the start-up stage, either risking on their own money or looking for investment or loans from external parties (e.g., banks, seed investors). However, quite a sizeable proportion of SEs do not aim high to expand their business and are very much shy of identifying business levers nor seeking additional funds to enable business growth. Another reason is that these SEs are overly passionate for service delivery rather than business development or lack the business acumen for doing so. This explains why these SEs are not able to scale up their business and thus their positive impact to the society.

2.2.4 Lacking a Promising Career Path

Most employees working in SEs are motivated to join and stay in the sector driven by social passion. However, they are usually not very well-paid, not provided good employment conditions and with promising career development prospects since most SEs are small and have limited resources (i.e., fewer than ten full-time employees) and financially not very capable. This partly explains why staff acquisition and retention is one of the top challenges faced in Hong Kong's SEs.

3 Ways Forward: From Social Enterprises to Purpose-Driven Companies

The end goal of promoting social enterprises in any society is to harness all the resources (e.g., experience, expertise, skills, networks, mindset, etc.) and influence resourceful actors such as business corporations—essentially more competitive and adaptive—to take part in addressing social problems and make the world a better place.

Although the SE movement in Hong Kong has seen encouraging results since early 2000s, several factors are noteworthy for further development to continue improving the development of the SE sector and promote the movement of using business as a force for good to the society and the world at large. We describe these factors below:

3.1 Alternative Funding Sources

Most funding to SEs is targeted at their start-up stage with the intention to encourage individuals or organizations to setup more social enterprises, i.e., to broaden the sector by increasing the number of SEs. From the perspective of scaling up the aggregate positive impact to the society, we believe it is important to have more *varieties of funding options* from different funders or funding platforms to fit with business needs, particularly enhancing their commercial capabilities to expand their business among established social enterprises with promising growth potential. For example, the funding and review mechanisms should be designed to enhance entrepreneurship (e.g., loans and capital rather than grants and subsidies, in-phases rather than one-time lump-sum, driven by the business model’s potential rather than the no. of beneficiaries, etc.).

3.2 Capacity Building

In line with the theme of nurturing social entrepreneurship and supporting promising SEs to scale up their business, more sophisticated and targeted non-financial support such as commercial and financial skills, business coaching and mentoring, etc. are equally, if not more, important.

3.3 Deeper Cross-Sectoral Collaboration

To provide more promising career prospects to attract passionate and social-minded young people to join and stay in the SE sector, cross-sector collaboration—involving tertiary education institutions, business corporates, the government, social enterprises, etc.—is needed to develop professional development and career advancement paths.

3.4 Inclusive Purpose-Driven Business

No matter how fast the SE sector is developing and growing, the number of SEs still accounts for a tiny portion—well under 0.1%—of the business establishments in Hong Kong according to the Trade & Industry Department company registration statistics (<https://www.tid.gov.hk/english>). On the other hand, increasingly more corporations want to become more purpose-driven and create positive impact to multiple stakeholders (e.g., staff, customers, community, the environment) in addition to making profit to the shareholders. Several “doing good” frameworks have

been proposed and implemented for some years (e.g., corporate social responsibility, caring company awards, creating shared value, etc.). One major gap is to have a framework which is inclusive—one that is relevant to businesses of different sizes, stages of development and industries—transparent, objective, and quantifiable to guide mainstream for-profit corporates to become (more) purpose-driven businesses. Some business leaders demand for a model that could organically integrate the purpose-driven mission into the company's core business strategy to maximize the profit-purpose bottom-line. This leads us to the discussion on *Certified B Corporation* (B Corp) and whether its framework could be used to drive more inclusive purpose-driven companies.

4 The Emergence of B Corp in Hong Kong

Certified B Corporation, or in short B Corp, movement—a voluntary certification for companies that wish to consider people, planet and profit—first began in Hong Kong when Education for Good, the first B Corp was certified in 2016 (Honeyman and Jana 2019). This was followed by B Market Builder Hong Kong which was formed in 2017—a joint initiative of Hong Kong Social Entrepreneurship Forum and the B Lab Global. Since then, various activities (e.g., publishing books and papers, training courses, seminars, and events, etc.) have been organized to promote the B Corp movement to different segments of the society including corporations, industry associations, academia and students, young workers, customers, and the public, etc.

Established legally as an NPO in 2020, the *B Lab Hong Kong and Macau* was formed to officially drive the B Corp movement in Hong Kong and Macau. As of the end of 2021, there were 17 certified B Corps and 4 pending B Corps in Hong Kong. The B Corp movement is still in its very early stage of development. B Lab Hong Kong and Macau have dual goals when promoting the B Corp movement. First, to boost the awareness of B Corps and assist the certification process for aspiring B Corps—those that are about to kick-start the certification journey. Second, to build communities in the business ecosystem and use B Corp and B Impact Assessment (BIA)—a tool to quantify a company's impact across five stakeholders: employees, customers, communities, environment, and governance—as the frameworks to inspire more mainstream corporates to become purpose-driven businesses.

B Lab (HK & Macau) sees this as the start of a broader dialogue to promote a wider adoption of the B Assessment by interested companies. It will engage with more stakeholders, organize events and training sessions to build greater capacity.

5 B Corp: A Movement to Promote Purpose-Driven Businesses to Achieve “Shared Prosperity” in Hong Kong

5.1 Shared Prosperity for All

The term “common prosperity” (共同富裕) has triggered heated discussions in Hong Kong and the Mainland when the China declared in 2021 that it will pursue “common prosperity,” pressing businesses and entrepreneurs to give back to the country and helping to narrow the huge wealth gap through the “third distribution” system (South China Morning Post 2021).

There are no quick fixes for China’s, or indeed for any country’s unequal income-distribution problem. Addressing it will require cultural and systemic changes. Our notion of shared prosperity combines both rising prosperity and equity. Prosperity is far more than wealth; it is when all people have the opportunity and freedom to thrive. The economy is benefitting a small number of people around the world, but few are sharing the resulting prosperity. We are facing escalated global climate crisis and poverty problems which are further aggravated by the pandemic. According to the World Bank, “Our focus on shared prosperity reflects the fact that many countries are seeking rapid and sustained increases in living standards for all of their citizens, not just the privileged few.” (1) How to achieve this? What is missing? What more could be done? (The World Bank 2013).

There are different pathways to shared prosperity. Although the government plays a critical role by developing a favorable eco-system and complementary policies, the *private sector* is the main growth engine for wealth, job creation and talent development. To give a fair representation of the views of the business community, in December 2021 and January 2022, we organized two focus groups with 35 leaders from various business, legal, financial, and social enterprise sectors. We sought to understand their views on “shared prosperity,” instead of “common prosperity,” and explore how this will provide a path to prosperity for all stakeholders of the society.

5.2 “Shared Prosperity”: An Imperative in the Post-COVID Era

It has been three years since the onset of the COVID-19 pandemic. The global economy is expected to rebound as major economies such as the USA and China will register strong growth. Even within these economic giants, income is unevenly distributed. Hong Kong is not emerging out of poverty either although it is a well-known financial centre. Its Gini coefficient rose to a high point of 0.54 in 2016 (HKCSS 2021). The Hong Kong Poverty Situation Report 2020 highlighted that 23.6% of the city’s 7.5 million population were living in poverty, the highest since 2009 (The Government of Hong Kong Special Administration Region 2021). We

can no longer hide from the pandemic, ageing, inequality, social exclusion, or the climate emergency that impact everyone. These realities have shown us the necessity and urgency of promoting shared prosperity. A few participants, though appreciate this notion, still maintain that this is a *myth* which the private sector does not fully embrace.

Almost all the participants of the focus groups agreed that over the past century, we overtly expand production, reduce costs by all possible means, improve technology, stimulate consumerism, producing far too many material goods than were needed. Now we need to face equity or the problem of “distribution efficiency.” We must use various methods to improve distribution efficiency, consider fairness, and prevent polarization.

Shared prosperity is not egalitarianism or robbing the rich to feed the poor. We should avoid falling into the trap of welfarism and populism. The fundamental aim is to encourage wealth creation through hard work, innovation, and investment. Many people are trapped in multidimensional poverty, that is, poverty in housing, health and education and other areas where disadvantaged people are relatively deprived. There are many challenges in developing the capacity of the disadvantaged groups to escape poverty and consolidate poverty reduction results. Almost all participants believe that society should strive to achieve equality of opportunity.

Income and property measured by money are of course important, but the common people also need to enjoy equitable and quality services such as healthcare, elderly care, housing, a safe and harmonious social environment, and a healthy natural ecology. In an ageing society, helping the elderly age in place and healthily will become an important demand from the people.

Shared prosperity is not only about income and material rewards, but also time and ability. People need access to equitable education and employment. People are also in great pursuit of social fairness, transparency as well as spiritual prosperity. Otherwise, no matter how much money they have, they will not be happy.

5.3 Business Community’s Roles in Driving “Shared Prosperity”

Most participants agree that the business community plays an important and positive role as the government and non-profits alone could not satisfy the demands for all of the above. Businesses are dynamic and excel in creating resources. Business leaders often have the skills and the ability to assemble the resources needed to take on large, complex problems with multiple stakeholders. However, the pandemic and the rapidly changing environment have taken a toll on small and medium-sized companies. Such companies have to strike a balance between survival and looking after the well-being of their stakeholders.

Furthermore, institutions and mechanisms for engagement of the private sector are inadequate. In many countries, business leaders have quietly but persistently

assembled civic alliances that pursue growth and shared prosperity. After all, business is deeply affected by the erosion of many of the common people's basic requirements, and a system that underpins innovation. How to promote enterprises to attach equal emphasis on social and economic benefits, innovate the practical means of shared prosperity, and create greater social value, are the missions of our time.

Some hold that mere market relocation of wealth by the private sector is difficult if not impossible. Society needs government policy to drive the post-COVID era. A few others do not believe in organic change and suggest that legal regulation is needed to push forward before a change of culture and attitude may take place.

Most participants are empowered by the ideal that business success and social progress should be closely connected. It is only by integrating sustainability and social impact into our business that we can truly create greater value for the present and also contribute to a brighter future for all.

6 The Emerging Popularity of the ESG Framework in the Business Sector

The ESG (environmental, social, and governance) framework and requirements provide the private sector with a new vision for profit and social change. Most participants agree that ESG programs are conducive to creating short- and long-term values. Although many corporations are uncertain of the ways to achieve ESG requirements, an increasing number of corporations have acted with spontaneity to build a more inclusive and sustainable economy. In their quest for profits, companies are also driving innovations that improve health outcomes, make progress on climate change, provide better access to education, and create new economic opportunities for those in poverty. Participants point out that talent pool development, including training on environmental and social impact measurements, mindset and skillset changes should be instilled in every profession.

Although half of the participants are not familiar with B Corps, they agree that business needs comprehensive, credible and comparable standards to support both internal and external changes. There are strong requests to build a *performance indicator or standard* so that corporations, especially medium and small enterprises, need not look further. The B Impact Assessment (BIA) represents rigorous standards of social and environmental performance, accountability and transparency that suit the needs of corporations.

The rise of the B Corp movement in Hong Kong signifies that in today's environment, business can, and must, act to change the world. We, the writers of this article, explained to the participants how B Corps work toward the prosperity of all, especially on reduced inequality, a healthier environment, stronger communities, and the creation of more high-quality jobs with dignity and purpose. To date, there are 17 B Corps in Hong Kong with a few under application. There is much room for promoting B Corps to the local community.

7 Impact Investing to Regain Hong Kong's Growth Momentum

Investment is not a demand. The demands of different market segments are the real demand, and investment is a necessary cost to meet this demand. With such a concept, it is not difficult to find out how economic development can be sustainable. The real needs of the common people, from food, clothing, housing, and transportation to housing for the elderly are what businesses should address. What scale and growth rhythm are needed? How to scientifically calculate and set the overall economic goals, and balance the all-round development of people's lives are the core issues?

Sustainable financial initiative and ESG development and regulatory is rapidly developing in Hong Kong and internationally, adding pressure for mainstream corporations to comply with ESG requirements. Participants from the financial sector point out that, from an investment perspective, "sustainability," "social investment," and definition for "creating impact" is essential. Institutional investors and fund managers alike should sign up for responsibility to make ESG investment decisions. However, their main concern is that ESG education is highly insufficient. Standard and data are needed. All these should be built up step by step. Again, the B Impact Assessment (BIA) will provide a well-tested benchmark to satisfy such loopholes (Marquis 2020).

When it comes to ROI, most of us may think of Return on Investment. But there is a new ROI, Return on Inclusion, being proposed in recent years (https://www.tahra.org/roi-summit_id202). According to the Global Economics of Disability 2020, People with Disability (PWD) and their friends and families represent 73% of consumers market and control over US\$13 trillion disposable income worldwide. In Hong Kong, PWD is an underserved business segment which represents about 8.1% of the total population or 600,000 people. Together with their families and friends, there are 1.2 million such consumers according to the research by a local social enterprise, iEnterprise. The business sector is encouraged to broaden the investment spectrum to the new ROI and meet their ESG goals.

Some participants see B Corps as models that would integrate high ESG performance standards for the business sector. In fact, B Corps and the comprehensive nature of BIA requires a company to go through a deep and thorough review of its business and operations, an exercise that corporations will increasingly need to go through to meet ESG reporting requirements imposed by the Hong Kong Stock Exchange or investors' demands. This may pose B Corps with market positioning value. Eventually, we need to bridge the gap between companies that really believe in doing "good" and businesses that do it for "compliance."

We, indeed, need a *critical mass* to drive social change. Yet we should go one step further, after raising people's awareness, we need to institutionalize those ideas and try to make changes at a systemic level. And to drive such change, we need collective efforts, real leadership, and a sustained commitment over a long period of time. However, when the right ingredients are in place, progress is possible.

8 Epilogue: B Corp As a Business-Cum-Social Movement to Drive Shared Prosperity

Our future requires both growth and shared prosperity which is underpinned by an inclusive society, an open economy, and people empowerment. The issues we tackle are complex. From ageing to ESG—there is no way for a single entity to achieve large-scale change in these areas. It will take many individuals and organizations working together to bring lasting change. B Corps are catalysts for positive business and social change. For this to happen, we need a business-cum-social movement to achieve these goals. A fundamental shift is much needed and many ingredients for the solutions are here. We hope that together, we can make shared prosperity a reality.

Having experienced political unrest, societal rifts, the outbreak of coronavirus and economic recession, everyone in Hong Kong has been trying very hard to find a new path to their dreams. Aspiring minds in the business communities should try to bring about innovation in businesses, embrace the idea of “benefit for all stakeholders” and truly pursue business sustainability.

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- (d) Centre for Social Policy and Social Entrepreneurship (www.cspse.com)
- (e) Diamond Cab (<https://www.diamondcab.com.hk/en/>)
- (f) Education for Good (www.education-for-good.com)
- (g) EldPathy (<http://eldpathy.hk/?lang=en>)
- (h) Fullness Salon (<https://www.fullness-salon.hk/>)
- (i) Fullness Social Enterprises Society (www.fses.com)
- (j) Green Ladies (<https://gl.sjs.org.hk/>)
- (k) Green Price (<https://www.greenprice.com/>)
- (l) Hong Kong General Chamber of Social Enterprise (https://sechamber.hk/en_gb/home/)
- (m) Hong Kong NGO Development Centre (www.ngos.com.hk)
- (n) Hong Kong Social Entrepreneurship Forum (<https://hksef.org/>)
- (o) iBakery (<https://ibakery.tungwahcsd.org/#>)
- (p) Light Be (<https://www.lightbe.hk/en/>)
- (q) Mental Care Connect, (<https://mentalcare.com.hk/>)
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B Corps in India: A Sustainable Business Model



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While writing this chapter we took part in a consultation process initiated by the Sustainability Reporting Standards Board (SRSB) of the Institute of Chartered Accountants of India (ICAI). We applied the part of this chapter to develop the Sustainability Reporting Maturity Model (SRMM) 1.0 The model is adapted and patented by the ICAI and the model became Mandatory for top 1000 companies in India from 2022 (https://icai.org/new_post.html?post_id=17221) . In the note we would like to add the above information and acknowledge SRSB, India and ICAI for their continuous support for the research

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1 Introduction

The business that considers society and ecology as an important stakeholder alongside their profit-making stakeholders are known as sustainable business (Jolink and Niesten 2015). Recently, the Business Roundtable¹ in the United States issued a statement, where chief executives of companies agreed, that for the sustainable development of a business, it needs to consider society and the environment, along with other stakeholders, in their corporate activities. In the recent consultation paper by the IFRS Foundation (September 2020), we discovered that business stakeholders are in urgent need of **sustainable reporting** that is consistent across countries and can be comparable in a simple manner. Such approach by business stakeholders indicates that companies are now focused on a multistakeholder approach for sustainable future of the business. But which business model sustainable entrepreneurs should follow to guarantee a sustainable business future is yet to be decided in the literature and practice. Studies on sustainable business are mainly focused on developed countries which highlight the importance of consideration of society in the business model by the profit-making business (Schaltegger 2002; Parrish 2010), but there is no concrete conclusion about the societal commitments required by business along with their profit objective, mainly in developing countries (Hiller 2013). In the last decade, we find the application of **B Corps** allow the business to combine environment and society as important stakeholders of the business (Hoffman et al. 2012). **B Lab** organization issue the B-Corps certificate as a third party and believe that their global movement will continuously generate good for all through the business activities. B Lab believes that sustainability is compatible with long-term prosperity. Because of the socio-economic objectives, we can find more than 3000 companies from 150 industries are now certified B Corps from 64 countries. As the B-Corps certification assess the societal impact of business along with shareholders profit on a continuous basis, thus, usually certified companies are considered as sustainable business by the stakeholders in the society. The process of the certification is expensive and the stakeholders expect higher contribution from these businesses on a regular basis. Thus, we observe inconclusive decision in the literature about the suitability of B Corps in developing market like India. Motivated by the above concerns, we are interested in conducting experiments to determine the feasibility of B Corps in the Indian context. In this paper, we propose a scoring tool that can be applied to the existing **Business Responsibility Reporting (BRR²)** and will allow to map the Indian model with the internationally accepted B Impact Assessment (BIA³), for a sustainable future of Indian business. The Committee on Business Responsibility Reporting (hereafter “Committee”) and its subcommittees conducted several meetings, from 2019 to February 2020, to make BRR clear,

¹<https://www.businessroundtable.org> accessed on 30 September 2020

²<https://www.sebi.gov.in/legal/circulars/nov-2015/format-for-business-responsibility-report-brr-30954.html> accessed on 20 June 2020

³<https://bcorporation.net/about-b-lab> accessed on 15 July 2020

accurate, and complete and eventually proposed a revised and comprehensive format, known as the **Business Responsibility and Sustainability Report (BRSR)**. The revised BRSR motivates us to examine if our proposed scoring scale can be applied to the new format to make it easily comparable across companies and sectors, as envisaged by the Committee (5th Governing Principle, Report of the Committee on Business Responsibility Reporting, The Ministry of Corporate Affairs (MCA), GOI, 2020). The proposed scoring can also be applied to the proposed BRSR.⁴

By critically examining the existing literature, publicly available relevant documents and by better understanding the initiatives of the Indian government to adhere to the requirement of sustainability practices by business, we propose a scoring mechanism to support the initiative of the Sustainability Reporting Standards Board (SRSB). The proposed scoring mechanism will enhance the simplicity of assurance process of financial reporting, which will make the financial report comparable and compatible with the BIA. We introduce measurement scores for BRR, where we consider 109 items of the existing scale and after benchmarking with BIA, we identified 13 items and then aggregated to a maximum score of 200. The proposed B Corps will allow companies to follow the “**Triple bottom line**”⁵ concept in business and will assist them to overcome the institutional complexity to consider a business model with profit and society motive together (Stubbs 2017) to generate sustainable value creating future. The B-Corps model will advance the literature discussing the importance of considering ecology and society with profit motive of business (Jolink and Niesten 2015) and will support the sustainability initiatives taken by the Indian government in line with the **Global Reporting Initiative (GRI)** and other leading world organizations (Haque and Ntim 2018).

1.1 Theoretical Framework

Following the Companies House ISO14001 System issued in 2002 and after understanding that business will encounter financial risk if not following nonfinancial stakeholders in operation (OECD 2019), legal recognition of nonfinancial activity reporting by business has been in the agenda of the researchers and policy makers. However, in the academic literature we cannot find any support from theory explaining how the legal approval form the B Corps can enhance the companies’ adaptability to the triple bottom concept. Thus, in this paper, we develop a theoretical framework that will support the amendments to the BRR system. It is hard to explain complex entrepreneurship activities with one theoretical model, which is

⁴In our future research we will expand the mapping with BRSR, once the companies start following the new reporting requirements.

⁵Concept developed by John Elkington (<https://johnelkington.com>), and other Scholars accessed on 12 August 2020

also explained by the researchers explaining complex business models (Haque and Jones 2020). Following this argument, in this paper we propose two most relevant theories that, together can explain better the need of the proposed scoring mechanism following the B-Corps model. First, we introduce the **natural inventory model** (NIM) (Gaia and Jones 2017). The theory is widely used in literature to explain that when businesses are not responsible toward the nonprofit stakeholder of the society, then they face questions from other stakeholders about the reliability of the product and services of the company. Such pressure and neglect from the stakeholders affect the long-term financial performance of the company, which reduces its corporate social responsibility (CSR) rating (Samkin et al. 2014). Certification of a B Corps of Indian companies will make them comparable with international companies, which will increase interest in social impact investing. The scoring of BRR, will allow the B Corps to assess if the companies are able to reach optimum natural inventory and the scoring mechanism will enhance BRR ease of use and thereby, assist the companies in self-evaluation, reducing the time required in B-Corps certification. However, the B-Corps certification will allow many companies from different countries to trade in the newly proposed Social Stock Exchange, which in turn will support the Indian economy to grow after taking care of the environment and the society. Thus, we expect that by applying NIM, the business can produce necessary information about the natural inventory to the B Corps. Second, we use the **actor-network theory** (ANT) as a supplement to NIM. According to ANT, there should not be any distinction between human and nonhuman elements while considering them in business activities (Barter and Bebbington 2013). The theory proposes to “clear the state of nature-culture dualism” (Ivakhiv 2002, p. 391) which will allow the business to mingle the nonfinancial aspects with their financial activities (Steen et al. 2006). By applying the ANT, business can understand how to link their activities with societal aspects (Lee and Hassard 1999; Lowe 2001), which will expedite the B-Corps certification in India. The theoretical framework also captures the relevant non human connections that are made continuously (Steen et al. 2006, p. 207), which allows business to adopt a new practice or a system (Whittle and Mueller 2008, 2010). In summary, we propose that by applying NIM and ANT together, the Indian business can understand better about how to consider nature in business and how to maintain natural inventory to maintain their financial activities to get certification from the innovative B Corps for a financially viable and sustainable future.

The findings of the study will contribute to the academic literature on CSR, B Corps, **corporate governance**, and sustainability reporting, especially in the context of developing countries, like India. The comprehensive theoretical model will provide a comprehensive sustainable framework for businesses and scholars to apply in future studies. In practice, the study will allow decision-makers to have a better understanding of the importance of B Corps.

The paper is organized as follows: in the following section, we discuss the evolution of B Corps around the world and the legal requirements in India for a sustainable business. In section 4, we outline the differences in practices followed by B Corps using **B-Impact Assessment** with the present mandatory regulatory

framework of BRR in India. In the last two sections we discuss the current position of India regarding the B Corps and we propose how sustainability reporting framework of India can be modified to scale up following the international standardization model used by the B Corps.

2 Evolution of B Corps

The transformation in the corporate landscape with companies changing from a traditional commercial entity striving to maximize profits to responsible business units with a concern for social causes gave way for B Labs, a nonprofit organization in the United States to institutionalize social and environmental certification of newly evolving business. Conventional **profit-driven companies** are taking extensive efforts to be identified as “green” and “good” business with social inclination. B Labs certify these for-profit companies involved in social and environmental cause as “certified B-Corps,” where “B” denotes companies working for the benefit of the society. The certificate endorses sustainable commitment of the business toward its stakeholders (Kim et al. 2016, Delmas and Grant 2014). It demonstrates that a company is following a fundamentally responsible governance philosophy than a traditional shareholder-centered approach. It is worth mentioning here that this is just a third-party certification for social enterprises and is voluntary in nature, without any legal implications. In order to have a far-reaching bearing of this philosophy, that is operating under the hybrid model including commercial interests along with social goals, it is imperative that countries should adopt this in their statutory framework (Hiller 2013). Only then will companies be obligated to pursue sustainable business practices with a concern for all **stakeholders**.

A mounting number of jurisdictions attempt to meet this demand by allowing new hybrid organizational forms in their countries (Reiser 2011). For example, in the United Kingdom (UK), there are **community interest companies** (CIC), which are for-profit companies set up for the benefit of the community, as defined by the Companies (Audit, Investigations and Community Enterprise) Act 2004 (community companies, UK). On the other hand, in the United States, Vermont was the first state to initiate L3C companies (**low limited liability companies**), which bridge the gap between nonprofit and for-profit businesses and facilitate investments in socially beneficial for-profit companies. Further, in 2010, **benefit corporations** were introduced in the United States as for-profit business entities that, while having profit as their legally defined goal, have a positive impact on society, workers, the community, and the environment (Alpern 2015⁶). Benefit corporations expand the principles of CSR by focusing on society and environment along with maximizing profits for shareholders with legal protections to management (André 2012). Beginning

⁶<https://www.cleanyield.com/when-b-corp-met-wall-street/> accessed on 2 September 2020

with Maryland in 2010, today there are nearly 36 US states where provisions on benefit corporations are legally enforceable (Reiser 2011).

B-Corp certified companies have now made a global presence in more than 64 countries, with around 3000 companies under its umbrella. Many other countries responded to this changing dynamics and formulated laws to enforce norms on the lines of benefit corporations. For example, in Italy, **societa benefit corporations** were introduced in 2016 to pursue economic activities with the aim of distributing profits and doing common benefit work by operating in a responsible, sustainable, and transparent manner (Societa benefit, 2016). Such benefit corporations are evaluated on the basis of transparency in corporate governance; relationship with workers, suppliers, and the community; and environmental conservation. However, in Switzerland, there have been two unsuccessful attempts to move toward creating a new legal form for benefit corporations or, at least, encouraging this movement (<https://bcorporation.eu/about-b-lab/country-partner/switzerland>). The evidence discussed here is mostly related to developed countries. But there is a lack of study about the suitability of application of B-Corps in emerging markets as a **sustainable business model**.⁷ Thus, we conduct an exploratory study on Indian B Corps. Our objective is to identify suitable amendments to the existing B-Corp model for Indian companies. In the following section, we discuss the existing legal requirements related to sustainable business in India and proposed the amendments required in the existing BRR model that can enhance the comparability of sustainable activities of Indian companies with their international peers.

3 Legal Framework for the Sustainable Business Model in India

From the above discussion, we find that, B-Corps model can generate profit for the business and can also positively impact the society and environment, which allows the business to positively address the needs of the non-profit stakeholders. In this case-study related to India, we first highlight on the existing policy that aims for a sustainable business model and then identify how the proposed B-Corps can assist businesses to be comparable with other sustainable businesses across the countries. Though, benefit corporations do not have a separate identifiable legal existence in India, yet under Companies Act, 2013, a social enterprise can be set up as any of the five formalized incorporation structures like as a sole proprietorship, limited liability partnership, partnership, private limited, or public limited company. Formalizing the existence of the enterprise is quite necessary for any kind of fund-raising activity and market credibility of a business. At the same time, **social enterprises** may also face a dilemma when it comes to balancing their financial and social goals. Another option

⁷ See the Report of the Committee on Business Responsibility Reporting, MCA, GOI, 2020 for legal initiatives in Denmark, China, South Africa, Malaysia and Philippines

under the Act is to set up under section 8 as not for profit or nonprofit institution or as a charitable public trust or a charitable society. Such organization get respect and legitimacy as an entity dedicated to a noble and selfless social service but lack financial support and talent. This further accentuates the need for a **hybrid organization** aligned with the concept of benefit corporations that provide separate legal identity to for-profit making social enterprises. The government responded to this emergent need by setting up a high-level committee for corporate social responsibility under the Ministry of Company Affairs (MCA). In August 2019, the recommendation of the committee entails creating **social impact companies**, having hybrid features of social welfare and profit making.

There are other legal provisions that focus on ensuring that responsible business is conducted by companies in India. The new Company's Act of 2013 proposes section 135, a landmark provision for mandatory corporate social responsibility (CSR) spending to nudge businesses to be more responsible and mindful toward the stakeholders. Essentially, every listed company having a net worth of rupees 500 crores or more, or turnover of rupees 1000 crores or more or a net profit of rupees 5 crores or more during any financial year shall need to spend 2% of the net profits on CSR activities and constitute a **CSR Committee** for monitoring CSR policy and spending. The section initially mandated companies to "comply or explain," wherein directors are required to submit the reasons for not spending for nonprofit activities. In a recent amendment in 2019, companies need to additionally deposit the unspent amount in a separate account, which if unused by the company in the next three years, will be transferred to the regulatory fund created under the Act. Further, section 166 of the Act states that directors have the **fiduciary duty** to work for the benefit of the company and promote the interest of their employees, the community, and the environment.

In 2009, the MCA issued "Voluntary Guidelines on Corporate Social Responsibility," which in 2011 were revised and became **National Voluntary Guidelines (NVG)** on Social, Environmental and Economic Responsibilities of Business. Also in 2011, the United Nations issued Guiding Principles (UNGP) on Business and Human Rights to make business more sustainable and make companies more responsible to society and the environment. India responded to the changing international standards in 2012 when the Securities and Exchange Board of India (SEBI) introduced BRR disclosures, which are based on UNGP principles and sustainable development goals (SDGs). The primary focus of BRR is to make business more responsible toward stakeholders beyond regulatory financial compliance. It addresses environmental, social, and governance perspectives based on NVG principles. More importantly, BRR is also aligned with nonfinancial reporting performance as per the GRI, SEBI circular dated 6 February 2017, and Integrated Reporting (IR). Initially, BRR reporting was compulsory for top 100 listed companies, but the requirement was extended to cover the top 500 companies in 2015 and further to the top 1000 companies in 2019. As decided before, the Committee collected evidence from the companies using BRR and extensively consulted with stakeholders to propose a new format known as BRSR.

Even after these excellent initiatives taken by the Indian government, current business models need to be comparable to facilitate the assurance of the annual reports of the companies and to allow the country to reach the **UN sustainable goals**. Indian national development agenda is well aligned with the UN sustainable development goals⁸ and we expect, the proposed BRSR will allow India to be a leader in the sustainable goal achievement race. However, to expedite the process of attaining sustainable goals, it is important to minimize the differences between BIA (which is a legitimate requirement), the BRR (which is mandatory for only top 1000 companies). This will allow businesses to generate a greater impact on society and the environment through their activities. It is always better to have a comprehensive theoretical model to explain the need for a sustainable model of business. As explained before, the ANT and NIM together, will provide a comprehensive framework about the importance of B-Corps for the Indian business to follow.

4 Comparability of the Indian BRR with the B Impact Assessment (BIA)

The “**CSR movement**” led to the the birth of many rating agencies focusing on assurance, certification, developing socially responsible principles for the corporate etc. (Scalet and Kelly 2010). The primary purpose of these rating agencies was to measure the environmental and social impact of companys’ CSR activities, which are widely used by stakeholders of the business in assessing the sustainable nature of the company. In the previous decade, BIA gained extensive popularity as a reliable sustainable rating scale for certified B Corps in different countries across the world. The scale measures the impact of performance of companies for environment, communities, customers, suppliers, employees and shareholders.

In this study, we compare BIA, a globally acceptable scoring scale of sustainable performance with BRR, a reporting structure of business responsibility used by Indian companies. BRR enlists the parameters of sustainable reporting, while BIA includes the scoring framework along with the reporting. Scoring of the BRR can improve the comparability of the sustainability nature of Indian business with the BIA rating system to derive advantages of B Corps for Indian companies. In Table 1, we compare BIA and BRR based on their applicability, enforcing organization, nature, scope of assessment, and purpose. From the comparison below, we can observe that BRR possesses a more detailed scope of assessment compared to BIA. As BIA is calculated as a score, it can be applied by any business. But BRR is not a scoring system, and so we find that the assurance mechanism is quite complicated. Also, BRR is mandatory for only the top 1000 listed companies, which, therefore, limits the applicability of the system. Removal of restrictions of

⁸Brief description of India’s “whole-of-society” approach (<https://sustainabledevelopment.un.org/memberstates/india>) accessed on 25 July 2020

Table 1 Comparing BIA and BRR

	BIA	BRR
Applicability	Global—any business can apply for B-Corp Certification	Mandatory for top 1000 listed companies in India
Enforcing organisation	B Lab, non-profit private organisation in USA	Securities Exchange Board of India (SEBI), apex regulatory body of India
Nature	Voluntary	Mandatory
Scope of assessment	5 impact areas: <ul style="list-style-type: none"> • Governance • Workers • Community • Environment • Customers 	9 principles: <ul style="list-style-type: none"> P1: Governance P2: Sustainability P3: Employee well-being P4: Stakeholders P5: Human rights P6: Environment P7: Policy making P8: Inclusive growth P9: Consumers
Purpose	Calculate Impact score to get/renew B-Corp certification	Disclosure in Annual Report

Source: Authors’ calculation

participation by private and non-profit organization can also add large scale applicability of the BRR in India.

Further, keeping BIA as the reference instrument, the impact areas are listed and corresponding principles of BRR are mapped. It is important to mention here that more than 80% of the items under BIA are already covered by BRR. However, this relative assessment highlights certain key items which are unaddressed in BRR. Based on the comparison presented in Table 2, we conclude that there are areas of improvement in the existing BRR that can enhance the participation of more companies in environmental and social activities in India.

After comparing BIA and BRR, we conducted a mapping exercise on the two to enhance our understanding of the limitation of the existing BRR system. As discussed previously, BIA is widely used by companies globally, which allows them to apply for B-Corp certification. The differences in BRR and BIA make it difficult for domestic and foreign companies to report on their sustainability activities to wider stakeholders and it is problematic for the Indian companies to be compared with global companies on sustainability parameters. In Table 2, we present the mapping of BIA impact with BRR principles. After mapping the impact areas (governance, worker, community, environment, and customers) with the BRR principles we find that inclusion of certain items can enhance the depth and breadth of the existing BRR system. In the following section, we address the gaps in the existing BRR and propose a revised BRR scale that will influence the logic of any business in India and can allow them to converge to the internationally comparable B-Corps certification.

Table 2 Mapping BIA impact areas with BRR principles

	Impact areas	BIA	BRR principles	Indicators
<i>1. Governance</i>				
1.1	Mission and Engagement	Includes identification, commitment, performance, material assessment and stakeholders' feedback of social and environmental issues		<i>Not covered by the BRR indicators</i>
1.2	Ethics and Transparency	Board of Directors, Code of Ethics, anti-bribery, corruption, disclosure of political contributions, breaches	P1	Policy relating to ethics, bribery and corruption
		Audit by an internationally accredited Certified Public Accountant (CPA)		<i>Not covered by the BRR indicators</i>
		Risk Assessment, Internal Control, Financial Control	P1	Truthfully discharge responsibility on financial and other mandatory disclosures
		Public Availability of financial social and environment performance reports	Section D	Publish a BR or a Sustainability Report
1.3	Governance Metrics	Revenues, net income, payment to government	Section B	Turnover and net income
<i>2. Worker</i>				
2.1	Workers Impact Area	Full time, Part time, contract, Salaried, Hourly, Temporary	P3	Total number of employees; employees hired on temporary/contractual/casual basis.
2.2	Financial Security	Lowest wages, Individual/family living wages, minimum wages, incentives, compensation policy, employee participation, retirement	P3	Ensure timely payment of fair living wages to meet basic needs and economic security of the employees
2.3	Health, Wellness, and Safety	Health care coverage, health benefits, health and safety programs, hazardous material, air quality	P3	Provide a workplace environment that is safe, hygienic humane, and which upholds the dignity of the employees
2.4	Career Development	employed on payroll, professional development, promotions, intern hiring	P3	Promote employee morale and career development through enlightened human resource interventions.

(continued)

Table 2 (continued)

	Impact areas	BIA	BRR principles	Indicators
2.5	Engagement and Satisfaction	Employee handbook, non-discrimination policy, supplementary benefits, worker empowerment, worker management conflict, labour rights, training	P3	Employee association: complaints relating to child labour, forced labour, involuntary labour, sexual harassment; safety and skill upgradation training; work-life balance, especially that of women; not use child labour; Equal opportunities; No discrimination; Grievance Redressal
<i>3. Community</i>				
3.1	Community Impact Area	Specific positive benefit for stakeholders such as charitable partners, vendors or suppliers in need, or your local community	P4, P8	Special initiatives to engage with disadvantaged, vulnerable and marginalized stakeholders; efforts to complement and support development priorities at local and national levels
3.2	Diversity, Equity, and Inclusion	Inclusive Hiring, Diverse ownership and leadership, managing workplace diversity, high-low pay ratio, females/other social groups in management, supplier diversity	P3	Number of permanent women employees; Number of permanent employees with disabilities.
3.3	Economic Impact	Geographic location and scope, job added, local purchasing, suppliers, national sourcing, in country management	P2	Procure goods and services from local and small producers
3.4	Civic Engagement and Giving	Charitable, community investment, stakeholder involvement in social and environment cause	P8	Initiatives for inclusive growth through in-house team/own foundation/external NGO/government structures/any other for community development
3.5	Supply Chain Management	Supplier description, risk assessment, outsourced staff—facilities to such staff		<i>Not covered by the BRR indicators</i>
		Code of conduct for suppliers for social and environmental performance	P1	Policy on ethics, bribery and corruption extend to the Suppliers/Contractors/NGOs/Others
		Evaluate social and environmental impact of suppliers and original producers		<i>Not covered by the BRR indicators</i>

(continued)

Table 2 (continued)

	Impact areas	BIA	BRR principles	Indicators
		Report on supply chain Impact, Policy to improve	P2	Reduction during sourcing/ production/distribution achieved throughout the value chain
		Average tenure of supplier		<i>Not covered by the BRR indicators</i>
		How small suppliers are supported	P2	Procurement from from local and small producers
		% suppliers having social env certification		<i>Not covered by the BRR indicators</i>
4. Environment				
4.1	Facility Environmental Efficiency	Environment Efficiency Practices in office and factory	P6	Initiatives to address global environmental issues such as climate change, global warming; assess potential environmental risks
4.2	Environmental Management	Environmental management system (EMS) covering waste generation, energy usage, water usage, and carbon emissions	P6	Environment Management Systems (EMS) and contingency plans and processes to prevent, mitigate and control environmental damages
		% of product and processes having environment certification	P2	Manufacturing processes and technologies are resource efficient and sustainable
		Environment consideration in design of product and services	P2	products or services design incorporate social or environmental concerns, risks, opportunities.
		Environment footprint assessment—own and for value chain	P2	Assure safety and optimal resource use over the life-cycle of the product, connect with value chain
		Practices to manage and minimise impact	P6	Clean technology, energy efficiency initiatives
		Practices to improve product longevity, reduce waste and landfill		<i>Not covered by the BRR indicators</i>
4.3	Air and Climate	Monitor, record, or report its energy usage	P2	Resource use (energy, water, raw material etc.)
		Energy from renewable resources	P6	Initiatives on—renewable energy,
		Energy efficient equipment purchased		<i>Not covered by the BRR indicators</i>

(continued)

Table 2 (continued)

	Impact areas	BIA	BRR principles	Indicators
		Energy Saved	P2	Reduction during usage (energy, water)
		manage its greenhouse gas emissions	P6	Measures to check and prevent pollution.
		monitor and manage your significant air emissions	P6	Emissions/Waste generated by the company within the permissible limits
		Carbon intensity, offset, GHG emissions, reduce emissions from transportation		<i>Not covered by the BRR indicators</i>
		Practices to reduce the greenhouse gas emissions produced through supply chain	P6	Proactively persuade and support its value chain to adopt environment protection
		Sourcing Raw Material from local suppliers	P2	Procedure for sustainable sourcing (including transportation) from local and small producers
		Purchase of Carbon credits		<i>Not covered by the BRR indicators</i>
4.4	Water	Monitor, record, or report its water usage, conservation and recycling	P2	Product, provide the following details in respect of resource use (energy, water, raw material etc.
		Monitors hazardous and toxic wastewater		<i>Not covered by the BRR indicators</i>
		Water footprint of your supply chain		<i>Not covered by the BRR indicators</i>
4.5	Land and Life	Manage your waste production		<i>Not covered by the BRR indicators</i>
		Non-Hazardous waste produced, disposed and recycled	P2	mechanism to recycle products and waste
		Environmental impact of packaging—recyclable material		<i>Not covered by the BRR indicators</i>
		Assessment of local communities' exposure to hazardous emissions		<i>Not covered by the BRR indicators</i>
		Input Material—Recycles/reuse/sustainable sources	P2	promote sustainable consumption, including recycling of resources.
		% end of life waste reclaimed		<i>Not covered by the BRR indicators</i>
		Reduce waste landfill after usage		<i>Not covered by the BRR indicators</i>

(continued)

Table 2 (continued)

	Impact areas	BIA	BRR principles	Indicators
		Manage/dispose/use Hazardous Waste		<i>Not covered by the BRR indicators</i>
		Reduce Hazardous Waste in supply chain		<i>Not covered by the BRR indicators</i>
		Policy to reduce supply chain's impact on natural habitat and biodiversity	P7	Advocate policies on Energy security, Water, Food Security, Sustainable Business Principles
<i>5. Customers</i>				
5.1	Customer Impact Area	Product/service address a social or economic problem for customers	P9	Wellbeing of consumers; Freedom of choice; free competition; Consumer Education
5.2	Customer Stewardship	Manage the impact and value created for your customers	P9	Carry out any consumer survey/consumer satisfaction trends
		Managing the potential impact their products have on customers	P2	Details of contents, composition and promotion of safe usage and disposal
			P9	Display product information on the product label, over and above what is mandated as per local laws

Source: Authors' calculation

After completion of mapping between BIA and BRR, we studied the proposed BRSR to examine if the revised format is comparable with the BIA, which can ease the application of B Corps. We find that the BRSR is highly comprehensive and is well aligned with the SDGs. Our research supports the findings of the IICA, which mentioned that companies are comfortable with the SEBI-BRR disclosures, but BRSR will provide comprehensive information from the companies. The minor modification of principle-wise performance of BRR is reflected in BRSR. Thus, the additional questions in proposed BRSR will allow the stakeholders to assess the responsibility of the business, however, we believe that the introduction of **scoring scale** in the BRSR will allow business to provide measurable evidence of their sustainable activities which will attract investors' interest towards the company and will also generate higher confidence among customers and other stakeholders. Adding the B-Corps scoring tool in the proposed sustainability reporting standards (BRSR) will expand the opportunities of international collaboration for Indian business and will result in a higher cooperation and coordination with international sustainability reporting bodies, other governments, regulators and various stakeholders. Consistency with international B-Corps scoring will increase interconnectedness between financial reporting and sustainability reporting of Indian business.

5 How the Scoring Tool Could Enhance the Comparability of BRR and BRSR with BIA

As stated earlier, there are five impact assessment areas in BIA which are mapped with the corresponding principles in BRR. After careful consideration of the BIA and BRR, we identify the following points of differences and discuss them for each impact area. For **governance**: BIA has wider coverage including assessment of social and environmental performance, and stakeholders' feedback for the same. For **workers**: it is mapped with principle three (employees) of BRR. Though most of the parameters are covered, yet "facilities provided and programs offered" can be added to make it more inclusive. For **community**: it maps well with principle four (stakeholders), principle seven (community) and principle eight (inclusive growth) of BRR. In fact, BRR also covers human rights under principle five, which is partly addressed in BIA. For **environment**: though most of the parameters of BIA are covered under principle two (sustainability) and principle six (environment) of BRR, yet there is a gap in reporting carbon intensity and emissions which needs to be handled. For **consumers**: this is completely mapped with principle nine (consumers). To sum up, in order to align BRR with standardized international scale BIA, the gaps identified are proposed to be included in the revised BRR framework. Annexure 1 documents the complete BRR score with part 1 providing the scale of the existing framework and part 2 of the proposed parameters. The summative score of the nine principles of BRR totals up to a maximum possible score of 200, including 163 scores for the existing parameters and 37 scores for the proposed parameters. In the next step, we compare our proposed BRR with MCA's proposed BRSR. From this comparison, it was found that the main objective of the proposed BRSR is to align the company's sustainable business model with the SDGs. Less focus is placed on the comparison with the BIA. Though some of the concerns raised in our analysis are addressed in the BRSR but our objective to make the Indian model highly comparable with the international model is still important to discuss. We recommend that the proposed scoring mechanism converts **qualitative information** to measurable and machine-readable **quantitative data**. After completing the scoring for BRR, we apply the same mechanism to score the first two sections of BRSR. The total score of sections A and B of the proposed BRSR is 48. We report the example of the part scoring of BRSR in Annexure 2.

Based on Annexure 1, we conclude that the scoring of these nine revised principles will allow Indian companies of various sizes to apply for B-Corp certification. The proposed scoring of BRSR will allow rating agencies to compare the sustainable nature of Indian companies with international companies. Overall, we expect that the higher applicability of B Corps in India will make the companies more socially responsible, which will also allow them to generate financial benefits from their sustainable activities in the long run and contribute to the development of the economy.

It is agreed in the academic literature that because of the various criteria used by rating agencies and the lack of uniformity in CSR standards, it is impossible to

determine poor- and good- performing companies (Chatterji and Levine 2006). But to benefit the stakeholders in better understanding the environment and social impact of the business activities, the International Organization for Standardization (ISO) implemented several changes over decades (for example, ISO 26000). From the above initiatives it is evident that even though there is no one standard that can allow any stakeholder of business to compare companies based on their social responsibility, but rating mechanism is widely used across countries. Thus, we propose that in India we should aim to introduce a **mandatory CSR rating**, which can be applied by all companies and every business can be compared with international companies on sustainable parameters. Such a detailed and comprehensive rating tool, like BIA, can encourage the B-Corp certification of private and nonprofit organizations in India. Higher applicability of the proposed BRR or revised BRSR will allow companies to generate a greater impact on the environment and society, which in turn will assist India in achieving the SDGs faster.

In addition, we find that the proposed model in this paper is well supported by the theoretical framework, which is comprised of NIM and ANT. If the companies can treat financial and **nonfinancial aspects** of their business with the same importance in detail (applying ANT), then the company will generate trust among people in the society about their products. If stakeholders discover that their products are not only allowing the business to generate profit but that they are also good for society and the environment, there will be more demand for such products. Higher demand for company products will allow the business to grow and they can generate higher profit by reducing the cost of debt etc. which will allow the business to continuously improve its sustainability score. Though, companies with B Corps are in limelight, but if they keep improving their score by investing in activities beneficial for society, then the business will experience less negative pressure from the stakeholders (by using NIM) and there will be more comparability with international companies. These theories together can explain the motivation for logical change in the business model to the stakeholders and by adopting B Corps, companies will generate profit through a sustainable model for the future.

6 Conclusion

In this paper, we compare the existing BRR and proposed BRSR in India with BIA and propose certain modifications to the existing BRR system. The motivation of the study is to address one major concern, which is the sustainability attitude of the companies. Even after several legal and voluntary changes, India is still lagging behind other countries when it comes to B-Corp certification. We argue that lack of **comparability** of the company reporting, and nonexistence of rigorous rating can be one major reasons of less B Corps. With support from existing literature, we argue that more B Corps can generate higher confidence about the business activities among the stakeholders, which in turn will enhance the financial position of the company. In summary, higher socially responsible business will create impact on

environment and society along with contributing to the economic development by strengthening the financial future of the business.

The detail discussion of the BRR, proposed BRR scale and BRSR in this study, will enrich the academic literature on CSR in developing countries, sustainability, corporate finance, corporate governance, and other related fields. The proposed model will give a clear guideline to the regulators and policymakers about the limitation of the existing BRR for each of the principles and they can modify the proposed BRSR format to make Indian companies highly comparable with foreign companies. The findings of this study can be applied to other countries with a similar setup. During the coronavirus crisis, almost all companies around the world are affected at various levels. The policy makers around the world are asking for higher contribution by the business for the environment and society. The urgency of sustainable business practices by companies was already in place before the coronavirus crisis. For example, in 2019, the Global Assessment of the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), mentioned the danger of loss in biodiversity and thus the UN Convention on Biological Diversity (CBD) actively advise business to start practicing sustainable biodiversity in business model. Europe declared the goal of a “Climate neutral Europe 2050.” Some experts say that the unsustainable activity by business is one of the reasons for the Covid-19 (Moore 2020). In summary, the proposed model with scoring of impact areas will allow Indian companies to assist the country to achieve the SDGs and the same model can be applied by other countries for the benefit of the society. The comprehensive theoretical model will be beneficial for researchers in identifying the gaps in the existing sustainable reporting models in their country.

Like any other study, this study suffers from certain limitations. A more detailed comparison of the existing systems in other countries can enhance the applicability of the proposed model. Separate consideration of sensitive industry can be interesting aspect to check. In future, we plan to expand the study by conducting detail model for each industry. In addition, to make the scoring system feasible, we will map the proposed BRSR with BIA in detail to introduce a traffic light system.

Annexure 1: BRR Framework with Scoring Scale

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scoring
Section A: General information about the company		
Section B: Financial details of the company		
B:4	Total Spending on CSR as percentage of PAT (%)	3 for >2%; 2 for 1–2%; 1 for < 1%; 0 for not reporting
B:5	List of activities in which expenditure in 4 above has been incurred	3 for covering >5 activities listed in schedule VII of Company Act; 2 for 3–5 activities; 1 for 1–2 activities; 0 for not reporting
Section C: Other details		
C:2	Do the Subsidiary Company/Companies participate in the BR Initiatives of the parent company? If yes, then indicate the number of such subsidiaries?	2 for all subsidiaries; 1 for not all subsidiaries; 0 for not reporting
C:3	Do any other entity/entities (e.g., suppliers, distributors etc.) that the Company does business with, participate in the BR initiatives of the Company? If yes, then indicate the percentage of such entity/entities?	3 for >60%; 2 for 30–60%; 1 for < 30%; 0 for not reporting
Section D: Directors information		
D:2	Indicate the frequency with which the Board of Directors, Committee of the Board or CEO to assess the BR performance of the Company.	3 for Within 3 months; 2 for 3–6 months; 1 for Annually; 0 for More than 1 year
D:3	Does the Company publish a BR or a Sustainability Report? What is the hyperlink for viewing this report? How frequently it is published?	3 for publishing every year; 2 for every two years; 1 for more than 2 years; 0 for not published
	Total Score for General Information (A to D)	Seventeen [17]
Section E: Principle-wise performance		
<i>Principle 1: Governance</i>		
E:1:1	Does the policy relating to ethics, bribery and corruption exist	1 for Yes; 0 for No
E:1:1	Applies to the company/Extends to Group/Joint Ventures/Suppliers/Contractors/NGOs/Others	3 for more than 3 Stakeholders; 2 for any Stakeholder; 1 for Company only
E:1:2	Number of Stakeholder complaints [Received]	1 for Reported; 0 for Not Reported
E:1:2	Number of Stakeholder complaints [Resolved]	1 for Reported; 0 for Not Reported
E:1:2	Details	3 for ensuring ethical conduct at all levels and across its value chains; 2 for all levels in the company; 1 for only at senior Management levels; 0 for Not Reporting

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
E1	Principle 1—Total	Nine [9]
<i>Principle 2: Sustainability</i>		
E:2:1	Name 3 of your products or services whose design has incorporated social or environmental concerns, risks and/or opportunities	3 for providing details of resource use of all 3 products or services incorporating social or environmental concerns; 2 for 2 products and 1 for 1 product; 0 for not reporting
E:2:2	For each such product, provide the following details in respect of resource use (energy, water, raw material etc.) per unit of product	
E:2:2	Is there a reduction in respect of resource use (energy, water, raw material etc.)? (Yes/No) Details	1 for Yes; 0 for No 3 for >20% Reduction; 2 for 10–20% reduction; 1 for < 10%; 0 for Not Reporting
E.2.3	Does the Company have procedures in place for sustainable sourcing (including transportation)? (Yes/No)	1 for Yes; 0 for No
E.2.3	If yes, what percentage of your inputs was sourced sustainably?	3 for more than 60%; 2 for 30–60%; 1 for <30%; 0 for Not Reporting
E.2.3	Details	3 for all inputs sourced sustainably; 2 for all raw material sourced sustainably; 1 for some inputs sourced sustainably; 0 for Not Reporting
E.2.4	Procure goods and services from local and small producers (Yes/No)	1 for Yes; 0 for No
E.2.4	What steps have been taken to improve their capacity and capability of local and small vendors?	3 for more than 5 initiatives taken; 2 for 3–5 initiatives; 1 for 1–2 initiative; 0 for Not Reporting
E.2.5	Mechanism to recycle products and waste (Yes/No)	1 for Yes; 0 for No
E.2.5	Percentage	3 for more than 60%; 2 for 30–60%; 1 for <30%; 0 for Not Reporting
E.2.5	Details	3 for promoting sustainable consumption, including recycling of all product and waste; 2 for recycling of some product and waste; 1 for only recycling of waste; 0 for not reporting
E2	Principle 2—Total	Twenty-Two [25]
<i>Principle 3: Employees</i>		
E.3.1	Please indicate the Total Number of Employees	1 for Reported; 0 for Not Reported
E.3.2	Employees hired on temporary/contractual/casual basis	1 for Reported; 0 for Not Reported
E.3.3	Number of permanent women employees	1 for Reported; 0 for Not Reported
E.3.4	Number of permanent employees with disabilities	1 for Reported; 0 for Not Reported

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
E.3.5	Employee association that is recognized by management	1 for Yes; 0 for No
E.3.6	What percentage of your permanent employees are members of this recognized employee association?	3 for more than 60%; 2 for 30–60%; 1 for <30%; 0 for Not Reporting
E.3.7	Child labour/forced labour/involuntary labour [Received]	1 for Reported; 0 for Not Reported
E.3.7	Child labour/forced labour/involuntary labour [Pending]	1 for Reported; 0 for Not Reported
E.3.7	Sexual harassment [Received]	1 for Reported; 0 for Not Reported
E.3.7	Sexual harassment [Pending]	1 for Reported; 0 for Not Reported
E.3.7	Discriminatory employment [Received]	1 for Reported; 0 for Not Reported
E.3.7	Discriminatory employment [Pending]	1 for Reported; 0 for Not Reported
E.3.8	Permanent Employees (%)	1 for Reported; 0 for Not Reported
E.3.8	Permanent Women Employees (%)	1 for Reported; 0 for Not Reported
E.3.8	Casual/Temporary/Contractual Employees (%)	1 for Reported; 0 for Not Reported
E.3.8	Employees with Disabilities (%)	1 for Reported; 0 for Not Reported
E.3.8	Training details	3 for ensuring continuous skill and competence upgrading of all permanent, casual, and disabled employees; 2 for permanent and casual; 1 for only permanent; 0 for Not Reporting
E.3.8	Does the company have an Internal Complaints Committee (Yes/NO)	1 for Yes; 0 for No
E3	Principle 3—Total	Twenty-Two [22]
<i>Principle 4: Stakeholders</i>		
E.4.1	Has the company mapped its internal and external stakeholders? Yes/No	1 for Yes; 0 for No
E.4.1	Details	3 for being responsible and transparent about the impact of their policies, decisions, product and services and associated operations on all stakeholders; 2 for only internal stakeholders; 1 for only shareholders; 0 for Not Reporting
E.4.2	Out of the above, has the company identified the disadvantaged, vulnerable and marginalized stakeholders? (Yes/No)	1 for Yes; 0 for No
E.4.3	Special initiatives (Yes/No)	1 for Yes; 0 for No
E.4.3	Details	3 for more than 3 initiatives taken for disadvantaged, vulnerable and marginalized stakeholders; 2 for 2–3 initiatives; 1 for some initiatives; 0 for Not Reporting

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
E4	Principle 4—Total	Nine [09]
<i>Principle 5: Human capital</i>		
E.5.1.	Does the policy of the company on human rights cover only the company (Yes/No)	0 for Yes; 1 for No
E.5.1.	Extend to the Group/Joint Ventures/Suppliers/Contractors/NGOs/Others (Yes/No)	1 for Yes; 0 for No
E.5.1.	Details	3 for integrating respect for human rights in management systems, assessing and managing human rights impacts of operations, and ensuring all individuals impacted by operations have access to grievance mechanisms; 2 for employees, suppliers and customers have access; 1 for only employees; 0 for Not Reporting
E.5.2.	Stakeholder complaints [Received]	1 for Reported; 0 for Not Reported
E.5.2.	Stakeholder complaints [Resolved]	3 for Resolving more than 90% complaints; 2 for 70–90% and 1 for < 70%; 0 for Not Reported
E5	Principle 5—Total	Nine [09]
<i>Principle 6: Environment</i>		
E.6.1.	Environment Policy covers only the company	3 for more than 3 Stakeholders; 2 for any Stakeholder; 1 for Company
E.6.1.	Extends to the Group/Joint Ventures/Suppliers/Contractors/NGOs/others	
E.6.1.	Details	3 for developing Environment Management Systems (EMS) and contingency plans and processes for preventing, mitigating, and controlling environmental damages and extend to value chain; 2 for EMS in all operations of the company; 1 for EMS in some of operations; 0 for Not Reporting
E.6.2.	Does the company have strategies/initiatives to address global environmental issues such as climate change, global warming, etc? Yes/No	1 for Yes; 0 for No
E.6.2.	If Yes, Details	3 for more than 5 initiatives taken for addressing global environmental issues; 2 for 3–5 initiatives; 1 for 1–2 initiatives; 0 for Not Reporting
E.6.3.	Does the company identify and assess potential environmental risks? Yes/No	1 for Yes; 0 for No

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
E.6.3.	Details	3 for assessing the environmental damage and bear the cost of pollution abatement with due regard to public interest and taking more than 5 initiatives; 2 for 3–5 initiatives; 1 for 1–2 initiatives; 0 for Not Reporting
E.6.4.	Does the company have any project related to Clean Development Mechanism? Yes/No	1 for Yes; 0 for No
E.6.4.	Details	3 for adopting cleaner production methods, promoting use of energy efficient and environment friendly technologies and use of renewable energy and taking more than 3 initiatives; 2 for 2–3 initiatives; 1 for some initiative; 0 for Not Reporting
E.6.5.	Has the company undertaken any other initiatives on clean technology, energy efficiency, renewable energy, etc? Yes/No	1 for Yes; 0 for No
E.6.5.	If Yes, Details	3 for more than 5 initiatives; 2 for 3–5 initiatives ; 1 for 1–2 initiatives; 0 for Not Reporting
E.6.6.	Are the Emissions/Waste generated by the company within the permissible limits given by CPCB/SPCB for the financial year being reported? Yes/No/NA	1 for Yes; 0 for No
E.6.7.	Number of show cause/legal notices received from CPCB/SPCB which are pending	1 for Reported; 0 for Not Reported
E.6.7.	Details	3 for < 5 cases pending; 2 for 5–10; 1 for >10; 0 for Not Reporting
E6	Principle 6—Total	Twenty-Seven [27]
<i>Principle 7: Community</i>		
E.7.1.	Is your company a member of any trade and chamber or association (Yes/NO)	1 for Yes; 0 for No
E.7.1.	How many associations (Number)	1 for Reported; 0 for Not Reported
E.7.2.	Have you advocated/lobbied through the above associations for the advancement or improvement of public good? Yes/No	1 for Yes; 0 for No
E.7.2.	How many broad areas covered (out of Governance and Administration, Economic Reforms, Inclusive Development Policies, Energy security, Water, Food Security, Sustainable Business Principles, Others) (State the number)	3 for >5 areas; 2 for 3–5 areas; 1 for <3 areas; 0 for Not Reporting
E7	Principle 7—Total	Six [06]
<i>Principle 8: Inclusive growth</i>		
E.8.1.	Does the company have a policy on "Businesses should support inclusive growth and equitable development" Yes/No	1 for Yes; 0 for No

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
E.8.1.	Details	3 for more than 5 initiatives taken for supporting inclusive growth and equitable development; 2 for 3–5 initiatives; 1 for 1–2 initiatives; 0 for Not Reporting
E.8.2.	Are the programs/projects undertaken through in-house team/own foundation Yes/No	1 for Yes; 0 for No
E.8.2.	Are the programs/projects undertaken through external NGO/government structures/any other organization? Yes/No	1 for Yes; 0 for No
E.8.2.	Details	3 for more than 5 programs/projects undertaken through internal or external NGO/government structures/any other organization; 2 for 3–5 projects; 1 for 1–2 projects; 0 for Not Reporting
E.8.3.	Have you done any impact assessment of your initiative? Yes/No	1 for Yes; 0 for No
E.8.3.	Details (how)	3 for impact assessment on all stakeholders; 2 for impact assessment on local community and environment; 1 for local community; 0 for Not Reporting
E.8.4.	What is your company's direct contribution to community development projects [Amount in INR]	1 for Reported; 0 for Not Reported
E.8.4.	Details	3 for >5 projects; 2 for 3–5 projects; 1 for 1–2 projects; 0 for Not Reporting
E.8.5.	Have you taken steps to ensure that this community development initiative is successfully adopted by the community?	1 for Yes; 0 for No
E.8.5.	Details	3 for >3 initiatives; 2 for 2–3 initiatives; 1 for 1 initiative; 0 for Not Reporting
E8	Principle 8—Total	Twenty-One [21]
<i>Principle 9: Consumers</i>		
E.9.1.	What percentage of customer complaints/consumer cases are pending	3 for less than 10% complaints pending; 2 for 10–20% and 1 for >20%; 0 for Not Reported
E.9.2.	Does the company display product information on the product label, over and above what is mandated as per local laws? Yes/No/NA	1 for Yes; 0 for No
E.9.2.	Details	3 for disclosing all information truthfully and factually, through labeling and other means, including the risks to the individual, to society and to the planet from the use of the products; 2 for

(continued)

Part 1: Scoring of the existing BRR framework		
	Parameters and indicators of BRR	Scaling
		disclosing information about product only; 1 for using only labeling; 0 for Not Reporting
E.9.2.	How many products	1 for Reported; 0 for Not Reported
E.9.3.	Any case filed by any stakeholder against the company regarding unfair trade practices, irresponsible advertising and/or anti-competitive behaviour Yes/No	0 for Yes; 1 for No
E.9.3.	Number of cases filed	1 for Reported; 0 for Not Reported
E.9.3.	In what category (out of any case filed unfair trade practices, irresponsible advertising and/or anti-competitive behaviour)	1 for Reported; 0 for Not Reported
E.9.3.	Number of cases pending	3 for less than 10% cases pending; 2 for 10–20% and 1 for >20%; 0 for Not Reported
E.9.4.	Did your company carry out any consumer survey/ consumer satisfaction trends Yes/No	1 for Yes; 0 for No
E.9.4.	Which Areas (Details)	3 for regularly conducting consumer survey and considering consumer feedback; 2 for only regularly conducting survey; 1 for conducting survey sometimes; 0 for Not Reporting
E9	Principle 9—Total	Eighteen [18]
	Maximum Possible Score	One Sixty-three [163]

Part 2: Scoring of the proposed parameters in the BRR framework

Principle	Indicators/parameters	Scale
Principle 1	Material Assessment of Social and Environment performance—Internal and External	3 for both internal and external assessment; 2 for internal assessment; 1 for reporting; 0 for not reporting
	Stakeholder feedback on social and environment issues	3 for taking feedback from all stakeholders; 2 for suppliers, customers, and employees; 1 for employees only; 0 for not reporting
	Anti-corruption reporting and prevention systems	3 for having anti-corruption, whistle blowing policy, direct reporting mechanism to directors; 2 for different policies but no reporting; 1 for only whistle blowing policy; 0 for not reporting
	Financial Control Mechanism and transparency in disclosures	3 for having audit committee, financial risk assessment, internal control and all mandatory disclosures; 2 for all but no risk assessment; 1 for only audit committee and internal control; 0 for non-compliance.

(continued)

Part 2: Scoring of the proposed parameters in the BRR framework		
Principle	Indicators/parameters	Scale
Principle 2	Mechanism to reduce waste/landfill	3 for >3 initiatives; 2 for 2–3; 1 for 1 initiative; 0 for not reporting
	Handling hazardous waste and toxic water waste; water footprint of Value chain	3 for ensuring handling hazardous and toxic water waste for company and value chain; 2 doing only for company; 1 for either for hazardous waste or water waste
Principle 3	Facilities/Special facilities to employees—Permanent/Women/Casual/Disabled	3 for providing facilities to all employees; 2 for permanent and women; 1 for only permanent; 0 for not reporting
	Occupational Health and Safety policies and programs	3 for implementing safety and health programs, reporting system, safety committee, taking corrective actions; 2 for implementing safety and health programs, reporting system; 1 for implementing safety and health programs; 0 for not reporting
	Non-discrimination policy in hiring, promotions, access to employee-handbook, empowerment of workers, workplace diversity	3 for having all policies in place; 2 for all but not empowerment of workers; 1 for only handbook; 0 for not reporting
Principle 6	Risk assessment and social and environment certification of company and suppliers? Yes/No	1 for reporting; 0 for not reporting 3 for both internal and external risk assessment; 2 for internal assessment; 1 for reporting; 0 for not reporting
	Reporting and reducing Carbon intensity, Carbon emissions, GHG, transportation	3 for reporting and ensuring emissions less than permissible limits; 2 for reporting and emissions within limits; 1 for only reporting; 0 for not reporting
	Carbon Credit (Purchased/Sold)	2 for Sold; –1 for Purchased
	Is the company doing environment impact assessment on community? Yes/No	1 for yes; 0 for No
	Maximum Possible Score	Thirty-Seven (37)
	Total Score (Existing + New Parameters)	163 + 37 = 200

Source: Developed by authors

Annexure 2: BRSR (Section A and B) Framework with Scoring Scale

	Parameters and indicators of BRSR	Scaling
<i>Section A: General disclosures</i>		
1–16, 18, 22– 24, 26, 28,	General Information about Company	No Score
17	Location of Manufacturing Plant	1 point for Location outside the scope of Category A, B, C or D; 0 for within the scope
19	Categories of Employees	3 for engaging differently abled employees >10% total employees; 2 for >5%; 1 for >2%; 0 for not engaging
20	Women Employees	3 for engaging women employees >25% total employees; 2 for >15%; 1 for >10%; 0 for not engaging 3 for engaging differently abled women employees >5% total employees; 2 for >3%; 1 for >1%; 0 for not engaging
21a	Do the Subsidiary Company/Companies participate in the BR Initiatives of the parent company? If yes, then indicate the number of such subsidiaries?	2 for all subsidiaries; 1 for not all subsidiaries; 0 for not reporting
21b	Do any other entity/entities (e.g., suppliers, distributors etc.) that the Company does business with, participate in the BR initiatives of the Company? If yes, then indicate the percentage of such entity/entities?	3 for >60%; 2 for 30–60%; 1 for < 30%; 0 for not reporting
25a	Total Spending on CSR as percentage of PAT (%)	3 for >2%; 2 for 1–2%; 1 for < 1%; 0 for not reporting
25b	Amount Spent in Local Areas	3 for >75% amount spent; 2 for >50%; 1 >25%; 0 for <25%
25c	List of activities in which CSR expenditure has been incurred	3 for covering >5 activities listed in schedule VII of Company Act; 2 for 3–5 activities; 1 for 1–2 activities; 0 for not reporting
27	Responsibility statement of the CSR Committee	1 for Yes; 0 for No
29	Stakeholders Complaints/Grievances on Responsible Business Conduct	3 for Resolving more than 90% complaints; 2 for 70–90% and 1 for < 70%; 0 for Not Reported

(continued)

	Parameters and indicators of BRSR	Scaling
30	Risk Assessment of environmental, social and governance matters	3 for assessment and efforts to address the concerns; 2 only assessment is done but not addressed; 1 for partial assessment; 0 for not reporting
	Section A Total	28
<i>Section B: Management and process disclosures</i>		
1	Company policy covering principles of the NGRBCs	3 for covering all Principles; 2 for >5; 1 for >3; 0 for not reporting
2	Translated the policy into procedures	1 for yes; 0 for No
3	Policies extend to your value chain partners	1 for yes; 0 for No
4	National and international codes/standards adopted and mapped to principles	3 for adopting and mapping for all Principles; 2 for >5; 1 for >3; 0 for not reporting
5–6	Specified committee of the Board to implementation of the BRR policy	1 for yes; 0 for No
7	Review of NGRBCs by the Company	3 for quarterly; 2 for half yearly; 1 for annually; 0 for not reporting
8	Assessment of policy—Internal and External	3 for both internal and external assessment; 2 for internal assessment; 1 for reporting by committee; 0 for not reporting
9–11	Identifying and communicating with stakeholders	2 for identifying and communication; 1 for identifying; 0 for not reporting
12	Reasons for not covering all principles in policies	3 for reason explained and planning to cover in future; 2 for reasons for all principles not covered; 1 for partial coverage; 0 for not reporting
	Section B Total	20
	Total of Sections A and B	48

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Social Enterprises and Benefit Corporations in Italy



Livia Ventura

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1 An Introduction to the Italian Benefit Corporation

The new capitalist paradigm embodied by the benefit corporation movement is not something completely new for Italy; on the contrary, it is deeply rooted in a traditional Italian line of economic thought—the so-called civil economy¹—based on the civic humanism of the thirteenth and fourteenth centuries and developed through the Italian Enlightenment philosophy in the eighteenth century by both the Milanese² and Neapolitan³ schools.⁴

Furthermore, the Italian entrepreneurial environment has experienced business models close to that of the benefit corporation long before its birth. Among many, examples are the stakeholder approach of the Olivetti group carried out from 1943 to 1960⁵ or the humanistic enterprise business model of Brunello Cucinelli's luxury fashion brand funded in 1978.⁶

It is therefore not surprising that Italy has been the first country in the world to adopt the US benefit corporation model (so-called *società benefit*), which it transplanted into its legal system at the end of 2015, effective since January 1, 2016.

The legal transplant⁷ was preceded by the development of the B Corp certification movement, sponsored by B Lab. *Nativa s.r.l.*, a sustainability consultancy company,⁸ has been, since February 2013, the first certified B Corp in Italy (and, together with

¹In a nutshell, we can say that the civil economy places well-being, virtue, and the common good alongside economic goals like market share, increased productivity, and competitiveness.

²Among Milanese scholars: Pietro Verri, Cesare Beccaria, Gian Domenico Romagnosi, Carlo Cattaneo.

³Among Neapolitan scholars: Gianbattista Vico and Antonio Genovesi. In particular, it is interesting to highlight that the first university chair in economics in the world was established at the University of Naples in 1753. It was entitled “Chair in Civil Economy” and the first holder of that chair was Antonio Genovesi, see Zamagni (2018), p. 52.

⁴On this issue, see the modern fathers of the “civil economy” school: Bruni and Zamagni (2007); Bruni (2009); Zamagni (2013); Bruni and Zamagni (2015).

⁵The stakeholders' involvement in firm management and the creation of a strong company-community relationship has already been experienced by some enlightened entrepreneurs, such as Adriano Olivetti, the CEO of the Olivetti group from 1943 to 1960; see, e.g., Sciarelli and Tani (2015), pp. 19–36.

⁶In 1978 Brunello Cucinelli started his activity as a cashmere producer. Today, Brunello Cucinelli S.p.A. is a publicly traded enterprise and a leading manufacturer of luxury fashion apparel. The Italian headquarters of the company is the small town of Solomeo, the fourteenth-century hamlet outside Perugia. The company's founder has striven to create an enterprise that follows principles of what he calls “humanistic capitalism” based on the pursuit of growth and profitability in a “gracious way”, with particular attention to human resources development. See, e.g., La Rocca (2014), pp. 9–34.

⁷On this issue, Ventura (2016), pp. 1134–1167.

⁸Nativa, as the licensee of The Natural Step for Italy, incorporates and applies the innovation methodologies of The Natural Step, an international nonprofit organization and a benchmark in the research and implementation of sustainability strategies since 1989. Nativa is an advisor to investment funds and a cofounder and strategic partner of NextEP, the first Italian Sustainable Investment platform.

other four companies,⁹ the first to register as a *società benefit* on February 26, 2016). Since then, it has become the country partner of B Lab in Italy and has been a key actor in introducing the benefit corporation law.¹⁰

Società benefit (SB) were introduced in Italy with the 2016 “Stability Law”,¹¹ which incorporated the parliamentary initiative bill on “*Disposizioni per la diffusione di società che perseguono il duplice scopo di lucro e di beneficio comune*”.¹²

2 The Benefit Corporation Phenomenon in Italy: Some Data

Data show that at the beginning of 2022, in Italy, there were over 120 certified B Corps.¹³ As for the number of *società benefit*, it is not possible to have complete information, given that, according to law, it is not mandatory to use the denomination *società benefit* or the abbreviation SB next to the company name registered with the Italian Company’s Register Office, and there is not a special section in the register exclusively dedicated to *società benefit*. However, as of September 30, 2021, there were 1344 *società benefit* registered with such name in the national Company’s Register.¹⁴

Studies carried out between 2019 and 2021 reveal that as far as their organizational structure is concerned, the majority of SB are organized as *società a responsabilità limitata* (i.e., limited liability company).¹⁵ Among the *società benefit* registered in the national Company’s Register as of September 2021, over 9% were

⁹Together with Nativa, the other companies that acquired the legal status of *società benefit* at the beginning of 2016, soon after the introduction of the Italian benefit corporation law, were D-Orbit (a space security company), Dermophysiologique (a company in the cosmetic industry), Croqger.it (a marketplace for the exchange of local working services), and Mailwork (a platform of services regarding sustainable building redevelopment and renovation).

¹⁰Nativa (through its founders, Paolo Di Cesare and Eric Ezechieli) took part in the working group (which I also had the opportunity to participate in) set up and led by Senator Mauro Del Barba, who, in April 2015, filed a bill (A.S. No. 1882/2015) with the Italian Senate of the Republic aimed at introducing the *società benefit* in Italy.

¹¹Law No. 208 of December 28, 2015 (G.U. 30.12.2015), “*Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Legge di Stabilità 2016)*” art. 1, paragraphs 376–384.

¹²Literally “Provisions for the diffusion of companies that serve the dual purpose of profit and public benefit”, bill A.S. No. 1882/2015, communicated to the Presidency of the Italian Senate of the Republic on April 17, 2015.

¹³Data provided by B Lab Europe, available at <https://bcorporation.eu/about-b-lab/country-partner/italy>. According to the website, in Italy there are 124 certified B Corps as of January 2022 (accessed on January 10, 2022).

¹⁴See Balestra, Caruso (2022). A partial list of the Italian *società benefit* can be found at <http://www.societabenefit.net/elenco-delle-societa-benefit/>.

¹⁵See Bellavite Pellegrini et al. (2020b), p. 8; Balestra and Caruso (2022).

società per azioni (i.e., corporation), while about 87% were *società a responsabilità limitata*.¹⁶ The others were cooperative companies or organizational forms that can be placed under the partnership category.

Among the existing *società benefit*, as of January 2022, 84 were also certified B Corps.¹⁷ It is necessary to highlight that, like in the United States, not all certified B Corps are *società benefit* and vice versa. On the one hand, there are SB that are not certified B Corps because Italian law does not require *società benefit* to be also certified by B Lab. It only requires the assessment of the company's impact through the use of any third-party standard available on the market (B Lab's Benefit Impact Assessment is only one of the available standards). On the other hand, according to B Lab's internal regulation, Italian certified B Corps shall adopt the legal status of *società benefit* within a few years (two or three) from their certification to maintain the certification itself.¹⁸

Data from 2019 and 2021 also show that most *società benefit* are small-medium enterprises,¹⁹ privately owned, and located in northern and central Italy.²⁰ As for the business sector, SB mainly operate in three macro-sectors: wholesale/retail trade, manufacturing, and service sectors.²¹

¹⁶Information elaborated from data proposed by Balestra and Caruso (2022).

¹⁷Information elaborated from data provided by B Lab Europe, available at <https://bcorporation.eu/about-b-lab/country-partner/italy>.

¹⁸For further information about the relationship between *società benefit* and Certified B Corps in Italy see the Italian official *società benefit* website at <http://www.societabenefit.net/domande-piu-frequenti/>.

¹⁹However, among Italian SB, it should be mentioned Eni gas e luce S.p.A, a wholly-owned subsidiary of Eni S.p.A. (a major player in the global oil and gas sector) that sells gas and electricity to households and businesses, which acquired the status of SB in July 2021. Some other relevant SB are: (i) Chiesi Farmaceutici S.p.A., an international research-oriented pharmaceutical group that in 2019 became a *società benefit* and the largest global pharmaceutical group to be awarded the B Corp Certification; (ii) Aboca S.p.A., a company leader in therapeutic innovation based on natural molecular complexes, which became a *società benefit* in 2018 and received the B Corp certification in 2019; (iii) Davines S.p.A., a family-owned, international hair care brand distributed in 70 countries that achieved the B Corp certification in 2016 and acquired the *società benefit* status in 2019; (iv) D-Orbit S.p.A., the first aerospace company in the world to receive the B Corp certification in 2014, and among the first firms to acquire the status of *società benefit* in 2016; (v) Alessi S.p.A., a leading internationally renowned Italian Design Factories founded in 1921 that acquired the B Corp certification in 2017 and has become SB in 2020; (vi) illycaffè S.p.A., founded in 1933 in Trieste, which produces and sells worldwide coffee, has become a SB in 2020 and received the B Corp certification in 2021; (vii) Euro Company s.r.l., founded in 1979 and based near Ravenna, produces, selects and markets nuts and dried fruits, has become SB in 2018 and a certified B Corp in 2019.

²⁰See Bellavite Pellegrini et al. (2020b), p. 9; Balestra and Caruso (2022).

²¹Bellavite Pellegrini et al. (2020a), p. 49; Bellavite Pellegrini and Seracini (2020), p. 71; Balestra and Caruso (2022).

It is worth mentioning that the status of *società benefit* has been acquired also by certain peculiar companies, such as companies with mixed public-private ownership²² and companies overseen by public independent authorities, like the Italian Stock Exchange Supervisory Authority²³ and the Italian Insurance Supervisory Authority.²⁴

Since its establishment, the SB movement in Italy has continued to grow. In December 2018, a representative association for the Italian *società benefit*, so-called *Assobenefit*, has been founded with the purpose of disseminating information on the “for benefit” model and fostering the birth of *società benefit* or the transformation of already existing firms into this business model.²⁵

3 The Background of the Legal Transplant

The Italian system was traditionally based on the dichotomy between (*i*) for-profit entities (or “business entities”), business organizational forms with profit-making purposes provided in Book V, Title V, of the Civil Code, and (*ii*) nonprofit entities, characterized by ideal or altruistic purposes, such as foundations and associations, provided in Book I, Title II, of the Civil Code. In addition, the Civil Code, Book V, Title VI, provides for cooperative companies, which are characterized by a “mutual benefit purpose,” that is, achieving exchanges of mutual aid between the members and the company.²⁶

The fundamental distinction between for-profit and nonprofit entities has been partially overcome with the emergence of the Italian social enterprise movement.²⁷

²²Farmacie Comunali Firenze (Farmacie Fiorentine A.Fa.M. S.p.A.) has been the first mixed public-private company in Europe and the first pharmaceutical network in the world to acquire the *società benefit* status in 2018, as well as the certification as a B Corp in 2019.

²³Redo Sgr, an asset management company specialized in social housing, has been the first asset management company authorized by the Italian Stock Exchange Supervisory Authority (CONSOB) to acquire the status of *società benefit*.

²⁴Assimoco S.p.A. has been the first insurance group to acquire the B Corp certification in 2018 and authorized by the Italian Insurance Supervisory Authority (IVASS) to acquire the status of *società benefit* in 2019.

²⁵For more information, see the *Assobenefit* website available at: <http://www.assobenefit.org/>.

²⁶The mutual purpose consists of directly providing goods, services, or job opportunities to members of the organization under better economic conditions than those available in the market. For a detailed description of the Italian organizational forms system, see Pernazza (2017).

²⁷Several definitions of social enterprise exist, characterized by different approaches to the phenomenon. For example, it is worth mentioning that Europe and the United States have different approaches toward social enterprises. In Europe, the social enterprise is considered an alternative to traditional charities, while the United States embraced a broader view, including profit-oriented businesses organizations engaged in socially beneficial activities, hybrid dual-purpose businesses (mediating profit goals with social objectives), and nonprofit organizations engaged in mission-supporting commercial activity. On this issue see Katz and Page (2010), p. 59; Esposito (2013),

The starting point in that direction dates back to the 1990s, when the law recognized the existence of the so-called *cooperative sociali* (social cooperatives).²⁸ Social cooperatives essentially provide *a*) social services, such as healthcare and educational services, or *b*) work integration (i.e., the performance of any activity with the aim of providing employment for disadvantaged people).

Later on, in 2006, the so-called *impresa sociale* (literally “social enterprise”²⁹) was introduced.³⁰ In Italy, the legal status of the “social enterprise” can be acquired by all eligible organizations, regardless of their structure (business organizations, cooperatives, nonprofit entities). To be eligible as a “social enterprise,” an organization must be privately owned, have a social purpose, comply with the nondistribution constraint,³¹ and make publicly available its financial statements and social report on the fulfillment of its social mission.

A “social enterprise” must perform an “entrepreneurial activity” (i.e., the activity must be productive, professional, economic, and organized³²), but its business has to be of social utility (i.e., working in the sectors of welfare, health, education, training, research, culture, environmental protection, and social tourism or helping the integration into the workplace of underprivileged or disabled people, regardless of the sector of activity). Moreover, “social enterprises” were originally characterized by strict limitations on the remuneration of workers and managers and by a strong nonprofit purpose, meaning that the net profit deriving from their activity could not be distributed (directly or indirectly) among its members and owners.

The strict areas in which a “social enterprise” could operate and the nondistribution constraint (together with the other drawbacks of the 2006 statute, such as the absence of any tax benefits and difficulty in raising finances), were partially amended by the Italian legislator through the “Third Sector Reform” of 2017.³³ The reform expanded the possible activities of a “social enterprise.” It provides the possibility of generally pursuing (mainly and permanently) civic, solidarity, or social utility objectives (including microcredit, social housing, fair trade, social farming, or employing in its activity at least 30% of disadvantaged or disabled workers) and allowed the distribution, though to a limited extent, of its net profits and surpluses to the members.³⁴

p. 646; Kerlin (2006), pp. 247–263; Fici (2020). On the development of the Italian social enterprise movement see Borzaga et al. (2017); Poledrini (2018), pp. 1–19.

²⁸Law No. 381 of November 8, 1991.

²⁹In Italy, the reference to “social enterprise” has a specific meaning, i.e., an entity that, according to the law, can be structured as a for-profit entity, even though it pursues a nonprofit purpose.

³⁰Legislative Decree No. 115 of March 24, 2006.

³¹See Hansmann (1980), p. 835 ff.; Hansmann (1981), p. 501 ff.; Ponzanelli (1991), pp. 469–470; Ponzanelli (1995), pp. 200–201.

³²See art. 2082 of the Italian Civil Code (hereinafter ICC).

³³Legislative Decree No. 112 of July 3, 2017.

³⁴According to art. 3, Legislative Decree No. 112 of July 3, 2017, a social enterprise is now allowed to allocate an amount less than 50% of its net profits (after deducting possible losses) to: (i) free capital increase or distribution to shareholders, within a certain limits (the limit of the variation of an

The introduction of the “social enterprise” status allowed for the first time the use of for-profit organizational forms (provided in Book V of the Civil Code) for social utility purposes. However, it is important to stress that Italian “social enterprises,” notwithstanding the nondistribution constraint amendment of 2017, remain firmly rooted in the nonprofit area, i.e., the “third sector.”

This represents the most important difference between the Italian “social enterprise” and the *società benefit*, the latter being included in the for-profit area and new “fourth sector” of the economy, in which boundaries between public, private, and nonprofit sectors are blurred and enterprises integrate social and environmental purposes with the business method.³⁵

4 The Italian *Società Benefit*

4.1 Sources and Legislation Features

The legal transplant of the benefit corporation into the Italian system was not the result of a long academic and political debate, considering that the provisions regulating *società benefit* were included in the 2016 “Stability Law” (a law aimed at regulating the country’s economic policy through public finance and budgetary measures) approved at the end of 2015, when the debate was completely focused of the national economic policy rather than on the introduction of the new hybrid form.³⁶

Before discussing the content of the Italian statute, it should be observed that the introduction of the *società benefit* seems to be in line with other provisions introduced into the Italian system in recent years. Among them are (i) the abovementioned introduction in 2006 of “social enterprises,” subsequently reformed in 2017; (ii) the 2015 amendment of the Corporate Governance Code related to listed companies promoted by *Borsa Italiana* (the Italian Stock Exchange Supervisory Authority), which included references to the creation of value in the medium- and long-term periods,³⁷ further amended in 2020 by introducing an explicit reference to

index that measures annually the prices for families of workers and employees as calculated by the Italian Statistic Agency), if the social enterprise is incorporated as one of the business organizational forms provided by Book V of the Civil Code; (ii) regardless of the legal form of the social enterprise, to free contribution in favour of organizations of the third sector (other than social enterprises) aimed at pursuing specific projects with social utility.

³⁵On the fourth sector see, among others, Kelley (2009), pp. 340–342; Gaffney (2012), pp. 329–332; Esposito (2013), pp. 645–648; Yockey (2015), p. 772.

³⁶See De Donno (2018), p. 11.

³⁷In particular, see the 2015 Corporate Governance Code, paragraphs 1.P.2. (“The directors act and make decisions with full knowledge of the facts and autonomously pursuing and placing priority on the objective of creating value for the shareholders over a medium-long term period.”) and 1.C.1. (“The Board of Directors shall: . . . b) define the risk profile, both as to nature and level of risks, in a

sustainability;³⁸ and (iii) the transposal of Directive 2014/95/EU, as regards the disclosure of nonfinancial and diversity information by certain large undertakings and groups,³⁹ and Directive (UE) 2017/828, as regards the encouragement of long-term shareholder engagement.⁴⁰

The Italian benefit corporation law is inspired by both the US Model Benefit Corporation Legislation (Model Act) and the Delaware Public Benefit Corporation Act, but it features some novelties. In particular, Italian law attempts to overcome a critical issue of the US model,⁴¹ the one of controls on the actual pursuit of the public benefit.

The law does not create a new type of company in addition to those provided for in the Italian Civil Code (ICC) (in Book V, Titles V and VI), but rather, it outlines a new legal framework where the double purpose of profit and public benefit (i.e., *beneficio commune*) lies in the company's purpose clause, in the company's governance system, and in disclosure requirements.

In the Italian system, as opposed to the Model Act or major US benefit corporation state laws, *società benefit* is a governance model and a status available to all existing for-profit organizational forms⁴² (i.e., partnerships, limited liability

manner consistent with the issuer's strategic objectives, taking into account any risk that may affect the sustainability of the issuer's business in a medium-long term perspective").

³⁸The increasing attention towards sustainability has been confirmed by the New Corporate Governance Code approved by *Borsa Italiana* on January 2020, applicable to companies listed on the *Mercato Telematico Azionario* (MTA) managed by *Borsa Italiana* itself. The new features of the Code follow four fundamental guidelines: sustainability, engagement, proportionality, and simplification. With reference to the former, the New Code aims to encourage listed companies to adopt strategies that are increasingly oriented towards the sustainability of their business activities. According to the Code, the board of directors' priority task is to pursue the "sustainable success" of the company, defined as "the objective that guides the actions of the board of directors and that consists of creating long-term value for the benefit of the shareholders, taking into account the interests of other stakeholders relevant to the company". The board of directors is responsible for integrating sustainability objectives into the business plan, the internal control and risk management system, as well as the remuneration policies.

³⁹Legislative Decree No. 254 of December 30, 2016. It is worth mentioning that, according to the Italian law, the nonfinancial disclosure requirements are mandatorily applicable only to a limited number of companies, i.e., "public interest entities," defined as Italian companies categorized as (i) issuers of securities traded on Italian or European regulated markets; (ii) banks; (iii) insurance companies; or (iv) reinsurance companies; and exceeding (on an individual or consolidated basis) certain thresholds at the end of the relevant fiscal year (such as 500 employees, and total net asset value of € 20,000,000, or total net revenues from sales and services of € 40,000,000). Other entities may voluntarily opt into the disclosure regime.

⁴⁰Legislative Decree No. 49 of May 10, 2019.

⁴¹See White (2015), pp. 344–346.

⁴²In particular, in the Italian system, we can identify two groups of for-profit companies. Firstly, there are organizational forms similar to Anglo-Saxon partnerships (so-called *società di persone*), such as *società semplice* ("informal partnerships," art. 2251 ff. ICC), *società in nome collettivo* ("general partnerships," art. 2292 ff. ICC), and *società in accomandita semplice* ("limited partnership," art. 2312 ff. ICC), which are all characterized by the absence of distinction between the assets of the partnership and those of its partners and the joint and several liability of the members for

companies, corporations) and cooperative companies⁴³ provided by the Civil Code, not just to corporations.⁴⁴

Like in the United States, the Italian statute regulates only SB's main features, such as the entity's purpose, the directors' fiduciary duties, the disclosure requirements, and the control mechanisms, while the existing company law applies in matters not expressly regulated.⁴⁵

4.2 Definitions and Purpose

With regard to the purpose, the Italian law resumes the provisions of Delaware: SB are characterized by a dual-purpose clause, combining the production of profits and the pursuit of both a "General" and (one or more) "Specific" public benefits.⁴⁶

Società benefit shall pursue, in addition to the profit-making purpose, one or more public benefit purposes (i.e., the Specific public benefit) and operate in a responsible, sustainable, and transparent manner vis-à-vis several categories indicated in a not exhaustive definition, such as individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other stakeholders (i.e., the General public benefit).⁴⁷ The law provides broad definitions and does not clearly indicate how these different interests should be prioritized, giving directors a large degree of flexibility in this respect.

partnership debts, aside from exceptions defined by law (e.g., for limited partners in a limited partnership). In the second group (so-called "*società di capitali*"), there are organizational forms characterized by juridical personality, the distinction between the assets of the corporation and those of its members, and the limited liability of the company's members, such as "*società per azioni*" ("corporation"/"joined stock company", art. 2325 ff. ICC), "*società a responsabilità limitata*" ("limited liability company", art. 2462 ff. ICC), "*società in accomandita per azioni*" ("limited partnerships by shares", art. 2452 ff. ICC).

⁴³The so-called "*società cooperativa*" (art. 2511 ff. ICC) is an organizational form which, differently to the for-profit companies, is primary called upon to satisfy the common needs of the members. Cooperatives pursue a "mutual purpose" ("*scopo mutualistico*") and have limits in the distribution of profits. There are several forms of cooperatives and not all the cooperatives forms can acquire the SB status, e.g., it seems that the so-called "*cooperative sociali*" ("social cooperatives") cannot acquire the SB status.

⁴⁴It must be said that a few states in the US extended the application of the "for-benefit" model to the limited liability company (LLC), e.g., Delaware introduced the "statutory public benefit limited liability company" in 2018.

⁴⁵Law No. 208 of December 28, 2015, art. 1, paragraphs 377.

⁴⁶Consequently, a company characterized only by responsible, sustainable, and transparent conduct toward all stakeholders (i.e., pursuing only the general public benefit) could not correctly qualify as a *società benefit*, and vice versa, a company in which the "common benefit" purpose is explicit but the business activity is not conducted in a responsible, sustainable, and transparent manner could not properly qualify as a *società benefit*.

⁴⁷Law No. 208 of December 28, 2015, art. 1, paragraphs 376.

With regard to the general public benefit, the law also describes the scope of the general reference to “stakeholders,” defining them as “the individuals or groups of individuals directly or indirectly involved in, or affected by, the activities of the benefit company, being, *inter alios*: workers, clients, suppliers, lenders, creditors, public administration and civil society.”⁴⁸ The definition is very general and is not a “closed definition,” and it permits identifying stakeholders different from those listed by law.

As for the specific public benefit, a *società benefit* shall identify, in its company purpose clause, the particular public benefit aim/s that the company intends to pursue.⁴⁹ *Beneficio comune* (public benefit) is also defined by law in a broad manner⁵⁰ as the pursuit of one or more positive effects or the reduction of negative effects with respect to one or more categories of stakeholders, such as the ones listed above.⁵¹

The public benefit purpose (both specific and general) can be considered as a complementary but equal purpose with respect to that of the company itself (i.e., profit-making purpose or mutual purpose). Consequently, from a theoretical standpoint, it is possible to affirm that the introduction of *società benefit* into the Italian system ends the rigid dichotomy that exists, in a functional perspective, between for-profit entities (as a model for speculative associationism, characterized by the selfish distribution of economic results) and nonprofit entities (as a model for other associations pursuing ideal or altruistic purposes, characterized by the unselfish distribution of economic results).

4.3 Formation

Both newly established companies and already existing companies can acquire the status of *società benefit*. A new SB shall be incorporated in accordance with the applicable company law and *società benefit* statute. An existing company may become a *società benefit* by amending its articles of incorporation and by-laws (so that they contain the double-purpose clause: for profit and for benefit) in compliance with the relevant provisions applicable to each organizational form provided by the Italian Civil Code.⁵²

The law does not explicitly address dissenters’ rights with regard to shareholders who oppose the transition to or from the SB status. However, the amendment of the articles of incorporation and by-laws requires a special majority vote to protect the minority shareholders in the case of fundamental changes to the entity’s purpose

⁴⁸Law No. 208 of December 28, 2015, art. 1, paragraphs 378, letter b).

⁴⁹Law No. 208 of December 28, 2015, art. 1, paragraphs 379.

⁵⁰Law No. 208 of December 28, 2015, art. 1, paragraphs 378, letter a).

⁵¹Law No. 208 of December 28, 2015, art. 1, paragraphs 376 and 378, letter b).

⁵²In compliance with arts. 2252, 2300, 2436, and 2480 ICC.

clause, such as the introduction of or deletion of the SB mission. Such amendment shall also be made public by filing it with the competent Company's Register Office in compliance with the applicable Civil Code provisions.

Regarding the amendment of the articles of incorporation and by-laws to acquire an SB status, a fundamental question under Italian law is the eventual application of the exit right granted to minority shareholders, especially in joint stock companies (S.p.A.) and limited liability companies (s.r.l.).⁵³

According to Italian company law, minority shareholders have the right to withdraw from the company in a wide range of circumstances, all grounded on the disagreement of the minority with the resolutions passed by the majority shareholders. In case they decide to exercise their cash exit rights,⁵⁴ the company has the duty to repurchase the shares of the withdrawing shareholders.

In particular, shareholders of joint stock companies and limited liability companies are entitled to exercise their exit rights whenever a resolution that changes the business purpose clause of the company is adopted. In order to exercise their withdrawal right, the amendment must result in a significant or substantial change in the company's activity, which is reflected—according to scholars—in the investment risk.⁵⁵

Thus, in the case of the introduction or deletion of the SB status, the amendment to the entity's purpose clause may, in practice, take a very different stance and may result or not in a change that can be considered relevant for the exercise of the withdrawal right. The relevance of the amendment depends on the activity already pursued by the company and the changes produced adding the public benefit purpose. The evaluations must be carried out on a case-by-case basis. However, it is worth remembering that minority shareholders are generally protected by the abovementioned special majority vote required for the approval of the amendments to the articles of incorporation and by-laws.⁵⁶

Finally, to mirror the change in the purpose clause, the law provides that *società benefit* can choose to add, along with the company name and company type, the words "Società Benefit" or the abbreviation SB and use such denomination in its official document and communications to third parties.⁵⁷

⁵³Respectively regulated by art. 1437, paragraph 1(a) and 2473, paragraph 1, ICC.

⁵⁴Exit rights can be exercised by sending a notice to the company through registered mail within 15 days after the publication in the Companies' Register of the resolution approved at the special meeting of shareholders.

⁵⁵Piscitello (2016), p. 2502; Di Cataldo (2007), p. 227. See also Assonime, Circolare No. 19, July 20, 2016, p. 15, available at <http://www.societabenefit.net/wp-content/uploads/2017/02/Assonime-Benefit-Corporation.pdf>.

⁵⁶On the issue see Siclari (2019), pp. 80–95.

⁵⁷Law No. 208 of December 28, 2015, art. 1, paragraphs 379, third sentence.

4.4 *Accountability and Governance Structure*

The direct consequence of the inclusion of a public benefit purpose in the corporate purpose clause is the alteration of the governance structure and the powers, duties, and responsibilities of the directors.

With regard to directors' duties and responsibilities, Italian law draws its inspiration from the Delaware statute. In fact, it requires the directors to manage the company in a responsible, sustainable, and transparent manner (i.e., pursuing the general public benefit), balancing the (i) interests of the shareholders, (ii) the interests of other stakeholders (like those materially affected by the company's conduct), and (iii) the pursuit of the specific public benefit, or public benefits, identified in its articles of incorporation and by-laws.⁵⁸ Thus, directors have great discretion in achieving a higher purpose than simply maximizing shareholder value.

Failure to comply with this balancing obligation may be deemed a breach of the duties imposed on directors by law and the by-laws, with the consequent application of the relevant provisions on directors' liability provided by the Italian Civil Code for each organizational form.⁵⁹ Only the company itself and the shareholders (through a derivative action) have standing to bring suits alleging the breach of directors' duties and the failure to pursue public benefit in case of damages (e.g. reputational damages).

The law does not explicitly provide for (nor denies) any kind of duty or additional liability of directors vis-à-vis third parties benefiting from the public benefit. Thus, directors are generally protected from claims made by the beneficiaries of the public benefit that have no standing to sue both the company and its directors for failing to pursue the company's social mission. The only exception is represented by the doubtful (and difficult) possibility of bringing an action pursuant to articles 2395 (for corporations) and 2476, paragraph 6 (for limited liability companies), of the Italian Civil Code.⁶⁰ These articles provide for the right of third parties to bring a liability action against directors in the event they suffered damages as a direct result of the directors' misconduct.

The Italian statute, like the one of Delaware and unlike the Model Act, does not provide for any limitation or exoneration from personal liability on the part of *società benefit's* directors and does not exclude the possibility of bringing claims for monetary damages against them. A personal action against directors is the central private enforcement tool offered to shareholders against directors' failure to comply with their duties of conduct and the duty to pursue a public benefit.

⁵⁸Law No. 208 of December 28, 2015, art. 1, paragraphs 377, first sentence and 380, first sentence.

⁵⁹Law No. 208 of December 28, 2015, art. 1, paragraphs 381.

⁶⁰According to the Italian Civil Code, third parties have the right, under art. 2395 ICC, to bring a liability action against directors of a joint stock company (*società per azioni*), but the damage they alleged must have directly affected their assets. The same remedy is recognized under art. 2476, paragraph 6 ICC, for third parties that suffered damages as a direct result of the misconduct of directors of a limited liability company (*società a responsabilità limitata*).

From the organizational perspective, a *società benefit* shall identify one or more individuals to be appointed as “impact manager/s,” with the specific task of pursuing the public benefit.⁶¹ The choice of the impact manager is left to the board of directors that has wide discretion in the selection. He/she can be a director, an officer, or another person working within the company, but the function can also be outsourced.

The law, unlike the Model Act, does not regulate in detail the role of the impact manager but more generally refers to “individuals . . . with the role and tasks for pursuing the common benefit.” The impact manager may assist directors in their activities or check whether the company’s activities are consistent with its social and environmental objectives. However, the appointment of the impact manager and his/her eventual liability does not exonerate directors and auditors from their duties and responsibilities.⁶²

4.5 *Transparency Requirements and Control Systems*

To create greater accountability and transparency, companies adopting the “for-benefit” model are required to publicly report on their social and environmental performance so that customers, workers, investors, and policy makers can assess the company’s impact.

In regulating the transparency requirements and the control system, the Italian law does not simply transplant the US provisions but introduces new elements.

In accordance with the Model Act, Italian law requires *società benefit* to produce and publish on their website (if existing)⁶³ an annual benefit report⁶⁴ detailing their pursuit of the public benefit.⁶⁵ Moreover, the company’s impact and the pursuit of the public benefit must be assessed using a third-party standard.⁶⁶

In particular, the annual benefit report shall include the following:⁶⁷

⁶¹Law No. 208 of December 28, 2015, art. 1, paragraphs 380, second sentence.

⁶²Assonime, Circolare No. 19, July 20, 2016, available at <http://www.societabenefit.net/wp-content/uploads/2017/02/Assonime-Benefit-Corporation.pdf>, pp. 23–24.

⁶³Law No. 208 of December 28, 2015, art. 1, paragraphs 383.

⁶⁴The law does not provide a specific indication, but it can be assumed that the annual benefit report must be prepared by the company’s directors (who are also in charge of drawing up the annual financial statements according to art. 2423 ICC), also with the collaboration of the impact manager. The benefit report should not be considered an integral part of the annual financial statements but an autonomous document, which is not subject to approval at the general shareholders’ meeting.

⁶⁵Law No. 208 of December 28, 2015, art. 1, paragraphs 382.

⁶⁶Law No. 208 of December 28, 2015, art. 1, paragraphs 382, letter b).

⁶⁷Law No. 208 of December 28, 2015, art. 1, paragraphs 382.

- (a) the description of the specific objectives and actions implemented by the directors to pursue the public benefit purposes, and the possible mitigating circumstances, which have prevented or slowed up their achievement;
- (b) the evaluation, through the chosen third-party standard, of the impact generated by the company in the areas of corporate governance, workers, other stakeholders, and environment;⁶⁸
- (c) a specific section containing the description of the new objectives that the *società benefit* intends to pursue in the following fiscal year.

The third-party standard used must comply with the requirements listed by the law. It must be comprehensive (in that it assesses the impact of the business and its operations aimed at pursuing the public benefit on all the possible stakeholders), independent (developed by an entity not controlled by, or affiliated to, the *società benefit*), credible (developed by a subject that both has access to the necessary expertise and uses a balanced scientific and multistakeholder approach), and transparent (in that information about the criteria used, the process and persons developing or supervising those criteria, and the sources of financial support for the organization developing them are made publicly available).⁶⁹

Italian law goes beyond the US model in that, on the one side, it requires the annual benefit report to be attached to the company's annual financial statements (and filed with the Company's Register Office),⁷⁰ with all the legal consequences and sanctions this entails in the event of a failure to deposit.⁷¹

On the other, differently from the United States (where there is no public enforcement on benefits corporations' activities), Italian law overcomes the private enforcement system, based on the company's action or the shareholders' derivative suits and the eventual reactions of consumers and the market to greenwashing, establishing a system of public enforcement. It gives the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* (AGCM)) the power to apply the regulation on misleading advertising and misleading business practices⁷² to sanction companies that, using the SB's legal form or the name *società benefit* or the abbreviation SB, repeatedly and without good cause do not pursue the public benefits provided for in their by-laws.⁷³

⁶⁸Law No. 208 of December 28, 2015, Annex 5.

⁶⁹Law No. 208 of December 28, 2015, Annex 4.

⁷⁰Law No. 208 of December 28, 2015, art. 1, paragraphs 382.

⁷¹Failure in preparing and filing the annual report together with the financial statements could result in the application of existing sanctions provided by art. 2630 ICC (i.e., financial penalties).

⁷²See Legislative Decree No. 145 of August 2, 2007; and Legislative Decree No. 206 of September 6, 2005, (*Codice del consumo*), Part II, Title III, in particular art. 20 and 21–23.

⁷³See Law No. 208 of December 28, 2015, art. 1, paragraph 384; and the introduction to the Parliamentary initiative bill A.S. No. 1882/2015 on "*Disposizioni per la diffusione di società che perseguono il duplice scopo di lucro e di beneficio comune*", p. 4.

In the performance of its supervisory activities, the AGCM, endowed with inspection, inhibitory, and sanctioning powers, may initiate *ex officio*, as well as at the request of interested individuals or organizations, an administrative proceeding aimed at investigating any violations by a *società benefit*.⁷⁴

The supervisory activity of an independent authority should contribute to the strengthening of the protection of stakeholders, which lack direct action against the company, and building a brand—the one of *società benefit*—characterized by greater guarantees of reliability for investors, consumers, and policy makers.

4.6 Specific Tax Treatment

With regard to tax treatment, in Italy, there are no specific tax advantages associated with the use of the “for-benefit” model.⁷⁵ *Società benefit* are subject to ordinary income tax rules provided by the Income Tax Code (TUIR)⁷⁶ for each business organizational form.

5 Reactions to the Legal Transplant

The *società benefit* statute has been subject to subsequent interpretations and debates on whether it was truly necessary and appropriate to introduce this new hybrid form into the Italian system.

In the opinion of some scholars, existing for-profit and nonprofit entities were sufficient for the development of the fourth sector and there was no need for *società benefit*, given that for-profit organizational forms were already allowed⁷⁷—in

⁷⁴The AGCM procedure is regulated by the Resolution of the Authority No. n. 25411 of April 1, 2015, on “*Approvazione del regolamento sulle procedure istruttorie in materia di pubblicità ingannevole e comparativa, pratiche commerciali scorrette, violazione dei diritti dei consumatori nei contratti, violazione del divieto di discriminazioni e clausole vessatorie*”.

⁷⁵There is a debate among scholars over the possible reduction (according to already existing statutory and case law) of the company’s taxable income with regard to all costs related to the pursuit of the public benefits provided for in the by-laws, in accordance with the so-called inherence principle of corporate income tax. See Setti (2016), pp. 2303–2305; Cordeiro Guerra and Lenzi (2021), pp. 307–321.

⁷⁶*Testo Unico delle Imposte sui Redditi* (TUIR), Presidential Decree No. 917 of December 22, 1986.

⁷⁷Some Italian scholars supported the idea that business entities can be used not only for profit-making purposes but for the realization of any lawful purpose, among them Santini (1973), pp. 151–173; Carrabba (1994), pp. 111–115; Di Sabato (2004), p. 45.

practice—to pursue nonprofit purposes (e.g., through CRS programs and philanthropy) and, thus, would have been allowed to pursue public benefit purposes.

Other scholars⁷⁸ highlighted that, based on Civil Code provisions and especially article 2247,⁷⁹ the Italian system (like the French system before the reform of 2019⁸⁰ and unlike the German, Swiss, or US ones) expressly and tightly links the use of business entity structures (provided by Book V, Title V, of the Code) with the pursuit of an economic activity and a profit-making purpose. Hence, according to a systematic interpretation of the Civil Code, business entities cannot be used for the pursuit of nonprofit purposes (except marginally) unless the law explicitly allows for it, as happens with social enterprises (since 2006) or *società benefit* (since 2016).

Accepting the latter interpretation, the legal transplant seems to have been necessary, given that the Italian Civil Code did not explicitly allow the use of business entities for hybrid purposes pursued by triple bottom-line⁸¹ oriented companies. Moreover, regardless of the different interpretations of the Civil Code, the *società benefit* statute provides legal certainty by eliminating the risk of rejection by the Company's Register Office of the articles of incorporation and by-laws of dual-purpose companies.⁸²

The *Società benefit* model also provides other advantages for entrepreneurs willing to pursue a social and environmental mission. The first is that the *società benefit* statute allows the safeguarding of the so-called *fidelity to the mission* following a change of control.⁸³ The second, is the increased flexibility through

⁷⁸ Among the scholars who support the idea that business entities cannot be used for nonprofit purposes, unless explicitly provided by the law, see Marasà (1984), pp. 413–418; Ferri (1987), pp. 23 ff.; Marasà (1994), pp. 194–197; Marasà (1995), pp. 193–195.

⁷⁹ Pursuant to article 2247 ICC a company is formed by an agreement (*contratto di società*) by which “two or more persons confer goods or services for the mutual performance of an economic activity with the purpose of sharing the profits”.

⁸⁰ Law No. 2019-486 of May 22, 2019, art. 169, amended the Civil Code (artt. 1833 and 1835) and the Commercial Code (e.g., artt. L. 210-10, L. 210-11, L. 225-35, and L. 225-64) to allow a for-profit company to incorporate social and environmental objectives (a public interest purpose) into the corporate objects. In particular, with regard to the general provisions regulating company agreements, the reform introduced a new paragraph to article 1833 of the Civil Code, providing that the company must be managed taking into consideration the social and environmental issues connected to its activity; consequently, shareholders and directors must comply with them in the management of the company.

⁸¹ See Elkington (1997); Fisk (2010); Slaper and Hall (2011), pp. 4–8.

⁸² In this regard, it is interesting to recall the *Nativa* case. In 2012, Eric Ezechieli and Paolo Di Cesare, the cofounders of *Nativa* s.r.l., decided to incorporate their company consistently with the benefit corporation legal model, which at the time existed only in a few states in the United States. The two entrepreneurs decided to include a reference to the “happiness” of their members and workers in the company purpose clause. When the article of association was presented to the Milan Chamber of Commerce for filing with the Company's Register Office, it was rejected several times because the concept of “happiness” was not accepted as a proper purpose for a limited liability company (i.e., a profit-making entity).

⁸³ Following a change of control in the company, the new majority shareholders can decide to terminate the original social mission and to pursue only the for-profit purpose, which is the only

which directors can pursue social and environmental objectives due to the decay of the shareholder wealth maximization paradigm as a parameter they have to consider in their decisions (even though in Italy the shareholder primacy doctrine does not have the same impact it has in the Anglo-American corporate model) to avoid claims for breach of their duties.⁸⁴

Furthermore, as mentioned above, *società benefit* do not have tax incentives, but they can have a reputational advantage in the eyes of third parties (e.g., clients, suppliers, investors, and other stakeholders). Thus, the real advantage is the possibility of making use of such qualification within the market, which currently is increasingly oriented toward sustainability.⁸⁵

Finally, the introduction of a well-known and recognized international hybrid entity model, such as the benefit corporation model, may play an important role for Italian companies. It can give them access to a rapidly growing fourth sector in a global market perspective and can enhance the credibility and branding of companies choosing to adopt it.

6 Further Legislative Evolution

After the legal transplant of 2015, the Italian legal system continued to support the SB model.

At the international level, Italy played an important role in the OSCE Parliamentary Assembly Annual Session of July 2019, dedicated to “Advancing Sustainable Development to Promote Security: The Role of Parliaments.” The Italian delegation indeed proposed the inclusion of two amendments in the “Luxembourg Declaration” issued during the Annual Session.⁸⁶

corporate purpose provided in the articles of incorporation and by-laws of an ordinary business entity. In the case of *società benefit*, the public benefit purpose is integrated into the articles of association and by-laws and is protected by supermajorities provided for in the amendment of such documents.

⁸⁴ On the shareholder wealth maximization theory in the Italian legal system see, among others, Jaeger (2000), p. 798 ff.; Ferrarini (2002), pp. 476–477; Costi (2010), p. 193; Montalenti (2010), pp. 84, 98–100. For a historical and comparative perspective on the issue see Jaeger (1964); Guaccero (2007). On the relationship between corporate governance systems and company’s interest Stella Richter (2010), pp. 454–462.

⁸⁵ See e.g., the BlackRock Investment Institute, *Sustainability: The future of investing*, February 2019, showing how assets in dedicated sustainable investing strategies have grown at a rapid pace in recent years; Reints (2019); Whelan and Kronthal-Sacco (2019).

⁸⁶ In July 2019, the OCSE (Organization for Security and Co-operation in Europe) Parliamentary Assembly’s Annual Session in Luxembourg adopted the Luxembourg Declaration (the Luxembourg Declaration and Resolutions, adopted by the OSCE Parliamentary Assembly at the Twenty-Eighth Annual Session, Luxembourg July 4–8, 2019), containing recommendations to national governments, parliaments and the international community in the fields of political affairs, security, economics, environment, human rights, and humanitarian questions. The document emphasizes the

The first amendment calls on parliaments and governments of Organization for Security and Co-operation in Europe (OSCE) states to take action through the adoption of new statutes that encourage and facilitate a responsible, sustainable, and transparent corporate behavior, “promoting laws to set up and foster companies that pursue—alongside profits—one or several goals with social or environmental benefits.”⁸⁷ Hence, the amendment encourages the adoption of hybrid models for businesses, such as the benefit corporation model.

The second amendment is aimed at promoting impact assessments for companies operating in the environment, social, and government sectors, as well as the creation and use of metrics correlated to the Sustainable Development Goals.⁸⁸

At the national level, the Italian legislator is taking action to support the development of *società benefit* through the economic leverage of public procurement and temporary incentives for their creation.

In December 2019, the Parliament amended the Italian public procurement law (i.e., the “Public Contract Code”)⁸⁹—applicable to public works, supply, and service contracts and concessions—introducing new reward criteria based on the positive impact of the company, to be used in the evaluation of tenders.⁹⁰

In attributing such reward, contracting authorities must now take into account, together with the “legality rating”⁹¹ and “company rating,”⁹² the positive impact—assessed with the use of a third-party standard—generated by the tendering company

commitment of OSCE members to implementing the United Nations 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals, as well as the necessity to ratify the 2015 Paris Agreement on climate change.

⁸⁷Luxembourg Declaration and Resolutions, adopted by the OSCE Parliamentary Assembly at the Twenty-Eighth Annual Session, Luxembourg July 4–8, 2019, paragraph 80.

⁸⁸Luxembourg Declaration and Resolutions, adopted by the OSCE Parliamentary Assembly at the Twenty-Eighth Annual Session, Luxembourg July 4–8, 2019, paragraph 81.

⁸⁹The public procurement legislation applicable in Italy is mainly laid down by Legislative Decree No. 50, April 18, 2016, so-called “Public Contract Code” (“*Codice dei contratti pubblici*”), as amended. The regulatory framework includes secondary sources, such as ministerial decrees and guidelines issued by the National Anti-Corruption Authority (ANAC).

⁹⁰See the amendment to art. 49, contained in Law No. 157 of December 19, 2019, titled “*Conversione in legge, con modificazioni, del decreto-legge 26 ottobre 2019, n. 124, recante disposizioni urgenti in materia fiscale e per esigenze indifferibili*”, which amended articles 83, paragraph 10, and 95, paragraph 13 of Legislative Decree No. 50, April 18, 2016.

⁹¹The Italian Competition Authority (AGCM) is in charge of the “legality rating” system, which indicates the ethical value of the company and enhances its reputation. The legality rating contributes to the determination of the “company rating” and not vice versa (see art. 213 of Legislative Decree No. 50, April 18, 2016).

⁹²ANAC (the National Anti-Corruption Authority) is in charge of the “company rating” system, which is an indicator of the conduct that the company has had in the context of public contracts (taking into account the previous behavior of the company with regard to failure to use the preliminary aid; mandatory reporting of extortion and bribery requests; compliance with deadlines and costs during the execution of contracts, as well as with the incidence and outcomes of disputes, both when participating in tender procedures and during the execution of the contract), see art. 83, paragraph 10, of Legislative Decree No. 50, April 18, 2016.

in the areas of corporate governance, workers, other stakeholders, and the environment. The amendment to the public procurement law explicitly recalls the legal requirements provided by the *società benefit* statute for the annual benefit report,⁹³ but the reward can be achieved by all companies producing such a report on their impact, regardless of their status as *società benefit*. The National Anti-Corruption Authority (ANAC) is in charge of defining the evaluation criteria for assessing the impact generated by the company within the framework of the public procurement procedures.⁹⁴ However, it has not yet issued the appropriate guidelines and is in the public consultation process.⁹⁵

As for incentives, among the measures offered to support the economy during the COVID-19 emergency, in July 2020, special temporary incentives (up to the end of 2021) were provided to strengthen the *società benefit* movement. A tax credit, equal to 50% of the costs related to the establishment of a *società benefit* or to the acquisition of an SB status, has been provided. Moreover, up to three million euros fund for the promotion of the “for-benefit” model in the national territory has been created at the Ministry for Economic Development.⁹⁶

7 Final Remarks on the Italian System from a Comparative Law Perspective

A few years after their introduction, *società benefit* seem to be widely accepted, and the movement, as highlighted at the beginning of this chapter, continues to grow. The Italian community is one of the world’s fastest-growing “for benefit” communities. As of September 2021, in Italy, there were more than 120 certified B Corps and 1344 *società benefit*. It is worth stressing that 31% of such *società benefit* were established between April and September 2021, notwithstanding the economic downturn caused by the pandemic,⁹⁷ meaning that the *società benefit* is still perceived by entrepreneurs as a resilient organizational structure suited to the needs of these uncertain times.

Considering the substance of the legal transplant, the Italian “for benefit” model, which is the first benefit corporation model adapted by a civil law system, is a mix between the Model Act and the Delaware law but is characterized by some peculiar features. In particular, the major innovations, compared to the United States, are the scope of the legislation and the control system.

⁹³ See Law No. 208 of December 28, 2015, art. 1, paragraphs 382, letter b) and Annex 5.

⁹⁴ Art. 83, paragraph 10, of Legislative Decree No. 50, April 18, 2016.

⁹⁵ ANAC, Documento di consultazione “Linee Guida recanti “Istituzione del rating di impresa e delle relative premialità””, in www.anticorruzione.it, 11 maggio 2018.

⁹⁶ See Law No. 77 of July 17, 2020, art. 38-ter, and Law No. 106 of July 23, 2021.

⁹⁷ Balestra and Caruso (2022) stress this aspect.

With regard to the first, the *società benefit* status can be acquired by any existing for-profit and cooperative organizational form provided by the Civil Code. This approach has been followed by other civil law countries, such as Colombia,⁹⁸ Ecuador,⁹⁹ and Perù,¹⁰⁰ which between 2018 and 2020 introduced the *Sociedades de Beneficio e Interés Colectivo*” (BICs), as well as France, which in 2019 introduced the hybrid model of *entreprise à mission*.¹⁰¹ In those systems, too, like in the Italian one, the hybrid status (BIC or *entreprise à mission*) can be adopted by any for-profit organizational form provided by law.

As for the second innovation, the Italian system has provided for a public enforcement mechanism through the attribution of supervisory powers on *società benefit*'s behavior to the Italian Competition Authority. Colombia, Ecuador, Perù, and France also decided to set up public enforcement systems, which differ from each other.

In Colombia, the oversight of BICs is assigned to the *Superintendencia de Sociedades*, an administrative body that maintains a public list of third-party standards to measure BIC companies' impact and oversees their compliance with the law. In Ecuador, supervisory powers over BIC companies have been assigned to the *Superintendencia de Compañías, Valores y Seguros*, which may sanction those companies that do not pursue public benefit purposes or violate the rules aimed at regulating BIC companies. In France, the public prosecutor, or any interested person (all the stakeholders of the company), can start a claim for the removal of the *entreprise à mission* status in the case of violations of the applicable regulation or in case the social and environmental objectives are not respected.¹⁰²

The Peruvian system, which seems to be the one most influenced by the Italian model, assigned supervisory powers over BICs to the *Superintendencia Nacional de los Registros Públicos* and the national competition authority (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*), which has the power, like in Italy, to sanction those companies that, by improperly using their status, carry out acts that can be traced back to misleading advertising or other practices that are contrary to free competition and consumer protection.

From this brief analysis, although based on the few civil law systems that have so far regulated benefit corporations (to which must be added British Columbia and Rwanda¹⁰³), it is possible to identify a convergence between civil law countries and to affirm that they have embraced some peculiarities of the Italian model.

⁹⁸Law No. 1901, of June 8, 2018.

⁹⁹See the Resolution of the *Superintendencia de Compañías, Valores y Seguros* No. SCVS-INC-DNCDN-2019-0021, of December 6, 2019, and the so-called “*Ley Orgánica de Emprendimiento e Innovación*”, approved by the *Asamblea Nacional* on January 7, 2020 and published in the *Registro Oficial Suplemento* No. 151, of February 28, 2020.

¹⁰⁰The Bill No. 2533/2017-CR, so-called *Ley de Sociedades de Beneficio e Interés Colectivo*, has been approved on October 23, 2020 by the *Congreso de la República*.

¹⁰¹Law No. 2019-486 of May 22, 2019, art. 169.

¹⁰²French Commercial Code, art. L. 210-11.

¹⁰³Other countries have so far regulated benefit corporations. Among them, Rwanda, originally a civil law legal system but now considered a hybrid system that combines principles from both the

Finally, it is worth noting that the path followed by the Italian system seems to be consistent with the recent European Union initiative aimed at a more comprehensive protection of stakeholders' interests in for-profit entities. From the early 2000s onward, the European Union developed its Corporate Social Responsibility Strategy,¹⁰⁴ while in recent years, the protection of stakeholders' interests has been integrated into company law and financial market regulation, as in the case of the Directive on nonfinancial reporting of 2014¹⁰⁵ (soon to be replaced by the Corporate Sustainability Reporting Directive¹⁰⁶) and the Directive on long-term shareholder engagement of 2017.¹⁰⁷ Moreover, a directive on sustainable corporate governance¹⁰⁸ and supply chain due diligence¹⁰⁹ is currently under consideration.¹¹⁰ It would be interesting to see whether in the near future it will be possible to envisage a uniform model for purpose-driven companies at the European level.

civil and common law systems, and British Columbia – Canada – a common law legal system. Rwanda passed, at the beginning of 2021, the benefit corporation legislation, introducing the so-called “community benefit company”, see Chapter XIII ‘Community Benefit Company’, Arts. 269-273 of Law N° 007/2021, of 5 February 2021 (Official Gazette n° 04 *ter* of 08/02/2021). British Columbia regulated “benefit company” between 2019 and 2020, see The Business Corporations Amendment Act (No. 2) 2019 (Bill M209) that introduced benefit companies in the Business Corporations Act (see Chapter 57, Part 2.3, §§ 51.991-51.995), which received the Royal Assent on 16 May 2019 and entered into force on 30 June 2020. In both countries, the legislation mainly follows the US model.

¹⁰⁴ See e.g. the Green Paper, Promoting a European framework for Corporate Social Responsibility, 18.7.2001, COM(2001) 366; the Commission Communication of 15 May 2001 on “A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development”, COM(2001) 264; the Commission Communication of 13 December 2005 on the review of the Sustainable Development Strategy – A platform for action, COM(2005) 658; the Commission Communication of 25 October 2011 on “A renewed EU strategy 2011-14 for Corporate Social Responsibility”, COM(2011) 681.

¹⁰⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of nonfinancial and diversity information by certain large undertakings and groups.

¹⁰⁶ See the recent Proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC, and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, of 21 April 2021, COM(2021) 189, 2021/0104 (COD).

¹⁰⁷ Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

¹⁰⁸ Final Report “Study on directors’ duties and sustainable corporate governance”, published on July 29, 2020, <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>.

¹⁰⁹ Final Report “Study on due diligence requirements through the supply chain”, published on February 20, 2020, <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>; and European Parliament resolution P9_TA(2021)0073 of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

¹¹⁰ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, of 23 February 2022, COM(2022) 71, 2022/0051 (COD).

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Corporations with Social Aims in the Japanese Legal System



Nobuko Matsumoto

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1 Overview: Corporations with Social Aims in Japan

1.1 Tradition of Businesses with Social Aims

An important distinction of a so-called “benefit corporation” is that it has not only a profit-gaining purpose but also a social mission that it pursues through its business activities.

Different from many countries discussed in this book, in Japan there is no specific legislation for “benefit corporations” or “social enterprises.” In fact, the concepts of “benefit corporation” and “social enterprise” are not widely known to the Japanese at all.

This does not mean, however, that businesses with social aims are not popular or widely spread in Japan. On the contrary, Japanese for-profit business corporations have a tradition of business with social aims in at least two ways.¹ First, it is widely acknowledged that Japanese corporations have been generally adopted an employee-oriented approach² in which most corporate directors are former employees and are sometimes “regarded as representatives of all the company’s employees.”³ Second, Japanese business corporations have found great significance in contributing to society. This idea is represented, for example, in the well-known Japanese management philosophy *sampo yoshi*, which means “to benefit all three parties.” This word has its origin in the practices of merchants in the Edo and Meiji periods, and the three parties concerned are sellers, buyers, and society.⁴ Noticeably, according to the 2015 research initiated by the Japanese Cabinet Office (hereinafter the “2015 Cabinet Office research”) that targeted small-medium “for-profit” business corporations in the service industry (real estate, restaurants, hotels, medical service, welfare service, education, etc.), 62.5% of companies surveyed found the question of whether the main business purpose was to solve social issues rather than pursuing profits to be either “very well applicable” (17.6%) or “applicable” (44.9%).⁵

¹London (1991), p. 4 mentioned that “for the most part, philanthropy is conducted in a more organic, less obvious, and less ostentatious manner.”

²See, for example, Araki (2009). See also Goto (2018), pp. 35–36.

³Okabe (2009), p. 487. See also Milhaupt (1996), pp. 20–21. It should be noted, however, that when one says “Japanese directors are representing employees’ interests,” the word “employees” might well mean only regular and full-time employees. Nowadays the number of non-regular or non-full-time employees is increasing, and disparities in treatment of regular employees and non-regular employees have become a serious social issue. See Araki (2009), pp. 246–251.

⁴In an effort to make its commitment to society clearer, Itochu Corporation, one of the biggest trade companies in Japan, introduced *sampo yoshi* as its mission in 2020 (https://www.itochu.co.jp/en/ir/news/2020/_icsFiles/afeldfile/2020/01/16/ITC200116_E.pdf).

⁵Mitsubishi UFJ Research and Consulting Co., Ltd, *Wagakuni ni okeru shakaiteki kigyō no katsudokibo ni kansuru chōsa hōkokusho* [Report on Scale of Activities of Social Enterprises in Japan] (March 2015), <https://www.npo-homepage.go.jp/uploads/kigyō-chōsa-hōkoku.pdf>.

Table 1 Characteristics of entities used to engage in businesses with social aims

	For-profit corporations	Nonprofit corporations		
	A share corporation (<i>kabushiki gaisha</i>)	A general incorporated association (<i>ippan shadan houjin</i>)	A public interest incorporated association (<i>koueki shadan houjin</i>)	An NPO corporation (<i>NPO houjin</i>)
Act	The Companies Act	The General Corporation Act	The General Corporation Act, The Act on Authorization	The NPO Act
Can the corporation make distribution to its shareholders/members?	Yes	No (nondistribution constraint). * General incorporated associations, however, are allowed to make distribution to members when they are dissolved.		
Does the corporation have to engage in specific types of activities?	No	No	Yes. Its businesses must fall into one of 22 designated types of businesses.	Yes. Its activities must fall into one of 19 designated types of activities.
Can the corporation change its purpose only with the approval of Shareholder meeting?	Yes	Yes	No. A change of its business requires authorization from the governmental agency.	No. A change of its purpose or its business requires certification by the competent authority.
Is it easy to establish the entity?	Yes	Yes	No	Some additional proceedings are required, but it is not very difficult.
In case of nonprofit corporation, is it monitored and supervised from outside?	N/A	No	Yes. Supervision by the governmental agency.	Yes. Supervision by the competent authority.

1.2 Entities Used to Engage in Businesses with Social Aims

Japanese corporations are engaging in business with social aims using both the forms of for-profit and nonprofit entities, which can be used to engage in social businesses (see Table 1). Among them, a share corporation (*kabushiki gaisha*), a general incorporated association (*ippan shadan houjin*), and an NPO corporation (*NPO houjin*) are likely options. Details of these entities will be explained in Sects. 3 and 4 below. In 2009, to raise awareness on social and community businesses, the Ministry of Economy, Trade and Industry (hereinafter “METI”) selected and announced 55 leading organizations engaging in business with aims to solve issues

of society or community.⁶ Many of these 55 organizations are incorporated as share corporations or NPO corporations. The list of 55 included only one general incorporated association, most likely because this type of association was introduced only after the legal reform in 2006.

1.3 Some Data on Businesses with Social Aims in Japan

In 2008, METI published a report (hereinafter the “2008 METI report”)⁷ that defined “social business” as an organization with the following three elements: (i) its mission is to address social issues to be solved; (ii) it continuously engages in business activities to pursue the mission; and (iii) it creates new social value. This report estimated that in 2008 there were 8000 social businesses in Japan, employing 32,000 people. As to the type of legal entities, the report showed that 46.7% of Japan’s social businesses were NPO corporations and 20.5% were for-profit corporations including share corporations.⁸ According to this report, areas frequently engaged in by social businesses were “activation of the community,” counting for 60.7%, followed by “health, medication, and welfare” (24.5%), “education and development of human resources” (23.0%), “environment” (21.4%), “development of industry” (19.7%), “support of child care” (17.5%), and “support of disabilities, elderly people, and homeless” (17.5%).

The 2015 Cabinet Office research, mentioned in Sect. 1.2 above, defined “social enterprise” with criteria including: (i) it addresses social issues by engaging in business activities; (ii) the main business purpose is to solve social issues rather than pursuing profits, and less than 50% of its profit is distributed; and (iii) profit from its business activities occupy not less than 50% of its profit. This report estimated that there were approximately 200,000 social enterprises in Japan, 187,000 of which were small-medium sized for-profit corporations and 18,000 were nonprofit corporation.⁹ Although the report provided valuable data, it should be noted that the actual number of so-called “social enterprises” may likely be much smaller, considering the criteria the report adopted. In Japan, it is not rare for companies to claim that they are addressing social issues; therefore, many business companies meet first criterion above. Further, it is common for family-managed

⁶*Sosharubijinesu 55 sen* [55 Social businesses] (February 2009). See www.meti.go.jp/policy/local_economy/sbcb/index.html.

⁷*Sosharubijinesu kenkyukai houkokusho* [Report of Research Meeting on Social Business] (April 2008), https://www.meti.go.jp/policy/local_economy/sbcb/sbkenkyukai/sbkenkyukaihoukokusho.pdf.

⁸As to the reason why general incorporated associations are not used at the time, see Sect. 1.2 above.

⁹It should be noted that this survey had a limited scope. As to for-profit corporations, only small-medium corporations that engaged in the service industry (real estate, restaurants, hotels, medical service, welfare service, education, etc.) were targeted.

companies in Japan to pay their family member in the form of remuneration as directors and not to make any distribution; therefore, many family-managed companies meet second criterion above, even if they are not using their profit for the purpose of social aims.

This report estimated that areas frequently engaged in by social enterprises were “health, medical care, welfare” (26,000 companies), “safety of community” (25,000), “environment” (23,000), “job training and support of employment” (23,000), “cultivation of children” (20,000), and “development of communities” (19,000).

1.4 Status of Discussions on Whether to Introduce Specific Legislation for Benefit Corporations

There are two characteristics regarding the status of discussions on benefit corporations in Japan. First, as mentioned at the beginning of this chapter, the concept of the benefit corporation has not attracted strong attention from industry or from academia. While the Cabinet Office and METI have been conducting some research and there are some academic works that refer to the benefit corporations in the United States or the community interest companies in the United Kingdom, they were sporadic movement. Most recently, the Japanese cabinet mentioned “[t]he government will consider the need for a new legal system as a new form of public private partnership” referring to benefit corporations of overseas. The discussion has just begun and continued observation is needed.¹⁰

¹⁰The Cabinet Office conducted research on foreign legal entities used by social enterprises in 2011 (*Shakaiteki kigyō ni tsuite no houjin seido oyobi shien no arikata ni kansuru kaigai genchi chousa houkokusho* [Report on Overseas Field Research on Legal Entities and Supports of Social Enterprises] (March 2011), <https://www5.cao.go.jp/npc/pdf/syakaiteki-kaigai.pdf>). The Cabinet Office also published the 2015 Cabinet Office research mentioned in Sect. 1.2 above.

METI has published subsequent reports relating to social enterprise in 2008 (the 2008 METI report mentioned in Sect. 1.3 above), in 2010 (*Heisei 21 nendo chiiki keizai sangyou kasseika taisaku chousa houkokusho* [Report on Revitalization of Regional Economy and Industry] (February 2010), https://www.meti.go.jp/policy/local_economy/nipponsaikoh/h21_fysbhokokusyo.pdf), in 2011 (*Sosharubijinesu suishin kenkyukai houkokusho* [Report of Research Meeting on the Promotion of Social Business] (March, 2011), https://www.meti.go.jp/policy/local_economy/sbcb/sb%20suishin%20kenkyukai/sb%20suishin%20kenkyukai%20houkokusyo.pdf), in 2016 (*Chiiki wo sasaeru sabhisu jigyou shutai no arikata ni tsuite* [Report on Business with Objectives to Support Local Communities] (March 2016), https://www.meti.go.jp/committee/kenkyukai/sansei/service_jigyo/pdf/report01_01_00.pdf), and in 2020 (*Chiiki no jizokukanou na hatten ni muketa seisaku no arikata kenkyukai houkokusho* [Report of Research Meeting on Policies for Sustainable Development of Local Communities] (September 2020), https://www.meti.go.jp/shingikai/sme_chiiki/jizoku_kano/pdf/20200930_1.pdf). In June 2022, the Japanese cabinet approved *Atarashii shihonshugi no gurando dezain oyobi jikkou keikaku* [Grand Design and Action Plan for a New Form of Capitalism], which refers to benefit corporations (<https://www.cas.go.jp/jp/>)

Second, METI, which seems to be continually interested in benefit corporations or social enterprises, appears to focus on supports and revitalizations of the local depopulated community particularly in and since its 2016 report.¹¹ This is reflected in the fact that METI often called a potential new type of entity as a “local management corporation” or “LM (local management) corporation.”

1.5 Why Has the Benefit Corporation Structure Been Largely Overlooked in Japan?

Answering the question of why the benefit corporation structure has been largely overlooked in Japan is difficult as there is very little literature or discussion on the issue. The impression of the author through conversations with legal practitioners and academics is that they are not convinced that the new structure is necessary to engage in social businesses in Japan.¹² This opinion is understandable, because in Japan, with the tradition of business with social aims and with additional options to use other nonprofit entities, companies can engage in business with social aims with little disturbance even without a formal benefit corporation structure.

Still, one might counterargue that existing entities are not perfectly suited for engaging in businesses with social aims. The rest of this chapter provides an explanation of options used to engage in social businesses in Japan, while paying special attention to potential inconvenience caused by using each entity.

2 For-Profit Corporations or Nonprofit Corporations?

Below, this paper discusses the available options for businesses with social objectives in Japan, where there are no specific legal entities for benefit corporations.

Before providing the details of each entity, this part briefly describes the difference between for-profit corporations and nonprofit corporations based on Henry Hansmann’s famous work.

The definitive characteristic of nonprofit corporations is that they are prohibited from distributing money to their members (nondistribution constraint).¹³ The nondistribution constraint limits the means of financing: nonprofit corporations cannot raise money by issuing shares to shareholders who expect to receive a

seisaku/atarashii_sihonsyugi/pdf/ap2022.pdf. Provisional English translation is available at https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/ap2022en.pdf.

¹¹ See supra note 10 above.

¹² See also Takahashi (2016), pp. 754–755.

¹³ Hansmann (1980), p. 838.

distribution. This makes it difficult for nonprofit corporations to obtain sufficient funds to work on a large-scale.

At the same time, however, the fact that they are subject to the nondistribution constraint can attract customers and donors. Customers do not have to be skeptical on the reduced quality of goods or services due to the excessive distribution of the corporation's money to members. Customers feel more comfortable that they will receive goods or services commensurate with the amount that will be paid. In the same way, donors do not have to be skeptical that the money paid will be distributed to members rather than being used to address social issues.¹⁴

The advantages and disadvantages of using for-profit corporations are the reverse of those of nonprofit corporations. That is to say, the main advantage of using for-profit corporations is that the corporation can raise money by issuing shares that enable corporations to work on a large-scale. A disadvantage of using for-profit corporations as entities to engage in businesses with social purposes is that donors and customers might feel uncomfortable about paying money to the corporation because they might be afraid that the money will be distributed to shareholders and will not be used to address social problems.¹⁵

Below, this chapter provides some details of four entities that can be used to engage in social businesses in Japan (see Table 1).¹⁶ Among them, a share corporation is a type of for-profit corporation. A general incorporated association, a public interest incorporated association, and an NPO corporation are nonprofit corporations.

3 Share Corporations Used As a Vehicle to Engage in Businesses with Social Aims

3.1 Social Enterprises Incorporated As Share Corporations

Considering that the stakeholder-oriented view has been accepted in Japan,¹⁷ one might choose to organize a social business as a share corporation (*kabushiki gaisha*).

One example of a business with a social mission that is incorporated as a share corporation is AsMama Inc.,¹⁸ which operates a “childcare sharing” Internet service

¹⁴Hansmann (1980), pp. 843–848.

¹⁵On this point, the community interest company in the United Kingdom is a hybrid of for-profit corporations and nonprofit corporations. As distributions to shareholders are not wholly prohibited, but partly restricted, donors and consumers will be confident that at least some parts of the money paid would be used for an appropriate purpose. At the same time, as distributions to shareholders are partly allowed, community interest companies can raise funds by issuing shares.

¹⁶As to the detailed explanation on each legal form, see Matsumoto (2018, 2022).

¹⁷See Sect. 1.1 above.

¹⁸<http://www.asmama.co.jp/>.

that connects parents who require childcare and person who can provide the childcare. The company uses the revenue generated by the company's other business (marketing support business) to operate the childcare sharing service. By doing so, the company avoids taking fees from users of the childcare sharing services. The hourly childcare fee, as little as 500 yen, is paid directly from the parents requiring childcare to the person providing the care.¹⁹

In 2015, Japan Venture Philanthropy Fund (hereinafter "JVPF"),²⁰ a fund providing financial and management support to organizations with social aims, jointly operated by Nippon Foundation²¹ and Social Investment Partners,²² invested a total of 30 million yen in AsMama Inc. via a convertible bond structure.²³ The convertible bond agreement included a characteristic provision considering the fact that AsMama Inc. is a share corporation, which, theoretically speaking, may prioritize profits over the pursuit of its social mission. The parties agreed on the convertible bond agreement which provided that the obligation to redeem the bond shall be accelerated and become immediately due, if AsMama Inc. loses its social mission.²⁴

3.2 *Legal Issues When Share Corporations Engage in Social Business*

When one organizes a business with social aims in the form of a share corporation, there are some important legal issues to be analyzed.

3.2.1 "Ultra Vires"? The *Yahata-Seitetsu* Case (1970)

The first issue is whether share corporations, which are supposed to pursue the interests of shareholders and maximize the value of shareholders, have the capacity to undertake actions that pursue social objectives rather than profit. Are these actions "ultra vires" and void?

The *Yahata-Seitetsu* case (1970) is one of the most famous cases on this point. *Yahata-Seitetsu* Corporation, a large steel manufacturing company, donated to the Liberal Democratic Party. One shareholder brought a lawsuit and claimed that making donations to a political party was beyond the corporation's purpose.

¹⁹ <https://www.nippon-foundation.or.jp/en/news/articles/2015/20150814-20931.html>.

²⁰ <http://www.jvpf.jp/en/>.

²¹ <https://www.nippon-foundation.or.jp/en>.

²² <http://sipartners.org/english/>.

²³ <https://www.nippon-foundation.or.jp/en/news/articles/2015/20150814-20931.html>.

²⁴ Explanation by a participant at the research meeting at METI on Business with Objectives to Support Local Communities (*chiiki wo sasaeru sahbisu jigyou shutai no arikata ni kansuru kenkyukai*) on December 15, 2015.

The Japanese Supreme Court held as follows.

Yahata-Seitetsu Case (1970) [a part on ultra vires]

“A Corporation has as its primary purpose the operation of a business that earns profit. Toward that end, it should focus on those activities that directly help it accomplish the purposes described in its charter. Like humans, however, companies are social beings, constituent parts of the national and local community. With that social context comes social responsibility. Even if a given action appears to lack a connection to the purposes stated in a firm’s charter, if society expects the firm to take those actions then it has the legal capacity to do so.”²⁵

It can be said that, in *Yahata-Seitetsu* case, the Supreme Court allowed companies to engage in a broad range of activities.

Attention must be paid to the fact that the *Yahata-Seitetsu* case involved making a “political” donation. On political donation, people tend to have diverse and even polarized ideas on whether they should donate anything, and if so, to which party. One of the reasons the shareholder brought a lawsuit in the *Yahata-Seitetsu* case may have been because it was a political donation. In fact, after the *Yahata-Seitetsu* case, there were other cases on donations and most concerned “political” donations. In one case in 1996, the Japanese Supreme Court said that a political donation made by a tax accountant association was ultra vires.²⁶

Today, at least except for political donations, it is understood that share corporations are given wide capacity and the cases would be quite rare where activities of share corporations are recognized as ultra vires in Japan.

3.2.2 Fiduciary Duty of Directors

The second legal issue, which certainly relates to the first issue, is whether a director of share corporations who prioritizes social objectives over making a profit breaches a director’s fiduciary duty.

In the *Yahata-Seitetsu* case (1970), the claimant shareholder, in addition to the “ultra vires” issue, claimed that the directors breached their duty as directors. However, the Supreme Court’s opinion, in saying that the directors had not breached their duty of loyalty, seemed to offer a wide range of discretion to directors.

²⁵ Judgment of the Supreme Court of Japan, June 24, 1970, Minshu 24(6): 625. English translation is from Ramseyer and Iwakura (2015), p. 140.

²⁶ South *Kyusyu* Tax Accountant Association Case. Judgment of the Supreme Court of Japan, March 19, 1996, Minshu 50(3): 615. Some academics point out that the reason the conclusion is different from that of the *Yahata-Seitetsu* case is because this is the case of a tax accountant association, to which tax accountants are obliged to become a member to practice as a tax accountant.

Yahata-Seitetsu Case (1970) [a part on a director's duty of loyalty]

*“When deciding the amount and other details of a company’s potential political donation, directors should reasonably consider a wide range of matters. They should, for example, consider the company’s scale, its performance, its social and financial situation, and the identity of the potential recipient. If they donate an amount that unreasonably exceeds the appropriate scale, they breach their duty of loyalty as directors.”*²⁷

Another element gives directors of share corporations a wide range of discretion: the “business judgment rule,” which has been recognized and established through many cases in Japan. In the United States, the business judgment rule is understood as a judicial standard that protects directors’ business judgments from the strict fairness review. Although the structure of the Japanese business judgment rule is different from its U.S. counterpart, the application of the Japanese business judgment rule reduces the probability that directors will be held liable, because the criteria of the Japanese business judgment rule are quite lenient, that is, “*unless the process or content of the decision-making is extremely unreasonable, a director who does this does not breach his duty of care as a prudent manager*”²⁸ (underlined by the author) according to the opinion of the Supreme Court in 2010. Although this case did not concern activities with social aims, one can expect that directors would also be given a wide range of discretion in these matters as well.

3.2.3 Is It Possible to Distinguish Share Corporations Which Surely Pursue Their Social Aims from Others?

So far, we have seen that share corporations are in practice allowed to engage in businesses with social aims, at least to some extent. It should be noted, however, that it is difficult for customers or investors to distinguish share corporations which surely pursue their social aims from others. Some of the reasons are that share corporations are not required to make a disclosure as to social activities, that there is no established standard for an assessment of whether a company has achieved its social goals, and that there is no mechanism which restrict share corporations from distributing “all” its profits to shareholders.²⁹

²⁷ Judgment of the Supreme Court of Japan, June 24, 1970, Minshu 24(6): 625. English translation is from Ramseyer and Iwakura (2015), p. 140.

²⁸ Judgment of the Supreme Court of Japan, July 15, 2010, Hanrei jihu 2091: 90. English translation is from Ramseyer (2019), p. 235.

²⁹ Relating to this point, there is a question whether a provision in the articles of incorporation stipulating that the share corporation shall use most of its profit (for example, 70%) to address social issues is valid or void. There is no established view to this question. Some insist that if the proportion is significantly high, the provision is void because it is contrary to the nature of a for-profit corporation. Another argues that even a provision that stipulates that the share corporation uses “all” its profits for a social purpose might be valid. In the author’s view, if every shareholder agrees with the provision when it is introduced and the share is transferred only to person who

In other words, the inconvenience when using share corporations to engage in a business with social aims is that the corporation cannot demonstrate to society, customers, or investors that it is surely committed to social aims.³⁰ Theoretically speaking, this issue can be addressed by providing provisions in specific agreements. For example, AsMama Inc.'s convertible bond agreements, mentioned in Sect. 3.1 above, included a provision that if AsMama Inc.'s business loses its social mission, the obligation to redeem the bond shall be accelerated and become immediately due. As you may notice, however, providing a specific provision is troublesome and it is not realistic for individual and small customers or investors to address the problem in this way. Therefore, if there are many customers or investors who want to buy goods from or invest in a corporation which surely commits to social aims, the introduction of new benefit-corporation-type entities seems beneficial.

4 Nonprofit Corporations Used As a Vehicle to Engage in Business with Social Aims

4.1 Overview of Types of Nonprofit Corporations in Japan

Another vehicle for engaging in business with social objectives is a nonprofit corporation. As explained in Sect. 2 above, the definitive characteristic of nonprofit corporations is that they are prohibited from distributing money to their members (nondistribution constraint). They can earn profits but are generally prohibited from distributing them.³¹

In Japan, there are various legal entities under the umbrella of nonprofit corporations. This section examines the legal structure and characteristics of three entities which can be utilized as corporations engaging in businesses with social aims: general incorporated associations, public interest incorporated associations, and NPO corporations (see Tables 1 and 2).³²

agrees with the provision after that, there is no need to void the provision. On the other hand, in cases where shareholders are divided regarding the provision, it should be understood as void because shareholders who oppose the provision should be protected. Also, it should be noted that even in case where the provision is introduced with every shareholder's approval, the provision can be removed later, when shareholders change their mind, and a shareholders meeting approves change to the articles of incorporation.

³⁰See Molk (2019), p. 245.

³¹Hansmann (1980), p. 838.

³²As to the detailed explanation on each legal form, see Matsumoto (2018, 2022).

The number of general incorporated associations shows the number of corporations which include the word "*ippan shadan houjin*" in their names. The number of public interest incorporated associations shows the corporations which include the word "*koueki shadan houjin*" in their names. Both are searched through the system at the National Tax Authority (<https://www.houjin-bangou.nta.go.jp/>). The number of NPO corporations' data are from <https://www.npo-homepage.go.jp/nportal/list?goc=00>. All search is made on February 13, 2022.

Table 2 Numbers of each type of nonprofit corporations

Legal entities	Number
General incorporated associations	67,215
Public interest incorporated associations	4162
NPO corporations	59,731

Two groups of nonprofit corporations exist in Japan.³³ One covers those entities incorporated under the General Corporation Act,³⁴ and the other covers entities incorporated under the NPO Corporation Act.³⁵

General incorporated associations (*ippan shadan houjin*) are incorporated under the General Corporation Act. When a general incorporated association applies for additional authorization under the Authorization Act³⁶ and is authorized, it becomes a public interest incorporated association (*koueki shadan houjin*) and obtain better tax treatment. All that is required to set up a general incorporated association is to enter it at a registry. If one wants to obtain additional authorization as a public interest incorporated association, it is required to meet strict criteria, explained in Sect. 4.3 below.

On the other hand, NPO corporations (*tokutei hieiri katsudou houjin*) are established under the NPO Corporation Act.

4.2 General Incorporated Associations Used As a Vehicle to Engage in Businesses with Social Aims

4.2.1 Advantages of a General Incorporated Association As a Vehicle to Engage in Social Business

A general incorporated association is a good option for incorporating business with social aims for the following reasons:

First, the activities of general incorporated associations are not subject to any restriction. As explained later in Sects. 4.3 and 4.4 below, businesses conducted by public interest incorporated associations must fall into one of the 22 designated types of businesses, and activities conducted by NPO corporations must fall into the

³³ As to why Japan has both systems (nonprofit corporations under the General Corporation Act and nonprofit corporations under the NPO Act), see Matsumoto (2018), p. 135.

³⁴ Act on General Incorporated Associations and General Incorporated Foundations (*ippan shadan houjin oyobi ippan zaidan houjin ni kansuru houritsu*). English translation is available at <https://www.japaneselawtranslation.go.jp/ja/laws/view/3588>.

³⁵ Act on the Promotion of Specified Nonprofit Activities (*tokutei hieiri katsudou sokushin hou*). English translation available at <https://www.japaneselawtranslation.go.jp/ja/laws/view/3028>.

³⁶ Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundation (*koueki shadan houjin oyobi koueki zaidan houjin no nintei touni kansuru houritsu*). English translation is available at <https://www.japaneselawtranslation.go.jp/ja/laws/view/145>.

designated 19 types of activities. For example, if a corporation plans to manage a restaurant and actively employ people with disabilities, it is not clear if the activities fall under the designated businesses or activities. To be sure, there is a type of business defined as “business to support persons having the will to work and seeking the opportunity of employment” in the Authorization Act, and there is another type of activity, “activities for supporting the development of vocational skills or the expansion of employment opportunities” in the NPO Corporation Act. However, these categories seem to be prepared mainly for job training services or employment agency services. If the restaurant pursues both business goals and the social aim of actively employing disabled people, the authorities may evaluate the company’s primary business or activity as running a restaurant, and that employing people with a disability is only an accompanying one. On the other hand, the activities of a general incorporated association are not subject to any restriction; therefore, they could incorporate their restaurant as a general incorporated association.

Second, the incorporation procedure of a general incorporated association is simple and quick. One can incorporate a general incorporated association by registering the corporation at the registry.

Third, the costs entailed in maintaining a corporation are light. While an NPO corporation requires at least ten members,³⁷ a general incorporated association only needs one. Also, general incorporated associations are not supervised or monitored by governmental authorities, while public interest incorporated associations and NPO corporations are under the supervision by governmental agency or competent authority. While monitoring and supervision might improve the governance and the transparency of the corporations, they might become burden to the corporation. To avoid cumbersome disclosure and monitoring, some may choose entities without supervision.

4.2.2 Possible Inconvenience of a General Incorporated Association

There is at least one inconvenience in using a general incorporated association as a vehicle to engage in social business.

General incorporated associations are prohibited from distributing money to members while they continue to exist. Also, they cannot provide in the articles of incorporation that the money left will be distributed to members. There is, however, a way to make distribution to its members. When they dissolve, they are allowed to distribute any remaining money to members with the resolution at a members meeting.³⁸ It is possible to have a provision in the articles of incorporation that the money left will be, for example, donated to meet a social purpose. The articles of incorporation, however, can be freely modified with the approval of a members meeting anytime.

³⁷The NPO Corporation Act, section 10(1)(iii).

³⁸The General Corporation Act, section 239(2).

The reason the General Corporation Act adopted the rule, which allows general incorporated associations to make distribution when they dissolve, is that, as the types of activities of general incorporated associations are not restricted, the scheme can also be utilized by mutual benefit associations, such as university alumni. Therefore, the distribution of any money left is allowed for general incorporated associations.

This rule might make donors or customers of general incorporated associations feel uncomfortable. As explained in Sect. 2 above, the advantage of a nonprofit corporation is that it is subject to the nondistribution constraint which might attract customers and donors. In the case of the restaurant mentioned above, customers who would like to support a socially minded business might choose the restaurant because they believe that at least some part of their money will be paid as remuneration to people with disabilities. However, due to the rule that allows it to distribute money to its members when it dissolves, customers cannot be confident that the money they pay will provide this type of support, and the restaurant might not be able to attract these customers. This fact might reduce the attractiveness of general incorporated associations as a vehicle for running a social business.

4.3 Public Interest Incorporated Associations Used As a Vehicle to Engage in Businesses with Social Aims

A public interest incorporated association is a type of “fully-equipped” nonprofit corporation, and once authorized as a public interest incorporated association, it receives tax benefits, including those offered to donors and to the corporation itself. At the same time, and perhaps because they get tax benefits, the criteria for obtaining public interest incorporated association status are demanding, and after they are authorized, they must keep meeting those strict criteria.

First, the principal objective must be operating the “business for public interest purposes,” and the businesses must fall into any of the 22 categories of businesses listed in the Authorization Act.³⁹ For example, the Japanese Soroban Association,

³⁹The Authorization Act, section 5(1) and its appendix. The 22 categories include businesses (i) to promote academism and scientific technology, (ii) to promote culture and art, (iii) to support persons with disability or needy persons or victims of accident, disaster or crime, (iv) to promote the welfare of senior citizens, (v) to support persons having the will to work and seeking the opportunity of employment, (vi) to enhance public health, (vii) to seek the sound nurturing of children and youths, (viii) business to enhance the welfare of workers, (ix) to contribute to the sound development of mind and body of citizens or to cultivate abundant human nature through education and sports, etc., (x) to prevent crimes or to maintain security, (xi) to prevent accident or disaster, (xii) to prevent and eliminate unreasonable discrimination and prejudice by reason of race, gender or others, (xiii) to respect and protect the freedom of ideology and conscience, the freedom of religion or of expression, (xiv) to promote the creation of a gender-equal society or other better society, (xv) to promote international mutual understanding and for economic cooperation to overseas developing regions, (xvi) to preserve the global environment or protect and maintain the

which conducts *soroban* qualification exams and provides education to *soroban* instructors,⁴⁰ is a public interest incorporated association, and its “business for public interest purposes” falls into the “education and sports” category. Second, with respect to the “business for public interest purposes,” the revenue is expected to not exceed the amount compensating the reasonable costs of its operations.⁴¹ Third, the costs of implementing the “business for public interest purposes” is expected to exceed 50% of the total cost.⁴²

After general incorporated associations are successfully authorized as public interest incorporated associations, they must keep meeting the criteria above and must submit detailed documents demonstrating that they meet the criteria every year to the governmental agency that continually monitor the association.

Considering these burdensome requirements, at least for those engaged in medium to small size businesses, a public interest incorporated association is not the best option for engaging in businesses with social aims.

4.4 NPO Corporations Used As a Vehicle to Engage in Businesses with Social Aims

The system of NPO corporations is well known, because the NPO Act was enacted in 1998, long before the General Corporation Act and the Authorization Act was enacted in 2006.

To organize an NPO corporation, it is necessary to obtain authentication by the competent authority. It is said that obtaining the authentication is not difficult.⁴³ After a corporation obtains authentication, the authority keeps supervising the NPO corporation. To obtain authentication, a corporation must meet the requirements including that the primary purpose of the corporation is to engage in nonprofit activities that fall in any of the 19 categories specified in the NPO Corporation

natural environment, (xvii) to utilize, maintain or preserve the national land, (xviii) to contribute to the sound operation of national politics, (xix) to develop a sound local community, (xx) to secure and promote fair and free opportunities for economic activity and to stabilize and enhance the lives of the citizenry by way of activating the economy, (xxi) to secure a stable supply of goods and energy indispensable for the lives of the citizenry, and (xxii) to protect and promote the interests of general consumers (English translation is from <https://www.japaneselawtranslation.go.jp/ja/laws/view/145>).

⁴⁰<http://www.shuzan.jp/english/>. A *soroban* is a traditional Japanese calculator.

⁴¹The General Corporation Act, section 5(6). This requirement limits corporations’ profit making.

⁴²The General Corporation Act, section 5(8) and section 15. This rule ensures those public interest incorporated associations mainly and actually engage in business for public interest purposes.

⁴³See Ohta (2012), p. 64.

Act.⁴⁴ For example, Coaches⁴⁵ is an NPO corporation that provides physical exercises to elderly people to maintain their health, and according to its articles of incorporation, its activities fall into several categories including “activities for enhancing healthcare, medical care, and welfare.”

One advantage for a business with social objectives to organize as an NPO corporation rather than a share corporation or general incorporated association is that NPO corporations can demonstrate that they are perpetually committed to their stated specific social purposes. It is important to note that the purposes of share corporations and general incorporated associations included in the articles of incorporations can be modified only by a shareholders/members meeting. Share corporations and general incorporated associations therefore cannot guarantee that they will perpetually pursue their stated specific social aims. In contrast, an NPO corporation cannot change its purposes without the authentication by the competent authority,⁴⁶ and it is therefore unlikely that its purposes will change significantly.

The NPO corporations, however, are not perfectly suited for engaging in businesses with social aims. To obtain the authentication as an NPO corporation, the activities must fall in any of the 19 categories specified in the NPO Corporation Act. Also, as with other nonprofit corporations, the NPO corporations are subject to the nondistribution constraint. Therefore, they cannot get funding through issuing shares, and this makes it difficult for them to obtain sufficient funds to work on a large-scale.⁴⁷

⁴⁴The 19 categories include (i) activities for enhancing healthcare, medical care, and welfare, (ii) activities for promoting social education, (iii) activities for promoting development of communities, (iv) activities for promoting tourism, (v) activities for revitalizing rural areas or hilly and mountainous areas, (vi) activities for promoting science, culture, arts, or sports, (vii) activities for preserving the environment, (viii) disaster-relief activities, (ix) regional security activities, (x) activities for protecting human rights or promoting peace, (xi) international cooperation activities, (xii) activities for promoting the formation of a gender-equal society, (xiii) activities for assisting sound development of children, (xiv) activities for developing an information-oriented society, (xv) activities for promoting science and technology, (xvi) activities for vitalizing economy, (xvii) activities for supporting the development of vocational skills or the expansion of employment opportunities, (xviii) activities for protecting consumers, and (xix) activities for doing liaison work or for providing advice or assistance for the operations or activities of organizations engaging in any of the activities set forth in the preceding items (English translation is from <https://www.japaneselawtranslation.go.jp/ja/laws/view/3028>).

⁴⁵<https://npocoaches.org/>. The corporation was selected as one of the 55 leading organizations by METI, mentioned in Sect. 1.2 above.

⁴⁶The NPO Corporation Act, section 25(3).

⁴⁷See Sect. 2 above.

5 Conclusions and Agendas for the Future

In Japan, there is no specific legislation for “benefit corporations” or “social enterprises,” and the concepts of those entities are not necessarily widely known. This does not mean, however, that Japanese industry and society do not accept the idea of businesses with social aims or that there are few businesses with social objectives in Japan. On the contrary, Japanese for-profit corporations have a tradition of conducting business with social aims, and there are various nonprofit corporation schemes that can be used when one incorporates businesses with social aims. The leading candidates as an entity are share corporations, general incorporated associations, and NPO corporations. As a result, companies can engage in business with social aims with little disturbance even without a formal benefit corporation structure. In the author’s view, the reasons why the idea of “benefit corporation” does not receive much focus include that existing entities are succeeding in their efforts to engage in social business at least to a certain extent, and that the necessity of the new structure has not been necessarily recognized.

At the same time, as explained in this chapter, existing entities are not perfectly suited for engaging in businesses with social aims. It is difficult for a share corporation to demonstrate that it is surely committed to social aims to its customers and investors. Nonprofit corporations cannot get funding through issuing shares, and this makes it difficult for them to obtain sufficient funds to work on a large-scale.

Continued observation is needed on whether these businesses will grow by using existing entities or new specific legal infrastructures will be introduced in the future.

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The Suitability of Luxembourgish Law to B Corp



David Hiez

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1 Introduction

Luxembourg is famous for its financial center but does not look like B Corp friendly. Worse, it has been considered a tax paradise, suspected of laundering and remains on some blacklists, notably because of its practice on tax ruling. Therefore, it may be surprising to inquire about its legal landscape for B corps. Nevertheless, at least two reasons justify that interest. First, it may be very fruitful to look at a B Corp situation into a difficult context. But there is a second very different reason, related to Luxembourg itself: this will be a good opportunity to discover another aspect of its legal framework, far more favorable to B Corp than expected.

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Table 1 Table of B Corp companies: name, date of label, sector of activity

Name	Date of label	Sector of activity
Innpact	November 2015	Service with Minor Environmental Footprint
FARAD Group	January 2017	Service with Minor Environmental Footprint
Ramborn Cider Co.	June 2020	Manufacturing
ABG Sarl-s	November 2021	Service with Minor Environmental Footprint

At first glance, the reality confirms the prior assumption, since there are very few companies labelled B Corp in Luxembourg.

However, that observation is not very meaningful, for several reasons. The first is the size of the country: with less than 650,000 inhabitants and four companies (see Table 1), the number of labelled B Corp cannot be compared to most other European countries. A second reason is also important and will be developed along that chapter: instead of being hostile to B Corp, the Luxembourgish legal framework offers other possibilities for enterprises wishing to emphasise their concern for social and environmental matters. On the one hand, the general Luxembourgish context is likely to welcome such companies (1); on the other hand, a special legal status has been created to allow them to make their engagement more visible and secure (2).

2 The Luxembourgish Framework

Geographically situated between Germany, France and Belgium, the Grand-Duchy of Luxembourg is culturally at the crossroad of German and French culture. Historically,¹ Luxembourg was bigger, including notably a part of the present Belgium. Therefore, it naturally kept some strong connections with that neighbouring country. Created by several steps between 1815 and 1867, the Grand-Duchy is, from the legal perspective,² parts of the Napoleonic area, with France and Belgium. Parts of the German Zollverein, a custom territory, till 1919, Luxembourg has no longer relation with German law, except for a part of its tax law established during the German occupation of the second world war. Because of its size and the limits of its human resources, Luxembourg has not generally established original legislations but copied other national acts, with some adjustments. Its main sources of inspiration are France and Belgium: France for civil law, commercial law and administrative law, Belgium for constitutional law, criminal law and company law. Therefore, concerning B Corp, the Luxembourgish law is very close to the Belgian law, even if some more distance developed with the recent Luxembourgish and Belgian reforms.

¹Trausch (1989).

²Prüim et al. (2016).

2.1 *The General Company Law Framework*

During the French revolution and the Napoleonic Empire, Luxembourg was a French Department. Therefore, the Napoleonic codes were applicable, and Luxembourg was submitted to French company law. No evolution occurred during the two first-thirds of the 19th century. But the obsolescence of that legislation was similar to the one acknowledged in France, and in 1982 the Luxembourgish government asked to Prof. Nyssens from the University of Louvain (Belgium) to draft a reform inspired by the most recent Belgian Act on Commercial Companies. That first draft appeared too innovative and was not adopted, but a second draft was ordered to another Belgian professor and the text was adopted in 1915.

For sure, Luxembourgish company law is mainly inspired by Belgium legislation, starting with the law of 1915, mainly a copy-paste of the Belgium Act of 1873. Therefore, the Belgian authors and case law remain commonly used in Luxembourg on that topic. Nevertheless, the Belgium law and the Luxembourgish law have evolved separately. Luxembourg went on paying attention to Belgian reforms and sometimes duplicated them, but it also developed its own agenda, notably when the development of the financial sector became a strategy, since the establishment of a suitable company law was part of the strategy. That observation is reinforced with the recent major reforms in Luxembourg in 2016 and Belgium in 2019.³ Belgium has established a new code of enterprises, regulating beyond companies. This Luxembourgish general redrafting of the Act of 1915 consisted mainly in its restructuration and rewording, but it also introduced some changes considered as necessary. Some critics have been addressed to it,⁴ especially the multiplication of reports required from executives, but more generally the generalisation of provisions maybe suitable for large international enterprises but severely detrimental for small and medium enterprises; in other words, the legislator paid more attention to the financial sector than to traditional companies running their activities inside the country.

Along this evolution, the Luxembourgish legal thinking was not immune to debates ongoing in its neighbouring countries but they were very muffled, the Luxembourgish law being generally considered to be essentially pragmatic.⁵ The Maxime of Luxembourgish company law has been well sum up as “Freedom for shareholders, legal certainty for third parties” (“*Liberté pour les associés, sécurité pour les tiers*”): used for the first time in 1882 by Prof. Nyssens, quoted by J.-P. Winandy.⁶ This is meaningful, nonetheless, because it clearly states the tension into the company law, and it does not refer to any social aspect at all. Indeed, the tension appears to be only patrimonial, the interest of third parties, that can be assimilated to stakeholders, are not integrated into the company; the only concern is to ensure that

³Loi du 19 juillet 2019 “De simplification, de clarification et d’actualisation du droit des sociétés”.

⁴For a summary: Winandy (2008), p. 9 f.

⁵Kinsch (2018), pp. 36 f.

⁶Winandy (2008), p. 1.

the behavior of the company and its executives is reliable for third parties. Moreover, the Luxembourgish legislator had a constant concern a wide freedom for shareholders;⁷ this is presently explicit into Article 100-1 of the Act on Commercial Companies which states that these companies are regulated by the contracts between parties. The contractual and institutional theories were not discussed in Luxembourg since the doctrine at that time was very poor. The debates are now evoked by the authors, but with distance, and with the attempt to establish a synthesis. Alain Steichen represents perfectly that tendency. He starts by concluding his presentation by a peremptory statement: “Finally, it must be concluded that the institutionalist theory is both imprecise and useless”.⁸ But when he comes into the technical details, his opinion appears far more nuanced. Undoubtedly in his opinion, the company is managed with company’s interest as a target, but this interest is understood differently depending on the emphasis put on the patrimonial interest (of shareholders) and entrepreneurial interest (of all the stakeholders).⁹ In case of conflict, the patrimonial interest has to be preferred, notably because of the legal definition of company but in practice these two sides of the company’s interest do not conflict but converge. Jean-Pierre Winandy proposes another synthesis, meaningful as well, since it goes back to the tension observed at the very beginning of Luxembourgish company law. In fact, he conciliates the opposition between the contractual and institutional theories of company by referring to the division established in the general Maxime of 1882 quoted above. The contractual dimension would apply to internal relationships, while the institutional one would concern external relations.¹⁰

All these debates do not directly impact the general definition of company. It remains into the Civil Code, and is rooted into the common Napoleon code: A company may be created by two or several persons who agree to bring together something to share the profit that may occur or, in the cases stated by law, by the unilateral will of a person which affects some goods to undertake a determined activity.¹¹ While France and Belgium have substantially amended that definition, directly or indirectly, Luxembourg did not modify the definition of 1804 except to make possible unilateral companies.

Like in its neighbouring countries, the legal entity opposed to company is association, and the opposition relies on the presence or absence of profits for members and the prohibition for associations to run commercial or industrial activities. But the Luxembourgish law still refers to a strict conception of profits, excluding notably spares. The judge makes a very strict appreciation, both to sanction associations which would run prohibited activities and to disqualify entities which would not seek profits for members.

⁷Steichen (2018), n°17. Winandy (2008), pp. 27 f.

⁸Steichen (2018), p. 24: “En définitive, il faut considérer que la théorie institutionnelle est à la fois imprécise et inutile”.

⁹Steichen (2018), ns°260–261.

¹⁰Winandy (2008), p. 89.

¹¹Civil Code, Art. 1832.

For instance, it refused the qualification of company to some cooperatives, cooperatives being commercial companies:¹² a consumer cooperative which restrains its business to its members and which sells at a cost price could not do it through the legal form of a cooperative, since it could make no profit.¹³ And an analogous opinion is still defended about mutuals,¹⁴ even if the author regrets the generality of the solution.

In opposition, associations that do not pursue a profitable purpose association (*sans but lucratif*) are so defined: The not-for-profit association is the one which does not undertake industrial or commercial business, or which does not aim at providing its members with a material advantage. Like the Act of 1915 on commercial companies was a copy paste of Belgian Act of 1873, the Act of 1928 was copied from the Belgian Act of 1921.¹⁵ The Luxembourgish legal thinking is very poor about the associations and no debate about the interpretation of Article 1 of the Act and the definition of association can be found in Luxembourg like in Belgian law. However, the orientation seems to be similar and legal uncertainty is felt by associations which undertake economic activities. The only clear decision has been held by the administrative court about public procurements, and it stated that associations were not allowed to tender to such a public procurement.¹⁶ Nevertheless, many enterprises with a social purpose have adopted the form of a not-for-profit association and meet the risk of legal uncertainty. Alternatively, some of them chose to be cooperatives.¹⁷ While their number remains very low, some creations occurred in the last ten years.¹⁸

The rigor with which the definition of company is considered was visible again when a special regulation has been drafted for social purpose companies (see below). While the adoption of such a legislation could have been considered like an implicit derogation to the general definition of Article 1832 of the Civil Code, the legislator felt the necessity to state explicitly the derogation in a special provision.¹⁹

That rigor, combined with the liberal orientation of the Luxembourgish company law, seems incompatible with B Corp values. However, if company law provides with the liability of executives, no author refers to hypothesis of liability because of the pursuit of social goals aside profitability, and no case occurred about such a situation. Moreover, Luxembourg strongly impulses corporate social responsibility.

¹²L. 1915, Arts. 811-1 f.

¹³Ibidem, ps. 237–239. See, to the same effect, Steichen (2018), n°597.

¹⁴Winandy (2008), p. 84. The solution is not questionable, only the reasoning about the definition of company is interesting.

¹⁵Majerus (1938).

¹⁶Cour administrative, 2010, n° du rôle 24416C 24427C.

¹⁷L. 1915, Arts. 811-1 f.

¹⁸Hiez (2020).

¹⁹L. 2017, Art. 2.

Table 2 Table of INDR labels per year in Luxembourg

Years	N°
2010	11
2011	14
2012	14
2013	3
2014	14
2015	21
2016	32
2017	23
2018	12
2019	21
2020	15

2.2 *The National Involvement into the Corporate Social Responsibility*

Apart from the strict legal framework, the question of B Corp takes place into a context of a growing interest for corporate social responsibility and an official recognition of social and solidarity economy.

From the capitalist enterprises perspective, the corporate social responsibility is not a Luxembourgish specificity and the European Commission supports that focus. In Luxembourg, the government early assessed its support to this orientation,²⁰ and the enterprises union of Luxembourg initiated the creation in 2007 of a National Institute for Sustainable Development and Social Responsibility (INDR).²¹ Till 2020, INDR has labelled 170 enterprises for their social responsibility (see Table 2). That public impulsion and support, relayed by the economic sector and notably the Chamber of Commerce, has been successful. In 2020, there are not less than 180 enterprises labelled by INDR.

The number of labelled enterprises is impressive, far higher than the number of enterprises labelled as B Corp in the neighbouring countries if related to the size of the country. Therefore, one may wonder if the labelling process is less exigent. It is difficult to answer this question and only a deep inquiry would give a full and certain answer. However, apparently, it does not seem to be the case; The procedure to get the label is similar to the one of B Corp: a questionnaire of about one hundred questions to assess the CSR performance is filled online. Each item may receive five different marks: no action, sensitivity, implementation, reporting, sharing. The enterprise receives a personalised reply and, if it did not succeed, is invited to implement an action plan. When a sufficient level is reached, an expert visits the

²⁰Speech of the Ministry of employment before the employee Chamber, 2003: https://gouvernement.lu/fr/actualites/toutes_actualites/discours/2003/07-juillet/03-biltgen-responsabilite-sociale-entreprises.html (last accessed on 20 December 2019).

²¹<https://www.indr.lu>.

enterprise to control the documents that have been provided to prove the answers to the questionnaire. Obviously, the diverse steps have a cost.

Luxembourg did not only consider CSR, but involved as well into social and solidarity economy.

2.3 The Establishment of a Legal Framework for Social and Solidarity Economy

Even if B Corp differs essentially from social and solidarity economy, they share at least the same object not to put the profitability and the distribution of profits as the only purpose of the enterprise. Therefore, the approach of the social and solidarity economy in a country may impact B corps: the development of the social and solidarity economy offers a legal status and the decreasing need to obtain the B Corp label. Therefore, it is important to describe this development of the social and solidarity economy in Luxembourg. From the social and solidarity economy side, the last decade has been the years of recognition. In the governmental coalition agreement of 2005–2009, the Ministry of Family was appointed as the responsible body for solidarity economy. In 2009 a new Department of Solidarity Economy was established within the Ministry of Economy and Commerce alongside a separate post of Minister for the Solidarity Economy. The department's creation was symbolically important, as it was the only one of its kind in Europe at that time.²² One of its principal goals was to better define the boundaries of SSE and stimulate the creation of a platform for all its actors. In 2013 the Department of Solidarity Economy joined the Ministry of Labour, Employment and Social and Solidarity Economy (MLESSE) and, as a result, was renamed the Department of SSE.

The social and solidarity economy union of Luxembourg (ULESS) was established in 2013,²³ with an official support of the state, through a convention which was immediately concluded between the ULESS and the Ministry in charge of social and solidarity economy. ULESS aims at the grouping of the enterprises of the sector, the follow-up and the information on the legal news, lobby in the legislative process. . . ULESS contains nowadays 300 members, employing 20 thousand employees. In 2016, that recognition made one more step with the adoption of a legislative definition of social and solidarity economy:²⁴

The social and solidarity economy is a way of undertaking to which take part private legal persons that meet the cumulative following conditions:

²² See <http://alternatives-economiques.fr/blogs/abherve/2010/08/24/la-vision-du-ministre-en-charge-de-leconomie-solidaire> (last accessed on 7 November 2019).

²³ <https://www.uless.lu>.

²⁴ Act of 2016 on the creation of societal impact companies.

- (1) To pursue a continuous activity of production, of distribution or exchange of goods or services.
- (2) To meet at least one of the two following conditions:
 - (a) They aim at bringing, through their activity, a support to the persons in a vulnerable situation, either because of their social or economic situation, or because of their personal situation, notably their health or their need of a social or medico-social accompaniment. These persons may be employees, clients, members or beneficiaries of the enterprise;
 - (b) they aim at contributing to the preservation and development of social cohesion, to the struggle against exclusions and the sanitary, social, cultural and economic inequalities, to the gender parity, to the continuation and strengthening of territorial cohesion, to the protection of environment, to the development of cultural or creative activities and to the development of initial training and lifelong learning activities.
- (3) They have an autonomous management, that is to say, they are fully able to choose and remove their management organ as well as to control and organise all their activities
- (4) To comply with the principle that at least half of their profits are invested in the continuation and development of the activity of the enterprise.

This creation is important for the question of benefit corporation, since the existence of the social and solidarity economy establishes a possible attraction for social enterprises, which otherwise could be naturally integrated among capitalist enterprises. This is particularly meaningful for societal impact companies.

3 The Societal Impact Company

The societal impact company (SIS) has been created by the same act which defined social and solidarity economy.²⁵ As such, this is already meaningful. Technically, the societal impact companies have duplicated several features from the Belgian social purpose company, and the parliamentary proceedings testify it.²⁶ They are companies. Therefore, they constitute a derogation to the general definition of a company. However, in opposition to Belgian legislation, the Luxembourgish legislator did not amend Article 1832 of the Civil Code. In the contrary, it stated the derogation into the Act of 2016 itself (Art. 2). This reinforces the exceptional feature of the derogation, since it is stated out of the general provision. In other words, the

²⁵For more details: Hiez (2017), p. 110.

²⁶Parliamentary proceedings, issue n°6831.

adoption of the societal impact company does not appear as a moment in a long-term evolution of rethinking of the notion of company.²⁷

However, the societal impact company is fully a company, that is to say, it is not close to the associations. It is not a new kind of company, but as social purpose companies, it is a modality of pre-existing companies. It is a legal scheme partially inspired by the Belgian example of social purpose company (“société à finalité sociale”), submitted to a form of accreditation that can be given to the organisations which fulfill a number of specific conditions under the following legal forms: public limited liability companies operating as sociétés anonymes (SAs);²⁸ private limited liability companies operating as *Sociétés à responsabilités limitées* (SARLs);²⁹ and cooperatives.³⁰ Although the associations are not eligible, they can pursue part of their activities under the scheme if they establish a subsidiary company that can be accredited. Of course, the SIS is an opposition to the general definition of a company, since it does not refer to the distribution of profits, and that the SIS may even state that it will not distribute any. Therefore, the legislator stated explicitly that derogation;³¹ It may only be observed that the derogation has not been included in the general provision of the Civil Code but strictly limited to the validity of the SIS. The SIS is surely on line with the new trend of social impact orientation and this is visible both through the conditions required for its accreditation (Sect. 2.1) and through its subsequent control (Sect. 2.2). That description will allow a short assessment (Sect. 2.3).

3.1 *The Conditions for the Creation of a Social Impact Company*

First, the creation of a SIS requires a ministerial accreditation³² that may be asked both by an existing company or a company to be created. The decision of accreditation is held by the Minister competent for social and solidarity economy, but he is supported in this mission by the consultative committee for the SIS.³³ The commission is composed of four members, chosen on one hand among representatives of

²⁷ We may notice that an important reform of the commercial companies Act of 1915 happened in 2016: Act of 10 August 2016 modernising the amended Act of 10 August 1915 concerning commercial companies and amending the Civil Code and the amended Act of 19 December 2002 concerning the trade and companies register as well as the accounting and annual accounts of companies, (Memorial A n°167, August 23rd, 2016); but it does not concern at all any conceptual aspect nor consider a substantial change of definitions.

²⁸ L. 1915, Arts. 410-1 f.

²⁹ L. 1915, Arts. 810-1 f.

³⁰ L. 1915, Arts. 811-1 f.

³¹ L. 2016, Art. 2.

³² L. 2016, Art. 3.

³³ L. 2016, Art. 10.

social and solidarity economy sector, on the other hand among highly qualified persons competent on social entrepreneurship, social investment or corporate social responsibility.³⁴ A public servant in charge of social and solidarity economy takes part to its meetings, without any voting right. The Minister may take part as well. We may notice that this commission is not only competent to give its opinions on the ministerial decisions but also to make any proposal to improve the legal framework for the SIS.³⁵ To achieve its mission about the accreditation, the committee may access all the documents provided to the Minister by the SIS and may also ask for any additional information.³⁶

Second, the SIS is defined by the conditions it has to meet.

- (1) Any public limited liability company, any private limited liability company, any cooperative society which meets the principles of social and solidarity economy may be approved by the Ministry in charge of social and solidarity economy as a societal impact company if their by-laws meet the following requirements:
 1. to precisely define the social object it pursues under Article 1 (2);
 2. to provide some performance indicators which are unable to control the achievement of the social object in an effective and reliable way.

At a first glance, therefore, the requirements are quite light, even if the provision of indicators for the social performance engages for the future. But apart from these prerequisite, some more substantial obligations are applicable to the SIS. The most exigent obligation concerned the remuneration of the employees: the average maximum remuneration paid to the employees may not exceed six times the minimum social wage.³⁷

In addition to this first obligation, another constraint is put on the financial structure of the SIS, more important. A limited profitability principle needs to be respected. The SIS's capital can only be composed of two classes of shares: "impact shares", which do not give rights to the distribution of any dividend nor to an added value of the share; and "return shares", which give entitlement to a portion of the dividends.³⁸ At any given time, the SIS's capital must be composed of a minimum of 50% impact shares (up to a maximum 100%). In addition, dividends can only be distributed after control that the social goal has been achieved, evidenced by the performance indicators. If a SIS's capital is composed of 100% impact shares, no dividend can be distributed to the shareholders. In return, the SIS benefits from tax exemptions³⁹ and donations or gifts presented to the SIS are tax-deductible for the

³⁴Règlement grand-ducal 20 January 2017, Art. 1 (1).

³⁵L. 2016, Art. 10 line 4.

³⁶L. 2016, Art. 10 line 3.

³⁷L. 2016, Art. 5.

³⁸L. 2016, Art. 4.

³⁹L. 2016, Art. 14.

donor.⁴⁰ A special law has been enacted in 2018 to ensure to these not-for-profit SIS the benefit of the same public support like other non-for-profit organisations,⁴¹ for instance building social housing.

3.2 The Continuous Control on the Social Impact Company

The control upon the SIS takes several forms. The most obvious one consists in the possibility to remove the accreditation of the SIS. No delay is foreseen for the accreditation, but the Minister is charged of the oversight of SIS, and he must ensure that they still comply with the conditions required for the accreditation but as well that they comply with the provisions of the act on the SIS.⁴² The Minister removes the accreditation to the SIS which does not meet anymore the legal conditions.⁴³ The letter of this last provision is a little bit confusing, since the word “condition” refers to the previous word “condition” on the second line about the conditions required to be accredited. If so, the accreditation could only be removed if such a condition is not anymore met, but not if the SIS does not comply with its legal obligations, notably the limitation of the wages. This restrictive interpretation is not the only one; in such a case, there would be no sanction to the infringement of its obligations by a SIS; the word condition can be understood as referring also to the obligations of the SIS.

As such, the removal of the accreditation does not provoke the dissolution of the accredited company, but the Minister may appeal to the court, through the public prosecutor, which will state dissolution and winding-up of the company (Art. 11). In addition, the winding-up of the company is substantially regulated by the act: the net assets shall be allocated either to another SIS pursuing a similar goal, or to a Luxembourgish foundation or not-for-profit association accredited for its public interest. This is a strong complement to the limited profitability of the SIS mentioned above.

But this administrative control is not the only one. As its name clearly indicates, one of the specificities of the societal impact company is both its social impact and the use of some indicators to measure its achievement. The company must establish

⁴⁰L. 2016, Art. 14.

⁴¹Loi du 31 août 2018 1° du Code du travail; 2° de la loi modifiée du 25 février 1979 concernant l'aide au logement; 3° de la loi modifiée du 19 juillet 1991 portant création d'un Service de la formation des adultes et donnant un statut légal au Centre de langues Luxembourg; 4° de la loi modifiée du 6 janvier 1996 sur la coopération au développement; 5° de la loi modifiée du 31 mai 1999 portant création d'un fonds national de la recherche dans le secteur public; 6° de la loi modifiée du 21 septembre 2006 sur le bail à usage d'habitation et modifiant certaines dispositions du Code civil; 7° de la loi du 12 décembre 2016 portant création des sociétés d'impact sociétal.

⁴²L. 2016, Art. 9 line 2.

⁴³L. 2016, Art. 9 line 3.

an annual extra-financial report,⁴⁴ communicated to the Ministry (Art. 63). The possibility (or impossibility) to allocate dividends to performance shares⁴⁵ depends on the conclusion of the report. Moreover, the societal impact companies have to adopt a salary policy that ensures that the maximal salary is not higher than six times the social minimum salary as defined by law⁴⁶ and the auditor will have to assess yearly the compliance with that obligation⁴⁷ nevertheless, that latter formality has been removed in 2021, among others, by an act aiming at the reduction of all the formalities and the subsequent cost for the SIS.⁴⁸ These reports are at first addressed to the members for the general meeting, and the prohibition of any distribution of dividends in case the social purpose has not been reached has been established as the best insurance for the pursuit of these goals. In fact, no SIS issued any return shares, so that any distribution of dividends is impossible, and the above control mechanism is inapplicable.

3.3 *An Assessment of the Social Impact Company*

The SIS can adopt some mixed business models: the SIS are allowed to carry out some commercial activities and to take part in public procurement tenders on the one hand and to receive public funding from the State of the other.⁴⁹

The SIS' emphasis on a social goal and the social impact assessment appears to fit the EU operational definition of social enterprise. This definition was first given by the European Commission through its famous communication on the social business initiative in 2011;⁵⁰ the last communication of the Commission in 2021⁵¹ has strongly renewed the European policy but did not amend the previous definition. It

⁴⁴L. 2016, Art. 6 (2).

⁴⁵L. 2016, Art. 7.

⁴⁶Ibidem, Art. 5.

⁴⁷L. 2016, Art. 5 line 2.

⁴⁸Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal et modifiant a) la loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises, b) la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, c) la loi modifiée du 1er décembre 1936 concernant l'impôt commercial communal et d) la loi modifiée du 16 octobre 1934 relative à l'impôt sur la fortune.

⁴⁹Meaningfully, two years after the adoption of the Act of 2016, a new act has been enacted to ensure for the SIS the same possible public funding by the allowance to be contractor of several ministers like not-for-profit associations: L. 31 August 2018.

⁵⁰COM(2011) 682 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Social Business Initiative, 25 October 2011.

⁵¹COM(2021) 778 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building an economy that works for people: an action plan for the social economy, 9 December 2021.

is considered both suitable for the social and solidarity economy enterprises and the social enterprises, most notably due to its limited profitability and its obligation to invest at least half of its profits back into the enterprise.⁵² The only potential gap with the European approach concerns the governance, and yet, as that dimension is rather loosely defined by the EU, the SIS does not strongly deviate from this requirement. Although it is very difficult to assess whether the organisations that are considered as social enterprises in Luxembourg fit exactly to those described by the European definition, the flexibility evident within both definitions suggests that they are compatible.

The societal impact companies are distinct from associations, but the assessment must be nuanced, since in practice one should strictly distinguish the societal impact companies whose capital is composed of 100% of impact shares and those whose capital contains both impact shares and performance shares.⁵³ The difference between the two situations does not concern the functioning of the company as such, but their tax treatment.⁵⁴ While the societal impact company are in principle taxed exactly like any other company, it is taxed like a not-for-profit association when its capital is composed only of impact shares. Indeed, in that case, the societal impact company will not be able to distribute any dividend. This was not the initial solution of the bill, but the ULESS obtained it to meet the need of associations of legal certainty. It must be observed that, in practice, all the societal impact companies established so far are 100% impact shares.

After that short research on B Corp into the Luxembourgish law, it appears that this act is ambivalent. On one hand, the importance of the financial sector is not without any consequence on company law: freedom remains the key feature of company law, and the model of large companies tends to influence the general regulation. On the other hand, the national solutions to show a social engagement are rich: a national label comparable to B Corp, a legal recognition for the social and solidarity economy, and specially the adoption of a new form of company with the societal impact company.

Therefore, the situation is apparently contradictory: a legal landscape friendly for the B Corp, and very few enterprises labelled as B Corp. However, the explanation is not difficult to find, and reminds that a legal environment open to an institution is not necessarily the guarantee of its success.

⁵²Articles 3 and 7.

⁵³L. 2016, Art. 4.

⁵⁴Ibidem, Art. 14.

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Certified B Corps in Mexico



Luis Manuel C. Méjan

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1 Introduction

Companies that identify a specific social or environmental problem and create a business model to facilitate or develop solutions to said problem from a market perspective are not specifically contemplated in Mexican positive law. This is despite the fact that Mexico has the highest inequality rate among countries belonging to the Organisation for Economic Co-operation and Development (OECD) and one of the highest rates in the world. At the beginning of 2020, before the COVID-19 pandemic, the OECD's Secretary General and former Secretary of the Treasury addressed Mexico's business community and stated that the average income of the richest 20% was 10.3 times higher than that of the poorest 20% and that, according to 2019 data from the National Autonomous University of Mexico's Institute of Social Research, the richest 10% of Mexicans receive 36% of the country's income, whereas 50% of the population receives 20%.¹ Therefore, it is critical for Mexico to ensure that businesses, in addition to earning profit, help specific areas of society by operating in ways that have a positive social, environmental, and economic impact.

Some initiatives originating from society's living forces contemplate the need for Mexico to regulate companies to regulate companies with an important social and environmental impact.² However, this could take some time, as the current public administration, although it claims to prioritize Mexico's lower-income population, has made few political efforts to eradicate poverty, thereby allowing poor Mexicans to simply remain as a source of political support and campaign votes. Thus, the present chapter highlights the great need for the Mexican government to promote the establishment of a regulatory standard for socially committed companies.

2 Mexico's Corporate Legal Structure

Although a company is an economic activity, the companies that practice such activity are the product of a legal structure. As pointed out by the Organisation for the Harmonisation of Corporate Law in Africa: "*Understood at the legal level, as an organization created for the exploitation of an economic activity and the sharing of the profits which result from it, the company is the theater of the combined application of various categories of legal norms.*"³

¹Gurría Treviño (2020).

²Pérez (2020).

³Kalunga and Mortier (2020), p. 9. Own translation from the original French.

Mexican companies are organized under various structures established in various laws.⁴ All of these laws contemplate entities that are eligible to be certified as B corporations.

2.1 Limited Companies

Most companies in Mexico belong to the public limited company (i.e., *sociedad anónima*) category; they can take various varieties such as fixed capital or variable capital and incorporated or unincorporated governance structures, regardless of whether they are public entities. The fundamental characteristic of this type of companies is their “impersonal nature,” as “the partner is not interested, but his contribution.”⁵ Many small and medium-sized enterprises as well as large corporations fall into this category, as do financial system entities and enterprises that place their capital or securities on the market.

2.2 Limited Liability Companies

The second most common (albeit by a wide margin), type of companies comprises limited liability companies (i.e., *sociedades de responsabilidad limitada*). Limited liability companies consist of partnerships in which the meeting of a capital is combined with the importance of the people that compose it (although with a maximum limit to the number of members); however, members’ responsibility is limited by how much they contribute to the company.

2.3 Cooperative Societies

Cooperative societies (i.e., *sociedades cooperativas*) are governed by their own laws, which define it as a: “*social organization made up of individuals based on common interests and the principles of solidarity, self-help and mutual aid, with the purpose of satisfying individual and collective needs through the performance of*

⁴Ley General de Sociedades Mercantiles, Ley de Sociedades Cooperativas, Ley de Sociedades de Solidaridad social, Ley del Mercado de Valores, Ley de Fondos de Inversión, Ley de Asociaciones Público Privadas, leyes del sector agropecuario y las leyes del sistema financiero, por citar las más significativas. <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

⁵León Tovar (2016), p. 28.

*economic activities of production, distribution and consumption of goods and services.*⁶

The purpose of these companies is that the owners of the company are both the clients and users of its services, establishing a closed-circle operation wherein synergies and economies of scale are used to obtain goods and/or services for them, their homes, or their productive activities. Owners work together in the production of goods and/or services, contributing their personal, physical, or intellectual work, attracting resources through money saving deposits from their partners, and providing said partners with credit using the funds raised. According to González Bustamante, “*The historical antecedents of this institute go back to the days when the feeling of solidarity or the need for mutual help was born among men.*”⁷ However, it seems that social cooperative societies are focused on meeting needs that differ from those contemplated by social enterprises.

2.4 Simplified Stock Companies

Having been only recently adopted within the Mexican legal framework, following the example set by France and Colombia, the simplified stock companies (i.e., *sociedades por acciones simplificadas*) category has emerged in Mexico, aiming to formalize small businesses, which may comprise only one partner. Simplified stock companies are structures intended for small enterprises, so they could hardly qualify as candidates to allocate part of their income to promote social or environmental causes. Rather, these societies should be seen as an object to be promoted by social enterprises.

2.5 Others

As with cooperative societies and simplified stock companies, the same thing can be said of the corporate structures in agrarian law. Although these structures are destined to an activity worthy of being promoted, they typically serve more as objects, rather than actors, of the social drive.

⁶ Article 2 of the General Law of Cooperative Societies (*Ley General de Sociedades Cooperativas*).

⁷ González Bustamante (1988), p. 2947.

2.6 Corporate Governance

An important reflection on Mexico's business sector is that the principles of corporate governance, as enunciated and promoted by the OECD,⁸ have been accepted in Mexican business practice, following the Code of Principles and Best Practices of Corporate Governance,⁹ which is not a legally binding set of rules but rather a set of recommendations (i.e., soft laws).¹⁰ However, in certain sectors, these principles have become mandatory standards; such is the case of the entities that make up the financial system, as all of them are required by law to implement corporate governance principles and standards.¹¹ The presence of these increasingly widespread principles and structures in Mexico's commercial environment makes the country a fertile ground for social enterprises.

3 Other Non-Business Corporate Structures

Since Mexico is a federal republic, some issues have been preserved for legal regulation by the states that make up the federation. Such is the case of what happens with three activities that must be considered to promote activities with social value: entrepreneurship, social welfare, environmental care as do the certified B-corporations. Those three activities¹² are: private assistance; social, sports, cultural or artistic activities; performance of liberal professions.

3.1 Assistance Institutions

Assistance institutions can be defined as: *“legal persons of public interest that, with assets irrevocably assigned to them by individuals, permanently carry out humanitarian acts and pursue purposes of assistance, non-profit purposes and without individually designating the beneficiaries.”*¹³

Assistance institutions comprise groups that are ordinarily subject to regulation and supervision by the government, which monitors their actions and performance to prevent them from being used for commercial purposes, as well as to promote and support their goals. Specific laws have been issued for their regulation, such as the

⁸[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN\(99\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En).

⁹https://www.cce.org.mx/wpcontent/uploads/2018/10/Codigo_Digital_v20_f.pdf.

¹⁰Instituto Mexicano de Ejecutivos de Finanzas (2009).

¹¹Méjan (2008), p. 136.

¹²Law of Social Assistance. <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

¹³Sánchez Medal (1998), p. 391.

Social Assistance Law (a federal law) and pieces of legislation issued by each state's government (Mexico is a federation with 32 independent entities).¹⁴ In the country's capital, Mexico City, there are 506 private assistance institutions.¹⁵

Assistance institutions' economic resources are usually obtained from individual donations, foundations created either by living persons or mortis causa in wills, and organizations dedicated to making these types of contributions. A great example of such institutions is the Nacional Monte de Piedad, a non-profit private assistance institution (originally established as a financial institution) that has operated uninterruptedly for 244 years; its main aim is to help people in need. It provides social aid mainly by offering pledge loans and other financial services at the lowest interest rates in the market, fair appraisals, and coverage throughout the entire Mexican Republic. With the operational remnants of the pledge loan and financial services, social investments are made in projects of health, education, housing, gender equality, food security, community, and economic development through 600 private assistance or charitable institutions and other programs.¹⁶

3.2 *Civil Associations (Asociaciones civiles)*

Regulated by each state's civil codes, civil associations are non-profit legal entities that are created through a contract through which the associates agree to pursue a common goal that is not prohibited by law and not predominantly financial in nature.

This legal structure is widely used for the realization of educational, cultural, sports or mutual aid activities. *"The civic association is a contract that is frequently observed by persons who join their efforts for purposes other than commercial gain."*¹⁷

Although these associations are restricted from dedicating themselves to a predominantly economic activity, they manage resources from associates or donors' contributions, which allows them to carry out their activities. If during these activities they obtain profits, these must be reinvested in their activities. Further, these associations will never be able to distribute profit, interest, or dividends to the associates.

¹⁴For instance, in Mexico City, there is the Law of Private Assistance Institutions. <http://www.aldf.gob.mx/archivo-956917130e21b29d90acb247ab5df8d5.pdf>.

¹⁵<https://toolsportal.jap.cdmx.gob.mx/DIRIAP/view/principal.cfm>.

¹⁶<https://www.montepiedad.com.mx/>.

¹⁷Rico and Garza (2008), p. 333.

3.3 *Civil Partnerships (Sociedades civiles)*

As with civil associations, civil partnerships are formed through a contract between partners for the purpose of conducting activities that are primarily economic and for-profit in nature but should not be classified as commercial in nature. “*Civil societies are private law businesses that primarily pursue economic goals through the provision of goods or personal labor, but without suggesting commercial activity.*”¹⁸ A classic illustration of this organization is the group of professionals who conduct their professional activities in these firms, such as lawyers, public accountants, physicians, and architects.

3.4 *Trusts*

Trusts have become more common in Mexico. A trust consists of an affectation that one or more people make of certain assets to an institution, regularly a bank, to be destined for a specific purpose, without establishing it as a legal entity but rather as an autonomous entity. This purpose can be the temporary or permanent performance of certain activities. Further, this purpose may be cultural, social, ecological, promotional, or related to a certified B corporation’s activities.

As it can be seen from the description of these legal structures, although they are not commercial entities, they can be used and qualified within the purposes of the so-called Certified B Corporations or entities for social or environmental impulse.¹⁹

4 Ecological Legislation in Mexico

In Mexico, companies’ environmental impact is strictly regulated; companies have a series of obligations to preserve the environment. These norms are established in the country’s Constitution, which states that “Everyone has the right to an adequate environment for their development and well-being.”²⁰ These laws include the following:

¹⁸Rojina (1962), p. 297.

¹⁹A more extensive explanation of Mexico’s legislation governing the formation of legal persons may be found in the book *Las Empresas con Propósito y la Regulación del Cuarto Sector en Iberoamérica. Informe Jurisdiccional de México* [Companies with a Purpose and the Regulation of the Fourth Sector in Ibero-America]. Secretaría General Iberoamericana, Programa de las Naciones Unidas para el Desarrollo, International Development Research Centre (1st ed.). Madrid 2021.

²⁰*Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the Mexican United States]. Article 4. <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

- General Law of Ecological Balance and Environmental Protection
- General Law of Sustainable Forestry Development
- General Law of Climate Change

Further, we must also consider laws and regulations in each of Mexico's 32 states, as well as the different international Agreements and Treaties to which Mexico is a party. All these rules and regulations focus on environmental risk-related issues such as:

- Land use
- Proximity of companies to population centers
- Supervision of high-risk activities
- Disposal and management of hazardous materials and waste
- Nuclear energy, noise, vibrations, thermal and light energy, odors, and visual contamination

This indicates that the protection of the environment and the purposes pursued by a company with social and environmental impact (i.e., a certified B corporation) are covered. Subsequently, we will explore how a company is regulated as a promoter of ecological well-being.

5 Fiscal Legislation

There is a tax regime in Mexico that authorizes any taxpayer, as a natural or legal person, to deduct from their income the amounts contributed or donated to charitable entities and activities, after they have received the authorization to do so. Mexican tax law²¹ exempts from income tax the following non-profit legal entities: assistance or charitable institutions; civil societies or associations; organized non-profit and authorized to receive donations; as well as associations, civil societies, and trusts that are dedicated to activities considered worthy of being promoted, including those conducted in pursuit of the objectives of certified B corporations. These activities include the following:²²

- Promotion and dissemination of the arts
- Educational and research activities
- Protection of the nation's cultural heritage
- Libraries and museums
- Promotion of citizen security
- Defense of human rights
- Participation in matters of public interest

²¹Article 82 of the Law on Rent Tax. <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

²²Articles 79 and 151 of the Law on Rent Tax. <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

- Promotion of gender equality
- Protection of natural resources and the environment
- Civil protection
- Advocacy
- Consumer protection
- Agricultural or artisan products projects
- Granting of scholarships

This means that the country already has a legal framework that provides significant incentives for the development and promotion of social and environmental activities.

6 Certified B Corporations in Mexico

In Mexico, there are 64 companies certified by B Lab as B-corporations. Some were created in Mexico and are currently operating under Mexican law, while others are foreign companies that have a legal presence in the country.²³ These companies are listed in the Appendix. To obtain such certification, Mexican companies must include in their statutes the following conditions:

1. That the corporate purpose of the company includes the mention of seeking a positive material impact on society and the environment.
2. That the company's administrative body takes into account any decision or action that influences (i) the shareholders; (ii) its workforce, subsidiaries, and suppliers; (iii) its clients and consumers; (iv) the community; (v) the local and global environment; (vi) its long-term and long-term performance; and (vii) its ability to fulfill its corporate purpose. However, none of this implies the creation of special rights for third parties, as the company's by-laws determine the rights and obligations of the shareholders and the company's legal representatives, as well as their actions toward third parties. Nevertheless, this does not allow third parties to enforce these laws (thereby affecting the company's shareholders or legal representatives) beyond what is established by law.²⁴ In Mexico, a Board of Directors of the Global Movement and Initiative of B Corporations was established in 2012, joining the global B movement in 2014.²⁵

²³<https://sistemab.org/mexico/>.

²⁴https://assets.ctfassets.net/l575jm7617lt/3YyR7Nc94xltqGJDfdybYE/07e07de6f2a501336b789c38767fa847/Mexico_Legal_Requirement.pdf.

²⁵ Further information on the appearance and operation of B companies in Mexico can be found in: *Sistema B y las Empresas B en América Latina: Un Movimiento Social que Cambia el Sentido del Éxito Empresarial*. Edición del Banco de Desarrollo de América Latina. ISBN: 978-980-422-146-0. Colombia 2019.

On the creation of an ad hoc legal framework for these companies, it should be noted that there is a plurality of opinions:

The legal figure that most of them start out as is that of a civil association. From my experience, most of them start out like that and eventually begin to operate under hybrid models or become a SAPI (Sociedad Anónima Promotora de Inversión), for example, when they want to raise investment.²⁶

For some, this issue must be exclusively fiscal because the incentives must come from the allocation of a tax prebend. Some ideas of how this issue can be addressed in legislation are displayed in the following section.

7 Ideas to Develop a Legal Regime for Social Impact Companies in Mexico

This section discusses the development of a legal regime for companies eligible for inclusion in the B-certification program. It also explores the goals for which certified B corporations have been formed by the movement led by B Lab, which states its purpose as follows: “*Building on our standards and certification process, our network leads economic systems change to support our collective vision of an inclusive, equitable, and regenerative economy.*”²⁷

7.1 Entity Rating

Muhammad Yunus defined social enterprises as organizations formed with the primary goal of resolving a social, environmental, health-related, or similar problem and the secondary goal of generating sufficient revenue to be sustainable over time.²⁸ Further, as Ortega mentioned at a recent symposium held at the National Autonomous University of Mexico, “[. . .] *social businesses* [. . .contribute] *to the creation of social value through productive activities that generate revenue for social benefit activities* [. . .].”²⁹

One way to achieve that is by establishing a new type of corporate structure that adheres to the principles espoused by socially responsible enterprises. “*The objective of such a commercial society would not be purely economic, but would encompass a much broader purpose. Initially, this approach was limited to the directors’*

²⁶Zarai (2010).

²⁷B Corporation. *About B Lab*. <https://www.bcorporation.net/en-us/movement>.

²⁸Responsabilidad Social Empresarial y Sustentabilidad [Business-related Social Responsibility and Sustainability], <https://www.responsabilidadsocial.net/empresa-social-que-es-definicion-caracteristicas-tipos-y-ejemplos/>.

²⁹Ortega (2019), p. 6.

*strategic decisions, but it is now reflected in the organization's governance structures (articles of incorporation or shareholders' agreements)."*³⁰

A way to address the issue in Mexican legislation and practice could be to qualify a corporate structure for those that already operate within the country with under the category that has been suggested: social and environmental impact entities (*entidades de impacto social y ambiental*). This could prove more beneficial than creating a new category of corporate enterprises. The global economic crisis currently prevalent makes it difficult to launch an initiative of such size to develop such companies exclusively for the purpose of promoting social and/or environmental well-being.

However, it may be possible to motivate extant companies to dedicate a part of their energy and profits to this purpose, especially if they are granted appropriate fiscal incentives. Such a transition for currently existing businesses is made possible by their legal structure. Valderrama et al. noted the following: *"this demonstrates that the company must be lucrative in order to continue. Economic duty is at the base of the pyramid; legal concerns necessary for the company's well-being are at the second level; ethical responsibility is a layer above the previous two; and philanthropic obligation is at the top of the pyramid."*³¹

The study described above²¹ reached the same conclusion when analyzing the feasibility of creating a new legal structure for social enterprises in Mexico. In other words, given the country's current political circumstances, it would be preferable to use the existing legal structures while adding certain provisions.

To this end, the study states: *"However, we believe that the political environment is unfavorable, given the legislator's current priorities with regard to the regulation of the extant types of businesses; in particular, cooperatives, which the legislator could classify them alongside SEs due to their mission containing a social and solidarity economy component."*³²

7.2 Requirements

To accomplish the integration of social enterprises into the existing legal framework, it is necessary to define what constitutes entities of social and environmental impact. Such entities would be required to:

- (a) Be constituted for profit purposes, which is a typical characteristic of commercial entities. An exception to this requirement could provide for non-commercial

³⁰Connolly C., Mujica, J., and Noel, S. *Movimiento legislativo de sociedades de beneficio e interés colectivo (B.I.C.)* [Legislative Movement of Collective Interest and Benefit], p. 7.

³¹Valderrama et al. (2007), pp. 125–134. Universidad Autónoma de Baja California.

³²Secretaría General Iberoamericana (SEGIB) Programa de las Naciones Unidas para el Desarrollo (PNUD) International Development Research Centre (IDRC) Las Empresas con Propósito y la regulación del Cuarto Sector en Iberoamérica. Informe jurisdiccional de México. Primera edición: Madrid, mayo de 2021 pp. 44, 45.

entities such as private assistance institutions, civil associations, civil societies, cooperative societies, etc. that could be subject to obtaining the qualification provided they meet the other requirements listed below.

- (b) Dedicate a part of their profits or income to social and environmental projects.
 - a. At the discretion of each company according to its statutes
 - b. According to a catalog of activities that the authorities define as suitable because they are those that the State considers that it should encourage according to its social and economic policies.
 - Typically, such activities could be:
 - i. Paying attention to basic health and wellness requirements.
 - ii. Providing access to basic public services.
 - iii. Supporting the defense and promotion of human rights.
 - iv. Promoting social inclusion and mitigation of inequality.
 - v. Promoting cultural activities.
 - vi. Promoting economic actions and support the economic development of social entrepreneurship.
 - vii. Innovating and developing a sustainable infrastructure.
 - viii. Preserving and improving the environment.
- (c) They can do it directly or through a subsidiary of the same corporate group. In this case (which illustrates the integration of a corporate group), it is possible that a non-profit entity (e.g., a civil association) may become part of it.
- (d) The way to do so may consist of a direct economic investment, a reinvestment of profits, or the integration of reserves that are later redirected for such purposes.
- (e) Have a corporate governance structure that establishes a board committee that deals with social and or environmental projects.
- (f) Include in their annual report what has been done in the social or environmental field (*vis-à-vis* sports, entrepreneurship, education, health, education, culture, housing, and environment-related activities).
- (g) Comply with ecological regulations and economic competitiveness-related industry standards in their specific sectors (e.g., healthcare, finance, communications, etc.).

7.3 Regulatory Authority

Some of the countries that have legislated the issue of the B corporation have designated a governmental department (according to their own legal and organizational structure) to supervise companies' registration, regulate the activities that companies must undertake to be promoted, supervise the fulfillment of the objectives such entities, approve the projects in which the resources are invested, and authorize the provision of incentives. In Mexico, the Ministry of Economy or some decentralized body could take on such responsibilities.

The existence of one such authority and the powers granted to it must be measured according to how much state intervention is determined to be appropriate. Particularly, it may be preferable that the legal regime only has a basic definition, and that state intervention remains as limited as possible. This is because B certification is about promoting social and environmental benefits instead of weighing companies down with bureaucratic responsibilities. Self-regulatory entities that make up the entities themselves tend to be a good answer.

This authority could exist independently from the B Lab network.³³

7.4 Incentives

Fiscal stimuli are often used to promote state-related activity effectively. Limiting fiscal voracity in the sake of identifying certain behaviors among the governed is an objective that governments must pursue, as fostering new and more active businesses will result in increased collection. According to Calvo Nicolau, *“there are times when the designer of the norm seeks to promote behaviors between individuals through the law; to accomplish this, they arrange for the awarding of incentives or rewards to those who adapt their behavior to the promoted behavior.”*³⁴

Legislation must preserve the deductibility treatment of donations received to be invested in such activities. Likewise, it will be convenient to consider giving a favorable tax treatment to the certified entity. Those incentives could range from paying taxes at a reduced rate; being able to deduct what was invested in social or environmental activities; having access to other types of deductions; alleviating bureaucratic requirements for filing applications; as well as obtaining permits and authorizations, frequent periodic declarations, and secondary tax obligations. Tax incentives should also be addressed to the entity’s shareholders or partners in regard to dividends or participations received or in the case of the sale of shares or social stock.

8 Conclusion

The purpose of certified B corporations is highly noble and worthy of being promoted. Although Mexico does not have a special legal regime for the creation of this specific type of entities, it does have structures in its legislation and practices that can be used for this purpose. Therefore, there is a system in place that can be

³³B Lab became known for certifying B corporations, which are companies that meet high standards of social and environmental performance, accountability, and transparency, <https://www.bcorporation.net/en-us/movement/about-b-lab>.

³⁴Calvo Nicolau (2013), p. 84.

used to supervise the registration and certification of social and environmental impact entities. It is possible to build a suggestive regime that invites enterprises to adhere to the program and philosophy of the project.

Appendix

There are 128 B Lab-certified companies working in Mexico. Of these, 56 companies are based in other countries, while 72 originated and are based in Mexico. Some of them operate in other jurisdictions (as of February 10, 2022; source: <https://www.sistemab.org/>).

B Lab-certified Mexican corporations

Enterprise	Summary	Product or service	Industry
Aguagente S.A.P.I.	Purified water in your home for a small monthly cost, in a simple, effective, and unique way.	Service	Water, Food
Altia Health	Private medical consultations—either face-to-face or through telemedicine.	Service	Health
Amor & Rosas	Ethical fashion brand bringing together modern designs with Mexican handmade embroidery and eco-friendly fabrics. Their pieces showcase the unique and authentic look of Mexican culture in a modern and trendy way, with high quality as a top priority.	Product	eCommerce
Asesores para la Ininvestment Social, S. C.	Company aiming to link key actors to promote sustainable development in the social, economic, and environmental fields in Mexico.	Service	Consultancy and Advisory, Support for Entrepreneurship, Employability
Blanco Carrillo	Expert legal advice for Mexico's business sector.	Service	Consultancy and Advisory
Bodega Cero	Food, personal hygiene products, cleaning, and home care, made with natural, local ingredients and free of disposable packaging.	Product	Food
Botica de Jabón S.A. de C.V.	Manufacture of soap, shampoo, conditioner, and handmade detergent.	Product	Beauty
BUNA	Find, toast, and share rich coffee. Espresso machines.	Product	Food

(continued)

Enterprise	Summary	Product or service	Industry
Carla Fernández	Fashion label inspired by the geometrics and textile richness of Mexico.	Product	Textile, Clothing, and Accessories
CIHUAH	Company offering responsible clothing and accessories with contemporary design.	Product	Art and Culture
Cielo Hamacas	Preservation and innovation of ancient Mayan hammock weaving tradition.	Product	Art and Culture
Cirklo	Company offering consultancy services for: innovation management, human productivity, strategic alignment, impact strategies, product and service development, development of impact projects in the fields of education, productive value chains, and sustainable cities.	Service	Consultancy, and Advisory
CO_ Capital	Company investing in early-stage and early-growth enterprises in Latin America across different sectors: (i) education, workforce, and economic development; (ii) access to healthcare; (iii) access to basic sustainable infrastructure; and (iv) the nexus between agriculture, food systems and regeneration.	Service	Financing
Comsustenta	Retails company selling compressed natural gas for vehicular use in Mexico.	Product	Energy, Financing, Investment, and Transportation
Coperva	Telemarketing, customer service, and collection.	Service	Communication and Marketing
Deep_Dive	Consultancy services and development of AI and machine-learning solutions.	Product and Service	Technology and Computing
DEV.F	Course, Professional, and Master in software development, data science/AI, UX/UI design, and digital marketing.	Product	Education
Disruptivo	DISRUPTIVO is a company that seeks to empower people to become agents of change through social entrepreneurship through three axes of work: inspire, train, and promote.	Service	Communication and Marketing

(continued)

Enterprise	Summary	Product or service	Industry
Donadora	Crowdfunding platform through which you can raise funds to support personal or social projects such as health campaigns, emergencies, community and environmental projects, volunteering, educational models, etc.	Service	Education, Financing and Investment, Health
Échale	Company aiming to restructure community social networking and rectify the flaws inherent in the self-building process through four pillars: organization and social inclusion, financial education and access to social finance trust, training and technology appropriation, and program replication through social impact franchise.	Products and Services	Construction and Real Estate
Ecolana	Interactive digital platform that allows each citizen to find the right place for their waste. 1. Where to recycle? 2. Recyclability analysis 3. Contact with inclusive recycling chain.	Service	Consultancy and Advisory
Ejido Verde	Sustainable producer of pine resin with the objective of generating prosperity through the establishment and use of resinforest plantations.	Product	Farming
EOSIS	Energy efficiency consultancy agency, aiming to achieve building comfort through passive design consultancy and architectural devices, especially in dry/warm climates.	Service	Consultancy and Advisory
Extensio	Service móvil de manejo de riesgos climáticos, de plagas y calidad para Productres y cadenas agro Provides farmers and actors of the farming value chains with timely information for decision-making: weather and pest forecast and management, production risk mapping, best farming practices, and market trends.	Service	Farming, Cattle-raising, Agroindustry, Food, Technology, and Computing
FINAE	Company offering student loans to support Mexican students who do not have enough financial	Service	Education, Financing, and Investment

(continued)

Enterprise	Summary	Product or service	Industry
	resources to pay for their undergraduate tuitions.		
Fitzer	Fitzer Agua Mineral Brava is a Mexican hard seltzer. A new refreshing combination of mineral water, alcohol, and a touch of flavor. The alcohol is created from our 100% natural cane sugar fermentation process. The very nature of its ingredients and production process.	Product	Food
FONDELA	Company aiming to strengthen institutions by facilitating their access to public and private resources that boost their productivity. Committing ourselves to support projects of vulnerable groups and fostering entrepreneurship. They provide tools, innovative and quality services for searching and obtaining resources, with leadership and excellent customer service	Service	Support to Entrepreneurs
Fondify	Fundraising company and platform that links companies, people with CSOs using different collection channels inspired by the theory of donor behavior.	Service	E-commerce, Financing and Investment, Community Management
Grameen de la Frontera	Microfinancing agency. Works to achieve participatory and self-sufficient communities.	Service	Financing and Investment
Green Tank Ideas para la Sustentabilidad	Company offering consulting and strategy in sustainability.	Service	Consultancy and Advisory, Financing and Investment
GRUNER	GRUNER is a sustainability solutions firm that specializes on consulting services for carbon management as well as renewable energy and waste valorization project development.	Service	Environmental
Grupo AXIUS	Company fostering sustainable growth for companies and people. It has 3 areas of expertise: leadership, planning, and positioning.	Product	Consultancy and Advisory, Human Resources
Grupo SAD	Graphic arts.	Service	Charts and Impressions
Handen Consultancy	Consulting company offering tips and tools to help businesses and	Service	

(continued)

Enterprise	Summary	Product or service	Industry
	organizations tackle social and environmental problems.		
HEALTHIC	Company offering sterilization of surgical instruments.	Service	Health
Hexagon Data	Data strategy.	Service	Environmental
Hipocampus Centros de Aprendizaje	Provides community-driven high-quality care and education services for early childhood at an affordable price for most of the population.	Service	Education
Iluméxico	Provides electricity to rural communities in Mexico by offering solar-powered home systems to families without access to the electric grid.	Product	Energy
Impact Hub Ciudad de México	Consultancy and working spaces.	Service	Agency
Integradora de Franquicias PKT1, S.A. P.I. de C.V.	Messenger service offering a personalized “zero carbon dioxide” service focused on satisfying customer needs through a documentation service and on-site collection of packages or envelopes.	Service	Messenger Service
IntegraRSE	Transformation of traditional companies into companies that solve socio-environmental problems.	Service	Environmental
Kaya Impacto	Kaya specializes in capital advisory services for social entrepreneurs looking to raise capital to grow and scale their business.	Service	Financing and Investment
Kubo Financiero	Online community for financial services: savings, investments, and loans on a peer-to-peer lending platform.	Service	E-commerce, Financing
LECOMF	As a brand of sustainable, innovative, and radically optimistic ready-to-wear, the LECOMF universe becomes a source of freedom, happiness and, above all, uniqueness.	Product	Textile
Luken Design	This company designs products and furniture manufactured with HDPE plastic and 100% recycled polyaluminium.	Product	Dseco and Home Furniture

(continued)

Enterprise	Summary	Product or service	Industry
Luxelare	An agro-tech/insurtech company offering small-to-medium-sized farmers an integrated solution combining precision agriculture and the CAPTUM software platform, as well as digital crop insurance products.	Products and Services	Technology, Computing, Farming
Matcha Kaori	Products made with Japanese green tea and accessories related to its consumption.	Product	Food
Natura Medio Ambiente	Agency offering environmental consulting and engineering advice. Also conducts studies related to the environment, construction safety, health, and social impact.	Service	Agency
Pixza	Pizzeria offering pizzas made from 100% Mexican blue corn.	Product	Food
PKT1	Local and foreign courier and parcel services without carbon dioxide emissions.	Service	Exports
PUJOL	Contemporary Mexican cuisine restaurant.	Service	Food
Rayito de Luna	Develops personal care products made with the finest natural ingredients free of synthetic chemicals.	Product	Beauty
Revitaliza Consultores	LEED® certification, green buildings, training, and corporate sustainability.	Service	Construction
RTDs de México	Alcoholic drinks.	Product	Water
Rutopía	Company offering customized, private trips with a quality and safety guarantee for remote destinations throughout Mexico, fostering immersion in nature and genuine connection with local hosts.	Product	Entertainment
Rutopía	Travel agency.	Product	Tourism and Hospitality
Sarape Films	Film and content producer with socio-environmental impact.	Service	Art and Culture
Sarape Social	Design, management, and communication of projects based on creative and transformative ideas from a humanitarian perspective using marketing tools for social transformation.	Service	Communication and Marketing

(continued)

Enterprise	Summary	Product or service	Industry
Semillero de Empresas Rurales, S.A. de C.V.	Artisanal and biodiverse products company that works as a platform to allow access to a competitive market for rural Mayan social enterprises of the Yucatan peninsula under the brands Taller Maya and Traspatio Maya.	Product	Decor and home furniture
Sistema Biobolsa	Waste and resource management system that is both economically accessible and technologically advanced.	Product	Farming
SM Ediciones	SM es una empresa que desarrolla soluciones educativos, formativos y culturales	Products and Services	Education
SmartFish	Una AC incuba las cooperativas de pesca artesanal que les permite producir mariscos de alta calidad validados bajo los estándares de sostenibilidad e higiene y una Comercializadora de Products del mar de origen sustentable	Product	Food
Solardec	Solardec is an industry leader in the renewable energies sector In Mexico. The company designs, develops, and maintains solar energy projects (photovoltaics) for the residential, commercial, and industrial sectors.	Products and Services	Energy
Someone Somewhere	Someone Somewhere designs clothing products showcasing artisanal work from various regions In Mexico. Its items are assembled in specialized workshops in the cities.	Product	Textile, Dress & Accessories
Suministros Analogico Digitales	Dedicated to prepress and digital printing using cutting edge technology. Seeks to boost economic and social development and to protect the environment.	Product	Technology
Sustainable Harvest	Sustainable Harvest is a specialty coffee importer whose mission is to improve the livelihoods of coffee-farming families around the globe through its Relationship Coffee model.		
SVX México	Consulting firm that aims to increase the volume and efficiency	Service	Financing

(continued)

Enterprise	Summary	Product or service	Industry
	of impact investments in Mexico and Latin America		
TAMOA	Abasto responsable de alimentos regionales, preservados por generaciones de agricultores de México.	Products and Services	Farming
Tierra de Monte	This company develops biological inputs based on more than 10 years of research to counteract the damage that erosion and intensive agriculture have left behind.	Service	Farming
Todo Accesible	Company creating accessible spaces for people with disabilities.	Products and Services	Consultancy and Advisory
Unboxed	Company developing projects that promote a balance between profitability and social and environmental impact within companies and organizations.	Service	Consultancy
Yema	Comestibles, Products de perfumería, Products de belleza, artículos para el hogar y artículos deportivos.	Product	Food

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Benefit Corporations in the Peruvian Legal Ecosystem



Juan Diego Mujica Filippi and Claudia Ochoa Pérez

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1 An Overview to the Peruvian Benefit Corporation Legal Movement

Until the late 2020, the Peruvian legal ecosystem did not have any laws that allowed businesses to declare, acknowledge, and operate within a social and environmental benefit purpose in addition to their economic activities. However, over the last decade, sustainable market trends have caught the attention of the Peruvian public sector, private sector, civil society, and academia. These stakeholders have collaborated toward several legislative endeavors such as the most recent and innovative example of the approval of the Peruvian benefit corporation statute, its regulation, and guidelines.

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This article covers the most important milestones of the legislative and regulatory journey of Peruvian benefit corporations, as well as its most recent implementation efforts by the government and civil society as a legal acknowledgment by the Peruvian State to fully regulating purpose-driven companies and their business models by recognizing the change in the market force paradigm as a response to the different economic, social, and environmental problems.

Before the approval of the BIC Law, the profit maximization interpretation of the law and legal practice forced business administrators to make decisions with the sole purpose of maximizing profit for shareholders. However, many companies and their shareholders voluntarily inserted different legal clauses in their bylaws pertaining to purposeful business, different duties, and protections, as well as enhanced transparency. However, they obtained mixed responses from the Corporate Public Registry and the different sectors within public administration.

The BIC Law, apart from providing an identity to purpose-driven companies, allows Peru to be at the forefront of Commercial Law, alongside countries such as the United States, Canada, Colombia, Ecuador, Italy, and Uruguay, which already have similar laws, and Argentina, Brazil, and Chile, which are discussing their bills at different stages of the legislative process.¹

2 Corporate Responsibility and the B Corp Movement in Peru

Corporate responsibility has evolved in Peru over the last few years, generating new management models that have changed the way corporations do business. Today, even corporations that do not adopt the Peruvian benefit corporation legislation must consider the expectations and perceptions of their stakeholders and obtain a social license to operate. This is even more important for companies that work with natural resources or other fields sensitive to the society and environment.

To this end, two trends can be identified since the start of the century: (i) corporate responsibility projects that seek to solve social or environmental problems related to a corporation's economic activity and (ii) initiatives that seek to impact their different stakeholders positively. These two trends have different objectives and are mainly embedded in corporate strategies and the decisions of medium and large sized corporations. Different organizations that aim to provide sustainable resources to corporations have thus emerged, such as Perú Sostenible, Conscious Capitalism, and Sistema B Peru.

Moreover, since 2016, the Peruvian companies listed on the stock market are also compelled to present an Annual Sustainability Report to the Securities Market Superintendence, which encourages social and environmental transparency.

¹Connolly et al. (2020).

Additionally, more than 500 Peruvian companies use the Global Reporting Initiative (GRI) to generate evidence of their contributions.

A particular subset of corporations, known as purpose-driven companies, are interested in measuring their social and environmental impact, as well to work towards a positive goal within their corporate objectives. Sistema B Peru and the B Corp Certification are closely aligned to the first trend above by allowing corporate activity to guarantee the creation of a positive impact in three areas that will permit the sustainability of the intervention: environmental, social, and economic. Their presence in Peru since 2015 means that, to date, more than 30 companies have completed an assessment that shows the positive transformations they generated for the society and the environment.

Peru has 37 certified domestic companies that report their environmental and social impacts annually, in line with the national policies that seek to reduce gaps in this field. There are also nine certified international companies with operations in Peru that, alongside two others still in the certification process, seek to generate positive impacts on the society and environment. Despite the economic, social, and healthcare complexities brought by the COVID-19 pandemic has been a complex year in economic, until 2019, Certified B Companies have handled profits of approximately USD 92.4 million.

3 The Peruvian “Sociedad BIC”

3.1 *Origin: A Legislative and Academic Partnership*

The import of benefit corporations in the Peruvian legal system is the result of three years of academic and political debate. In 2016, then congressman Alberto de Belaúnde and Juan Diego Mujica Filippi (co-author of this article) began a legislative and academic partnership that allowed that Mujica Filippi’s law school thesis² on benefit corporations to be used as a theoretical basis to introduce its adaptation in the Peruvian Congress: the *sociedad de beneficio e interés colectivo*. This academic partnership was the beginning of a multi-year legislative journey that included different business sectors, well-known corporate leaders, and civil society organizations, mainly known as Sistema B Peru, which led and supported the legislative efforts since the beginning. The active collaborations with William H. Clark, who led the drafting of the U.S. Model Benefit Corporation Legislation, and other lawyers and policymakers from Latin America and Europe were key to the final draft bill.

The main feature of the *Sociedad BIC* is allowing all existing corporate models regulated by the Corporate Act³ to have three main features: (i) a specific social and

²Mujica Filippi (2016).

³Law No. 26887 of December 9, 1997, “Ley General de Sociedades.”

environmental purpose in their bylaws, (ii) higher duties and protections for managers and directors, and (iii) transparency and reporting requirements. Therefore, the bill was written in a simple and concise way to allow the existing legal models to organize purpose-driven companies based on their main corporate activities.

These features and framework aim to consolidate an active impact economy in Peru, under which corporations can consider and track their economic, social, and environmental impact and contribute decisively to the Sustainable Development Goals. However—and following the path of other benefit corporation statuses around the world and in Latin America—*Sociedad BIC* does not consider any tax incentives or complementary benefits for the corporations that choose to adopt this model.

3.2 Path of Approval and Regulation

In March 2018, Congressman Alberto de Belaúnde presented the Bill to Congress, and it was discussed one year later in the Economy, Banking, Finance, and Financial Intelligence Commission. The commission unanimously approved the ruling of the bill.

Subsequently, it was also unanimously approved in the Justice and Human Rights Commission, after reviewing the institutional opinions of the Ministry of Justice and Human Rights, Ministry of Economy and Finance, Central Reserve Bank, Ministry of Foreign Trade and Tourism, Ministry of Industry, Public Defender's Office, and Superintendence of Banking and Insurance.

Additionally, several workshops and events were held, where the bill was analyzed by leaders from the business sector, academia, the public sector, and other strategic players, reflecting on possible improvements. Unfortunately, in the second semester of 2019, the Peruvian Congress was dissolved by the ruling of President Vizcarra due to the unsettled political context, which kept the bill from being debated in Congress. In October 2020, after the election and installment of a new legislative assembly, Congress approved the BIC Law and it was passed on November 24, 2020, thus starting the regulation process.

In January 2021, the Council of Ministers designated the Ministry of Industry to lead the implementation process of the recently approved BIC Law. Shortly afterward, the innovation department within the ministry identified key actors within academia, civil society organizations, businesses, and other public institutions to work together on a draft for the BIC law regulation. An inter institutional approach was led by the Ministry of Industry to address several pressing topics regarding the BIC Law and the different processes public institutions needed for full its implementation.

The result of this collaborative process was the publication of the Regulation of Law No. 31072, approved by Supreme Decree No. 004-2021-PRODUCE, and Ministerial Resolution No. 00127-2021-PRODUCE. These documents make possible the implementation of the BIC Law within the public sector.

3.3 *Legal Framework*

3.3.1 **The Peruvian Constitution**

The Peruvian Constitution⁴ includes a set of principles that guide the exercise of business and entrepreneurial activities in the country. Particularly, Article 58 establishes that the economic regime is one of a “social market economy,” in which the essential component are the social implications of economic activity. While freedom in private and entrepreneurial activities is ensured, companies need to comply with a social return that contributes to the common or general welfare. In this regard, *Sociedad BIC* fulfills this constitutional mandate fully, as its business model directs activities both toward profitable economic activity and achieving the chosen social and environmental purpose.⁵

Further, Article 58 enshrines the concepts of “minimal government” and “strong government.” The first concept refers to the fact that the government will only intervene in an economic activity in cases of proven public or national interest for the general welfare and the second describes that the government must comply with essential duties in the areas of employment promotion, health, education, security, public services, and infrastructure.

Along these lines, the implementation of the *Sociedad BIC* legal framework can contribute toward the concepts enshrined in Article 58, as the corporations themselves are the ones that choose their social and environmental purposes and start generating measurable social and environmental impacts.

Therefore, the approval of the BIC legal framework fulfills the state’s obligation to provide an adequate response to the various economic actors that deviate from traditional business activities by seeking to operate with a sustainable and transparent purpose that not only generates economic benefits but also social and environmental ones.

3.3.2 **Law No. 31072, Sociedad de Beneficio e Interés Colectivo (Sociedad BIC)**

Law N. 31072,⁶ known as the BIC Law, approves the legal framework for the *Sociedad BIC* in Peru and mandates the creation of a regulatory framework to create a legal ecosystem that ensures the implementation of the norms and incorporation of purpose-driven companies in the country. The *Sociedad BIC* legal framework does not create a new corporate model in the Companies Act, but a legal category that can

⁴Peruvian Constitution of December 29, 1993.

⁵Guerra Cerrón (2021).

⁶Law No. 31072 of November 24, 2020, “Ley de la Sociedad de Beneficio e Interés Colectivo (Sociedad BIC).”

be voluntarily adopted by shareholders in corporate bylaws and registered with the Corporate Public Registry.⁷

The adoption of the BIC legal category creates an enforceable duty that a corporation—besides having an economic activity and distributing dividends to shareholders—has a detailed social and environmental purpose in its bylaws. This category can be adopted in the bylaws from the time the company is incorporated or when an existing corporation shareholders meeting agrees to amend the bylaws. Additionally, along with the inclusion of purpose, the category also regulates the responsibilities and obligations of the managers and directors—to not only work diligently toward the economic success of the company but also toward the gradual achievements of the social and environmental purpose. Similarly, the Sociedad BIC legal framework demands that the company has sound organizational transparency policies, considers its stakeholders in decision making, and verifies the achievement of goals on presenting a Social and Environmental Management Report, which must be open access.

The Peruvian benefit corporation legal model is the result of the international and regional export of similar laws.⁸ For example, similar to the U.S. Model Benefit Corporation Legislation, the BIC Law does not provide tax breaks to companies that adopt the legal model.⁹ As previously mentioned, the goal is that, initially, the market itself will determine the benefits that can be given to these companies, as with any policy that the state deems fit to implement in the long term.

However, the Peruvian BIC law—similar to its Latin American counterparts—goes beyond the U.S. Model Benefit Corporation Legislation, as it requires the social and environmental purpose to be specific and the Social and Environmental Management Report to be approved at the same time as the company's annual financial statements—with all the legal consequences and sanctions this entails in the event of a failure of fulfilling the duties imposed by the law.

Moreover, unlike in the United States and other jurisdictions where there is no public enforcement of such corporations' activities, the Peruvian law follows the Italian benefit corporation statute in giving the Peruvian Competition Authority (Instituto Nacional de Defensa al Consumidor y de Propiedad Intelectual, INDECOPI) the power to apply the existing regulations on misleading advertising and business practices to sanction companies that use the BIC legal model or the name "sociedad de beneficio e interés colectivo" or the abbreviation "BIC," but do not pursue the social and environmental purpose detailed in its bylaws.

The main goal of the BIC Law is to achieve what the Peruvian State identifies and acknowledges as purpose-driven companies, which try to solve specific social and environmental problems. Therefore, depending on their economic activity, benefit purpose, and strategic plan, the purpose-driven companies in Peru that adopt the BIC legal category can generate concrete benefits from the market and create an

⁷Elías (2000).

⁸Mujica Filippi (2019).

⁹Clark (2016).

identifiable critical mass for the subsequent creation of public policies that acknowledge their true legal nature.

3.3.3 Regulation of Law No. 31072, Approved by Supreme Decree No. 004-2021-PRODUCE

In February 2021, the regulation of the BIC Law was approved through Supreme Decree No. 004-2021-PRODUCE¹⁰ by the Executive Branch to create the Peruvian legal ecosystem. The Ministry of Industry, alongside the Ministry of Environment, led a participatory process that involved the academia, civil society, and corporations to draft a regulation that would complement the BIC Law and its procedures to allow the promotion and incorporation of BIC companies in Peru.

The regulation provides definitions that clarify the impacts that BIC companies must achieve through the development of their business. Similarly, the regulation specifies how the social and environmental objectives must be linked to the benefit purpose of a BIC company, prioritizes them, and indicates how activities that allow the objectives to be met in the medium and long term must be designed.

Additionally, it promotes organizational transparency and clearly defines how BIC companies must evidence their impacts by writing a Social and Environmental Management Report that allows verifying the activities included in the company's annual planning. It should also be noted that this management report must be prepared by a third party and can be submitted to the Ministry of Industry for publication. While submitting it to the Ministry is not a legal duty, the Ministry oversees the publication of these reports to facilitate access to information and ensure that the citizens can complain if the company does not fulfill its social and environmental purpose.

The regulation also delineates the cases in which a BIC company could lose its legal status and the corrective measures that the Peruvian Competition Authority can impose if a BIC company is carrying out practices that violate to consumer defense regulations, as well as in the case of anticompetitive conduct. In both cases, the Peruvian Competition Authority is the authority responsible for analyzing the behaviors adopted by BIC companies to determine if consumer protection standards were breached, as well as any actions that limit or prevent free competition between companies.

3.3.4 Other Legal Instruments Under the BIC Legal Framework

The approval of the abovementioned BIC Law's regulation allows, among others, two main objectives: (i) to create a framework within the public sector that would

¹⁰Supreme Decree No. 004-2021-PRODUCE of February 23, 2021, "Reglamento de la Ley No 31072, Ley de la Sociedad de Beneficio e Interés Colectivo (Sociedad BIC)."

make it possible to apply the law through complementary legal provisions within the governmental administration and (ii) to allow the business sector to use this law in practice, with a clear scope regarding the application of its mandates.¹¹

In this sense, to create this framework and make the application of the law possible for public administration, other legal instruments were adopted by different organizations within the public sector. The most relevant are the ones of the Peruvian Public Registry and the Peruvian Competition Authority.

On the one hand, the Peruvian Public Registry (Superintendencia Nacional de los Registros Públicos, SUNARP) approved Directive DI-003-SNR-DTR,¹² which regulates the qualification of registrable acts of BIC companies. This directive made it possible for the Corporate Public Registry to adopt all necessary measures to adapt their informatic systems and notify the public registrars on the specific application of the law for evaluating incorporation or amendment requests.

On the other hand, the Peruvian Competition Authority worked on the issuance of Directive No. 002-2021/DIR-COD-INDECOPI,¹³ which regulates the application of the corrective measures of loss for the BIC corporate category referred to in Law No. 31072 and its regulations, in the case of infringements of consumer rights, being approved by Resolution No. 000056-2021-PRE/INDECOPI, dated May 21, 2021.

Correspondingly, for the business sector to have a practical example, the Ministry of Industry issued Ministerial Resolution No. 00127-2021-PRODUCE,¹⁴ dated April 29, 2021 and approved the “Guidelines for the preparation of the Strategic Plan and the Management Report of the BIC Company,” which regulates the minimum content of the strategic plan and the management report of BIC companies within the provisions of Law No. 31072 and its regulation.

4 The BIC Ecosystem in Peru

The Ministry of Industry considered it important to lead the implementation process of the BIC Law and its regulation to promote the purpose-driven ecosystem in Peru. With that in mind, by Ministerial Resolution No. 000150-2021-PRODUCE, dated May 25, 2021, the Working Group for the Dynamization of the Ecosystem of BIC Companies in Peru was created to strengthen this ecosystem by articulating strategic

¹¹ Caillaux and Ochoa (2021).

¹² Superintendent Resolution No. DI-003-2021-SNR-DTR of March 26, 2021, “Directiva que regula la calificación de los actos inscribibles de la Sociedad de Beneficio e Interés Colectivo (Sociedad BIC).”

¹³ Resolution No. 000056-2021-PRE/INDECOPI of May 23, 2021, “Directiva que regula la aplicación de la medida correctiva de pérdida de la categoría societaria a la que se refiere la Ley N° 31072 y su Reglamento, en el caso de infracciones a los derechos del consumidor.”

¹⁴ Ministerial Resolution No. 00127-2021-PRODUCE of April 30, 2021, “Lineamientos para la elaboración del Plan Estratégico y del Informe de Gestión de las Sociedades de Beneficio e Interés Colectivo (Sociedad BIC).”

opportunities for national entrepreneurship to achieve financial profitability and social and environmental impact, thus contributing to the Sustainable Development Goals. The main aim of this multi-sectoral working group is to enable the conditions to promote BIC companies and build an entire ecosystem that allows them to develop successfully financially and regarding their impact.

The working group is composed of the representatives of public and private sector entities, academia, and civil society: the Ministry of Industry (chairs the group and includes the Technical Secretariat), the Ministry of the Environment, the Peruvian Competition Authority, Universidad Nacional Mayor de San Marcos, Universidad Continental, Universidad de Lima, Sistema B Peru, Global Reporting Initiative, Peru Sostenible, and Capitalismo Consciente Peru.

As part of the activities carried out by the working group, the Joint Agenda was approved, containing the milestones of the activities proposed for each prioritized category: incentives, dissemination/communication and training, deadline for their implementation, subgroups formed for the execution of each milestone, and the persons responsible for them.

In response to this approach, important results have been achieved for the BIC ecosystem, such as the creation of a specific directory of these companies in the Peruvian Public Corporate Registry, inclusion of the BIC category in the Public Registry online database, the first BIC companies' event organized by the Working Group with a participation of 182 attendees (of which 86 were companies), publication in the Legal Supplement of the official newspaper *El Peruano* on "BIC Companies—Impact of BIC Companies," and launching the website <https://sociedadesbic.produce.gob.pe>.

Roughly a year after the passing of the legal framework for BIC Companies, the ecosystem only has five companies that have incorporated or amended their bylaws to adopt the BIC model. These companies are mostly small and medium sized companies with Peruvian capital. The multi-sectoral group estimates that, in the next few years, more BIC Companies will be incorporated and become part of the legal ecosystem.

Furthermore, this ecosystem was initially sought by civil society and academia for overcoming different legislative challenges during the three years of the debate. The Peruvian government, as the one in charge of implementing this ecosystem, is prioritizing participation, collaboration, and a constant strategy to foster the creation of new purpose-driven companies. The remaining question is if the Peruvian corporate sector and other stakeholders will follow this new legal trend without further incentives in the BIC Law.

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Social Enterprises and Benefit Corporations in Portugal



Deolinda Meira and Maria Elisabete Ramos

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1 Introduction

The Public Procurement Code presents a legal definition for social enterprise, which has a sectoral scope in Portugal. The Basic Law of the Social Economy (approved by Law No. 30/2013 of May 8, 2013) does not have any provision expressly dedicated to social enterprises. Portuguese legislation does not offer a general legal definition for social enterprises of general scope.

There is no specific law governing *benefit corporations* nor any known draft legislation under preparation to regulate this business model.

Contrary to Italian laws on social enterprises¹ and “Società Benefit”,² Portuguese law does not include these forms of corporation, which are aimed at the distribution of profits to shareholders and the pursuit of “general interests” or “common benefits”.³ The absence of a general regime on social enterprises and the silence of the Portuguese legal system regarding benefit corporations raise the question of which legal instruments entrepreneurs can use if they intend to pursue a general interest purpose or common benefit in the course of a given profitable economic activity.

2 Sources and Legislation Features

The Constitution of the Portuguese Republic (CRP) structures the economic organization around the principle of coexistence of the public sector, the private sector and the cooperative and social sector in Article 81(b) of the CRP. According to the constitutional model of Portuguese economic organization, the private sector aggregates for-profit organizations, geared towards obtaining and distributing profits (Article 82(3) CRP). The cooperative and social sector is a heterogeneous reality that gathers all sorts of organizations: cooperatives, means of production owned and managed by local communities, self-management undertakings by workers from external companies (*meios de produção objeto de exploração coletiva por trabalhadores*) and “means of production held and managed by not-for-profit legal persons whose primary objective is social solidarity, particularly entities of a mutualist nature” (Article 82(4) CRP).

In this context, profit-oriented business models are part of the private sector, and business models designed to promote “common benefits” are part of the cooperative

¹Legislative Decree 112/2017 (D.Lgs. 3 July 2017, no. 112 (Official Gazette 19 July 2017, no. 167), which regulates the legal status of Italian social enterprises.

²LEGGE 28 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016), Commi 376-384, Gazzetta Uff. 30 dicembre 2015, n. 302, S.O.

³These are defined by the “Società Benefit” regime as one or more positive effects or the reduction of negative effects on people, the community, territories, the environment, cultural and social goods and activities, entities and associations and other stakeholders. See Commi 376, 378 of Legge 28 dicembre 2015, n. 208.

and social sector. However, this distinction is not clear-cut. The private sector of for-profit organizations cannot ignore collective interests, such as those relating to the environment, sustainability, gender equality, transparency, workers and all other business stakeholders. On the other hand, the entities that make up the cooperative and social sector are not prevented from making profits but are subject to specific regimes for the application of profits.

In the private sector of for-profit organization, companies stand out. In Portugal, the Commercial Companies Code (CSC) provides for the different organizational models that commercial companies may adopt (the so-called legal forms of commercial companies).⁴ In the cooperative and social sector, cooperatives abound. They benefit from formally autonomous regulation in the Portuguese Cooperative Code (PCC), approved by Law 119/2015, 31 August.

Another important legislative framework is the Social Economy Basic Law. This law “establishes, in the development of the provisions of the Constitution regarding the cooperative and social sector, the legal regime for the social economy, as well as measures to encourage its activity in accordance with its own principles and purposes” (Article 1). The social economy is described as a “set of economic and social activities, carried out freely by the entities referred to in article 4 of this law”. The following entities are part of the social economy as long as they are covered by the Portuguese legal system: (a) cooperatives; (b) mutual associations; (c) mercies (*Misericórdias*); (d) foundations; (e) private social solidarity institutions not covered by the preceding paragraphs; (f) associations for altruistic purposes operating in the cultural, recreational, sports and local development fields; (g) entities covered by the community and self-managed subsectors, integrated under the Constitution into the cooperative and social sector; (h) other entities with legal personality, which respect the guiding principles of social economy provided for in the Basic Law and which are included in the social economy database (Article 4 of the Social Economy Basic Law).⁵ The various social economy organizations pursue the “general interest of society, either directly or through the pursuit of the interests of its members, users and beneficiaries, when socially relevant” (Article 2(2) of the Social Economy Framework Law).⁶

It is also possible to distinguish between social economy entities *ex lege* and social economy entities by “concession” in the Portuguese legal system. The first group includes the entities mentioned in paragraphs a) to g) of Article 4 of the Social Economy Basic Law. Social economy entities “by concession” are those that, although not being *ex lege*, are endowed with a legal personality and are included in the Social Economy database. Concerning the latter, the legislator expressly refers, in Article 4(h), to the need to comply with the guiding principles of the social economy.⁷

⁴See Maia (2015), pp. 13–36; Ramos (2018), pp. 162–168; Abreu (2021), pp. 65–86.

⁵The database of social economy organizations is not yet completed.

⁶Meira (2017a), p. 121, ff.

⁷Ver Meira (2013b), p. 32, ff.

3 Social Enterprises in Portugal

3.1 *The Legal Notion for Public Procurement Purposes*

Historically, the first reference to social enterprises was about social enterprises of insertion,⁸ which the Resolution of the Council of Ministers No. 49/2008, of 6 March, regarding the National Mental Health Plan (2007–2016), designated as “social enterprises”. This regulatory act of the Portuguese government did not define social enterprises, and no relevant legal consequence could be drawn from such qualification.

Exclusively for public procurement, Article 250-D, 7, of the Public Procurement Code⁹ provides: “social enterprises are considered those engaged in the production of goods and services with a strong component of social entrepreneurship or social innovation, and promoting integration into the labour market, through the development of research, innovation and social development programmes” in the areas of health, social, educational and cultural services.

The legal notion of Article 250-D, 7, is legally consequential. The Public Procurement Code allows social enterprises to be reserved for the supply of health, social, educational and cultural services, provided that they meet the legal requirements for forming such contracts.

For the purposes of public procurement, both profit-making and non-profit entities may be considered social enterprises.¹⁰

3.2 *Social Enterprises and the Social Economy: The Persistent Legal Ambiguity*

The Draft Social Economy Basic Law No. 68/XII, of 16 September 2011,^{11/12} proposed a generic definition of a social enterprise. In Article 13(2)(c) of the aforementioned project, it was stated that the legislative reform of the social economy sector would involve “the creation of the legal framework of social enterprises, as entities that develop a commercial activity with primarily social purposes, and

⁸Regulated by Ministerial Order 348-A/1998, of 18 June, which was revoked by Article 25(m) of Decree-Law 13/2015.

⁹Decree-Law No. 18/2008, of 29 January, amended and republished by Decree-Law No. 111-B/2017, of 31 August (rectified by rectification statements No. 36-A/2017, of 30 October and No. 42/2017, of 30 November).

¹⁰See Meira and Ramos (2019), pp. 1–33.

¹¹See Official Gazette of the Assembly of the Republic II series A No. 31/XII/1 2011.09.19 (pp. 24–29).

¹²The text of the draft project can be consulted at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=36468>.

whose surpluses are, essentially, mobilised for the development of those purposes or reinvested in the Community”. This proposal did not succeed, and the current text of the Basic Law of the Social Economy does not, expressly and immediately, foresee the legal notion of social enterprise.

The Basic Law on Social Economy text is deliberately ambiguous with regard to social enterprises. While, on the one hand, the legislator did not accept the proposal to provide for them, on the other hand, the content of Article 4(h) is sufficiently vague and ambiguous to allow for future legislative decisions that integrate social enterprises in the perimeter of the social economy.

This political-legislative position determines that, for the time being, the legal effects associated with social enterprises in Portugal are scarce. On the other hand, the relationship between social enterprises and commercial companies is not clear from a legislative point of view. This issue has been discussed within the legal doctrine, and opinions are divided between those who defend that social enterprises cannot be companies¹³ and those sustaining that, under certain requirements, companies may be considered social enterprises.¹⁴

4 Definition and Aim of Social Enterprise and B-Corps

In Portugal, the definition of a social enterprise applies exclusively for the purposes of public procurement, and there is no legal regulation on B-Corps.

5 The Activity

For the Public Procurement Code, social enterprises are characterised not by their legal form but, in part, by their activity, more specifically by the exercise of health, social, educational and cultural services.

As stated before, Portuguese legislation does not regulate B-Corps. The Portuguese business experience shows that B-Corps adopt different legal forms.

As a rule, companies are entitled to engage in any profitable economic activity. Associations may, under certain legal requirements, engage in economic activity, but they are prevented from distributing profits. Cooperatives are intended to meet the needs of their members and, in their statutory activity, may engage in economic activity but may not distribute profits.

¹³See Abreu (2015), pp. 369–376.

¹⁴Farinho (2015), pp. 247–270; Meira and Ramos (2019), pp. 26–29.

6 Forms and Incorporation of Social Enterprises and B-Corps

There is no rule in the Portuguese legal system imposing a specific legal form for social enterprises. In particular, the Portuguese legal system does not foresee any norm expressly dedicated to the incorporation of social enterprises.

Although not expressly stated in Portuguese law, the current state of the Portuguese legal doctrine allows us to argue that social enterprises in Portugal are included in the perimeter of social economy entities.¹⁵

Under Portuguese law, there are no specific ways of creating B-Corps. The applicable rules depend on the legal person to be set up. Entrepreneurs who wish to create B-Corp-like models in Portugal can set up a company and, through statutory clauses, within the limits of the law, accommodate some social concerns or social responsibility. It seems to us that, in Portugal, such entrepreneurs may resort to companies to fulfil their purpose.

7 Financial Profiles of Social Enterprises and B-Corps

The Portuguese law does not foresee any regulation specifically dedicated to financing social enterprises. Article 250-D of the Public Procurement Code discriminates positively regarding social enterprises, which has financial impacts. On the other hand, social economy entities benefit from positive discrimination in taxation, access to credit and technical support.

The Portuguese legal system does not provide specific rules on the financing of B-corps. The legal rules on financing depend on the selected organizational form.

8 Organizational Profiles

8.1 *Commercial Companies' Way*

The companies (commercial, civil in commercial form and civil), as a rule, aim to obtain the profits intended to be distributed to the shareholders (Article 980 Civil Code). The company is “the entity which, consisting of one or more subjects (shareholders), has an autonomous asset for the exercise of economic activity, in order to (as a rule) make profit and distribute it to the partners—becoming subject to losses”.¹⁶

¹⁵ Abreu (2015, passim); Meira and Ramos (2019, passim).

¹⁶ Xavier (1987), p. 7; Abreu (2021), p. 40; Ramos (2018), p. 146.

Although the Commercial Companies Code does not expressly state this, there seems to be no doubt that commercial and civil companies in commercial form are also designed to make profits to be distributed as dividends to their shareholders. Exceptionally, and only in the cases permitted by law, non-profit corporations are lawful. At the same time, it is understood in the Portuguese legal system that shareholders can freely choose the corporate purpose (i.e. the economic activities performed by the company), but establishing non-profit companies by statutory definition is not lawful. Profit making is regarded as an imperative requirement for companies in Portuguese doctrine.¹⁷

Although partners are not allowed to create non-profit companies, they may, subject to mandatory legal limits, adapt corporate by-laws to their business projects. Company by-laws may incorporate the interests of other stakeholders. Consider, for example, statutory clauses concerning the attribution of profits to workers¹⁸ or the statutory consecration of social responsibility measures implemented, namely through corporate-sponsored foundations.¹⁹ The directors are responsible for respecting the statutory clauses, and, therefore, they are required to fulfil the vision and mission stated in the by-laws.

Article 64(1)(b) of the Commercial Companies Code concerning the duties of loyalty requires the directors to act in the “interest of the company”. As in other civil law countries, managers of Portuguese profit companies can take into account the interests of various stakeholders,²⁰ as laid down in Article 64(1)(b) of the Commercial Companies Code. This provision states that “the company’s managers or directors shall comply with (. . .) their duty to be loyal to their interests, serving their long-term customers and creditors while ensuring the sustainability of the company”.²¹ Similar provisions can be found in other legal systems. Consider, for example, Article 154 of the Brazilian Corporation Law; section 172 of the *Companies Act* 2006, entitled “Duty to promote the success of the company”; § 70 (1) of the Austrian *Aktiengesetz*; or Article 2:129(5) of the Dutch Civil Code.

Article 64(1)(b) of the Commercial Companies Code sets forth that managers, in the exercise of their functions, must consider the interests of workers, customers and creditors. In Portuguese doctrine, we doubt the effectiveness of this rule since the

¹⁷ Abreu (2021), pp. 31–33.

¹⁸ About these measures, see Gomes (2011), pp. 513–521.

¹⁹ About corporate-sponsored foundations as an indirect model for corporate philanthropy, see Serens (2014), p. 585.

²⁰ In the United States, the legislation on benefit corporations was created to protect directors and officers in their pursuit of a social mission. That is, the shareholder value doctrine requires directors and officers to maximize shareholder value; otherwise, they will be found to violate fiduciary duties and, consequently, be subject to civil liability. By having legislation that allows directors and officers to incorporate the interests of various stakeholders into their decisions, a legal basis is provided that makes it possible for directors and officers to serve the interests of other stakeholders.

²¹ This standard was introduced into Portuguese law in 2006 through DL 74-A/2006 of 29 March, and since then the interpretations that have been made have been very discrepant. For the various interpretations of this standard, see Ramos (2010), pp. 103–126.

law does not provide any sanction for the directors who, in their performance, do not consider the interests of these subjects. In addition, the law is not clear as to what and who may be sanctionable. The doctrine highlights the perplexity caused by the reference to the interests of creditors, who are relevant subjects for the sustainability of the company. In fact, the interests of creditors are safeguarded by the fulfilment of the legal duties incumbent upon the company.

Reference to the interests of customers who, through various legal rules, are themselves the object of legal protection also creates a sort of perplexity.²² However, as organic representatives of the company, managers are bound by the various legal rules intended for the company.²³

The interests of workers are also reflected in Article 64(1)(b) of the Commercial Companies Code. Workers are mainly interested in business decisions that help maintain jobs, promote fair remuneration, ensure the best working conditions, tackle social support concerns, etc. In Portugal, workers do not participate significantly in corporate management, ergo the interpretation that the reference in Article 64(1)(b) CSC to the interests of workers is “a norm of almost zero positive content”.²⁴

Article 64(1)(b) CSC does not provide for any legal mechanism that protects the interests of workers, nor does it provide for compensation for damages caused by the decisions taken by directors against the workers. The duty of loyalty of managers is to the company.²⁵ Article 64(1)(b) may have a limited protective effect on directors as, in some cases, it might allow for the elimination or limitation of the liability of directors to the company.²⁶

There is no explicit reference in Article 64(1)(b) to corporate social responsibility but only an implicit reference to “the interests of other relevant subjects for the sustainability of the company”. It is necessary to distinguish corporate social responsibility of a voluntary nature from the legal duties (general and specific) of directors, which are binding.

Corporate social responsibility is, according to the definition proposed by the European Commission in 2001,²⁷ “a concept whereby companies voluntarily integrate social and environmental concerns into their operations and their interaction with other stakeholders”.²⁸

In 2011, the European Commission proposed a new definition for corporate social responsibility: “the responsibility of enterprises for their impacts on society”. Respect for applicable legislation and for collective agreements between social partners is a prerequisite for achieving that responsibility. “To fully meet their corporate social responsibility, enterprises should have a place to integrate social,

²² Abreu (2021), pp. 286–288.

²³ On the duty of legality of directors, see Ramos (2014), p. 131.

²⁴ Abreu (2021), p. 289.

²⁵ Ramos (2010), p. 118.

²⁶ Ramos (2010), p. 118, and also see Costa and Dias Figueiredo (2017), p. 792.

²⁷ Commission of the European Communities (2001), p. 5.

²⁸ Commission of the European Communities (2001), p. 5.

environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders.”²⁹

No wonder the European Commission is so focused on and committed to the strategy for corporate social responsibility. At a time when the social responsibility of the State is receding, the European Commission calls for corporate social responsibility.

The flexibility of company types, whether in governance, profit allocation or financing, allows entrepreneurs to shape company statutes to incorporate non-partner interests. However, the profit purpose cannot be denied. The articles of association may limit the periodic distribution of profits or partially allocate them to non-partners.

8.2 *The Cooperative Way*

Within the Portuguese cooperative sector, social solidarity cooperatives, which are part of a movement to reinvent the cooperative model that began in Italy in 1990, with the Italian social cooperatives, a movement that led to the emergence of cooperatives with an objective focused predominantly or exclusively on the pursuit of purposes of general interest, have been identified by doctrine as the cooperative branch that is closest to the European concept of social enterprise. These cooperatives regulated by Decree-Law No. 78/98, of 15 January, are cooperatives whose activities are clearly focused on the area of social services. Their social object is a clear mission to support situations of economic and social vulnerability based on a welfare paradigm of social intervention for families, children, the youth, the elderly, the disabled, the unemployed and other vulnerable categories with a view to their professional integration, education, training, and occupational and residential care.

Portuguese social solidarity cooperatives pursue, as their main or exclusive purpose, a disinterested or altruistic mutualistic purpose, which the legislator refers to as “social solidarity purposes”.³⁰

The areas of impact measured by B certification—“Community”, “Environment”, “Customers”, “Governance” and “Workers”—seem to be inspired by the values and principles that integrate the concept of cooperative identity, defined by the International Cooperative Alliance (ICA) in Manchester in 1995—based on a set of seven principles (the Cooperative Principles³¹), a set of values (the Cooperative Values³²)

²⁹Commission of the European Communities (2011), p. 6.

³⁰See Meira (2020), pp. 221–247.

³¹These Principles are as follows: Voluntary and Open Membership, Democratic Member Control, Economic Participation of Members, Autonomy and Independence, Education, Training, and Information, Cooperation among Cooperatives, Concern for the Community. See Namorado (1995), *passim*.

³²Cooperatives base themselves on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical

that shape those principles and a definition of cooperative.^{33/34} This concept is strongly present in Portuguese cooperative legislation. Indeed, in the Portuguese legal system, the ICA cooperative principles are mandatory³⁵ and are even enshrined in the Portuguese Cooperative Code (PCC).³⁶

Like cooperatives, B-Corps also seek to combine a social dimension with an economic one in their purpose.

In cooperatives, the link between these two dimensions is a consequence of the internationally accepted definition of cooperative—under which the object of the cooperative will result in the fulfilment, without profit, of the economic, social and cultural needs of its members by reference to a method of management of the cooperative, which relies on compliance with the cooperative principles and on mutual help and the cooperation of their members.

In fact, cooperatives are organizations characterized by the following: the primacy of individuals and social objectives over capital, the combination of the interests of the members and the general interest, the defence and implementation of values of solidarity and responsibility, the reinvestment of surplus funds in long-term development goals or in providing services that are of interest to the members or of a general interest, voluntary and free membership, democratic governance and autonomous and independent management.

Cooperatives have a mutual scope, which distinguishes them from other entities. The feature uniquely identifying cooperatives is not the non-profit-making aim (as other entities share this same feature) but the absence of an autonomous scope, which sets them apart from the interests of their members or cooperators. In the context of the mutualistic scope, the cooperators assume the obligations of participating in the activities of the cooperative, cooperating mutually and helping each other in accordance with the cooperative's principles.

By virtue of this cooperative mutual vocation, the governing bodies will necessarily and primarily be oriented to promoting the members' interests and attending to their economic, social and cultural needs.³⁷

Hence, the governing bodies of a cooperative are structured to pursue economic activities mainly in the interest of their members. Note the use of "mainly" and not exclusively because the social object of the cooperative is not limited to meeting the

values of honesty, openness, social responsibility and caring for others. See Moreno (2014), pp. 371–393.

³³ICA has established that "A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise".

³⁴See Fici (2013), pp. 37–64.

³⁵See Meira and Ramos (2015), pp. 401–428; Namorado (2018), pp. 28–36.

³⁶The main source of Portuguese Cooperative law is the Cooperative Code, approved by Law No. 119/2015, published on 31 August 2015 and entered into force on 30 September 2015.

³⁷See Fici (2017), p. 20.

needs of its members, taking also into account the interests of the community where the cooperative operates.³⁸

In this regard, the governance of the cooperative should focus entirely on the ICA principle of concern for the community, which states: “Cooperatives work for the sustainable development of their communities through policies approved by their members.”

Therefore, although focusing primarily on the needs of their members, cooperatives work to achieve sustainable development for their communities, under certain criteria approved by their members. In this context, the governance of cooperatives is not restricted to their internal relations. The cooperative governance paradigm should be aligned with the fundamental principles of corporate social responsibility (CSR), structuring concepts of sustainability based on the adoption of best practices regarding organization, equal opportunities, social inclusion and sustainable development.³⁹

CSR is not voluntary in cooperatives. In other words, given the legal framework of cooperatives, in particular the fact that their governing bodies must consider the principle of concern for the community, it is argued that there is a legal obligation for the governing bodies of the cooperative to incorporate the core values of CSR into their activity, which should be subject to control, both internally (through a general meeting and by the supervisory board) and externally.

The ICA principle of concern for the community is strongly connected with another cooperative principle, the principle of voluntary and open membership, which is the traditional *open door principle*, described as follows: “Cooperatives are voluntary organizations, open to all persons who are able to use their services and willing to accept the responsibility of membership, without gender, social, racial, political or religious discrimination.” This principle can be considered from two views: (i) adherence should be voluntary since it depends exclusively on the will of the member, and (ii) the cooperative must be open to all people, provided the member candidates meet two requirements—ability to benefit individually from the cooperative’s activities and acceptance of membership responsibilities.

The way in which these two principles connect is evident: the traditional open-door policy, adopted by the cooperative when accepting new members, is justified by the willingness to serve the community in which it is rooted. Taking on members from the area where the cooperative carries out its activity has been a constant practice in this type of organization, whose ultimate goal is to meet the needs of the community. This practice reveals the cooperative as a generator of stable jobs—not least because, being strongly rooted in the communities, cooperatives carry out activities that do not allow relocation—and as a fuel for entrepreneurial spirit.

In this sense, membership in a cooperative must be open to any person able and willing to accept the responsibilities of membership. Another principle of enormous relevance that supports that cooperative governance should promote sustainable

³⁸See Meira and Ramos (2014), pp. 493–498.

³⁹See Meira (2012), pp. 127–144.

development is the ICA principle of education, training and information, which states that “cooperatives will provide education and training for their members, elected representatives, managers and employees, so that they can contribute effectively to the development of their cooperatives. They will inform the general public, particularly the young and opinion leaders, about the nature and benefits of cooperation.”

This principle emphasizes the cooperatives’ duty to guarantee the education and training of their members, representatives of the elected bodies, directors or employees, in cooperative thought and practice. Moreover, this principle includes the duty to inform the public, in order to raise awareness of the nature and benefits of cooperation, which could encourage new membership, especially informed membership.

This principle materializes directly in the Portuguese Cooperative Code through the establishment of a compulsory reserve fund, the “reserve for cooperative education, training and information”.

The establishment of reserves for education and training means that the cooperative is not only a business organization but also an organization with social and educational concerns. This reserve fund will seek to bear the costs of activities beyond the satisfaction of the purely individual interests of the cooperative members. These activities are not strictly economic but may result in direct or indirect, immediate or deferred economic effects, both for the cooperative and for the community where the cooperative operates.

This reserve is one of the most distinctive features of the cooperative enterprise, compared with other types of enterprises. It generates capital allocated to social activities for the benefit of its members, cooperative workers and the social environment.⁴⁰

It is well known that, as a result of the ICA principle of democratic member control, cooperative governance is characterized as democratic governance.⁴¹

Thus, cooperatives are managed and controlled by or on behalf of their members, who have ultimate democratic control over their governance system. Voting at members’ meetings is in principle on the basis of one member one vote, regardless of the capital held.⁴² However, when necessary for the better functioning of a cooperative, statutes may confer multiple votes regardless of the capital held, reflecting, for example, participation in cooperative transactions, the number of people in the specific subdivisions or the balanced representation of different member groups.⁴³

The democratic character of cooperative governance also rests on the fact that the members of the governing bodies must be cooperators. According to the cooperative doctrine, this mechanism was designed by the legislator to ensure that members of

⁴⁰See Meira (2017b), pp. 57–72.

⁴¹See Rodríguez and Revuelta (2015), pp. 175–203.

⁴²See Meira (2013a), pp. 9–35 and see also Meira and Ramos (2014), pp. 55–56.

⁴³See Snaith (2017), p. 58.

the cooperative's governing bodies would focus their activities on the goal of promoting the interests of members. In fact, by allowing the interests of the cooperators to be directly represented in the management and supervisory bodies, this mechanism has the advantage that the members of these cooperative bodies, by virtue of their experience as a result of their dual role as both beneficiaries and managers, are permanently aware of the interests of the cooperators and do not deviate from the main purpose of the cooperative.⁴⁴

Democratic governance will necessarily be transparent, recognizing members' broad right to information. Thus, it is provided that board members and managers shall ensure that the cooperative operates with a high level of transparency and shall provide members with enough clear information to enable them to control the cooperative. In particular, they shall ensure that members receive full annual accounts and, if appropriate, consolidated accounts that are drawn up, audited and published with an annual report as well as cooperative and financial audit reports, as required by law.⁴⁵

B-Corps must trade competitively for profit, and profit can be distributed. Unlike B-Corps, cooperatives perform an economic activity whose aim is not to make profit but rather to seek mutual cooperation. In fact, a cooperative is a legal person that carries out any economic activity, mainly in the interests of its members and without having profit as its ultimate goal. When cooperatives carry out non-member cooperative transactions, they must keep a separate account of such transactions, and the profits from these non-member cooperative transactions must be allocated to indivisible reserves.

When a member leaves the cooperative, and also in the case of the liquidation of the cooperative, members are only entitled to recover the nominal value of their shares and their portion of the divisible reserves, as provided in the cooperative statutes. If the divisible reserves were generated through transactions with members, the allocation should be made in proportion to the transactions with each member.

Residual net assets shall be allocated in accordance with the principle of disinterested distribution, e.g. distributed to the community or other associated cooperatives (ICA principle of Member Economic Participation).

In conclusion, in our view, cooperatives have powerful dimensions that go beyond the B-Corp identity. By virtue of its legal regime, a cooperative is an enterprise owned and run by its members and built on principles that encourage cooperation, empowerment and solidarity, rather than just profit. The purpose of a cooperative is not limited to meeting the needs of its members but includes equally attending to the interests of the community where the cooperative develops its activity. In the context of cooperatives, CSR is not voluntary. By contrast, B-Corps may benefit many stakeholders, but generally in a passive way. Being a B-Corp company entails a commitment by such company (voluntarily assumed) to

⁴⁴See Münkner (2016), p. 54.

⁴⁵See Meira (2016), pp. 281–327; Snaith (2017), pp. 71–72.

the values set by B-Lab. This commitment does not derive from the legal nature of the entity. [CHECK GRAMMARLY]

9 B-Corps as Social Enterprise

In the current Portuguese legal environment, can certified B-Corps be considered a specific type of social enterprise?

Given the doctrine and legislation in force in various legal systems, the social enterprise can be understood as a private entity independent of the State or other public entity, which pursues an activity of general interest; is managed in a business-like way; does not aim at making a profit, or profits, if any, are mainly reinvested in the scope pursued; and is based on democratic and participatory principles.⁴⁶

Thus, social enterprises can be either non-profit or for-profit organizations. This position is confirmed by trends in European Union law.

According to the definition from the European Commission:⁴⁷

(...) a social enterprise (...) is a company whose main purpose is to have a social impact, rather than to generate profits for its owners or partners. It operates in the market by providing goods and services in a business and innovative manner and uses its surpluses primarily for social purposes. It is managed responsibly and transparently, in particular by associating its employees, its customers and other stakeholders (p. 2).

The European Commission uses the term “social enterprise” to refer to companies:

- Whose social or societal objective of common interest justifies commercial activity, which often translates into a high level of social innovation
- Whose profits are mainly reinvested in fulfilling their social objective
- Whose method of organization or ownership system reflects their mission, based on democratic or participatory principles or aiming at social justice

The European Commission underlines the fact that there is no single legal form for social enterprises. Theoretically speaking (and without considering any particular legal system), it is possible to identify (a) for-profit companies that incorporate a social mission strand in their organization, in particular through social responsibility policies (for example, a distribution company that maintains a scholarship programme for its workers); (b) non-profit organizations that manage enterprises

⁴⁶See Meira and Ramos (2019), pp. 1–33.

⁴⁷This is the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation [SEC (2011) 1278 final].

(cooperatives, mutuals, foundations that own companies); and (c) hybrid legal figures.⁴⁸

In Portugal, the social enterprise concept is not yet fully stabilized. The first legally valid social enterprise scheme in Portugal corresponds to the social integration enterprise scheme, which is part of a European tradition of social enterprises designed to ensure the integration of long-term unemployed persons and other types of unemployed people with specific characteristics.

Pursuant to the Resolution of the Council of Ministers No. 49/2008, of 6 March, social integration enterprises, regulated by Ordinance No. 348-A/1998, of 18 June (meanwhile repealed by paragraph m) of Article 25 of Decree-Law No. 13/2015), are considered social enterprises. Article 3(1) of the said Ordinance defines social integration enterprises as non-profit legal persons whose purpose is the social-occupational reintegration of disadvantaged or long-term unemployed people into the labour market. In particular, they may take the following forms: cooperatives, associations, foundations and private institutions of social solidarity. They must also operate according to “business management models” (Article 5(1) of the Ordinance). It turns out that the legislator restricts social integration enterprises to non-profit entities.

Furthermore, Bill No. 68/XII of 16 September 2011⁴⁹ refers expressly to social enterprises. Thus, in Article 13(2)(c) of the draft law, it is stipulated that the legislative reform of the social economy sector will also involve “the creation of the legal regime of social enterprises, as entities that carry out a trade activity primarily for social purposes, and whose surplus is essentially used for fulfilling such purposes or reinvested in the Community”. However, after an overall discussion in the Parliament, this provision was deleted from the final draft of the bill.

We can find a definition of social enterprise in paragraph 7 of Article 250-D of the Portuguese Public Procurement Code.⁵⁰ This article, which deals with “contracts reserved for certain services”, namely health, social, educational and cultural services, which are included in Annex X of the Code, establishes in paragraph 6 that the regime therein is also applicable to social enterprises, constituted in accordance with the law, provided that the requirements set out in paragraph 2 are cumulatively met, namely:

(a) have as their object the pursuit of a public service mission linked to the provision of the services referred to in the preceding paragraph; (b) reinvest their profits in pursuit of the organization’s objective; (c) rely on the participation of workers in the capital stock of the organization performing the contract or base its management structure on participatory principles requiring the active involvement of workers, users or stakeholders; (d) have not signed, in the past three years, with the

⁴⁸See Ramos (2018), p. 123.

⁴⁹Portuguese Official Gazette. II Serie A No. 31/XII/1 2011.09.19 (pp. 24–29).

⁵⁰Decree-Law 18/2008 which establishes the rules applicable to public procurement and the substantive regime governing public contracts that take the form of administrative contracts.

same contracting authority any contract covered by this Section (added by Article 5 of Decree-Law No. 111-B/2017⁵¹).

These requirements shall be deemed to be fulfilled when organizations are set up or owned, in accordance with the law, by entities that individually or jointly fulfil those requirements (No. 5).

Finally, paragraph 7 states: “[. . .] For the purposes of this article, social enterprises are those that are dedicated to the production of goods and services with a strong component of social entrepreneurship or social innovation and promote labor market integration through the development of research, innovation and social development programs, in the service areas laid down in paragraph 1.” So far, this is the only legal definition of social enterprise in Portugal, even if it is a sectoral definition. Note that it does not prevent the pursuit of profit, revealing thus an understanding of social enterprise that will cover both non-profit and for-profit entities, such as commercial companies.⁵²

Furthermore, the concept adopted by Regulation 1296/2013⁵³ admits that both for-profit and non-profit entities can be considered social enterprises. For the purpose of this Regulation, “social enterprise” means an undertaking, regardless of its legal form, that:

- (a) in accordance with its Articles of Association, Statutes or with any other legal document by which it is established, has as its primary objective the achievement of measurable, positive social impacts rather than generating profit for its owners, members and shareholders, and which:
 - (i) provides services or goods which generate a social return and/or
 - (ii) employs a method of production of goods or services that embodies its social objective;
- (b) uses its profits first and foremost to achieve its primary objective and has predefined procedures and rules covering any distribution of profits to shareholders and owners that ensure that such distribution does not undermine the primary objective; and
- (c) is managed in an entrepreneurial, accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activities.”

⁵¹Portuguese Official Gazette. No. 168/2017, 2nd Supplement, Series I of 2017-08-31, effective from 2018-01-01.

⁵²In the doctrine, Abreu (2014–2015), pp. 369–376, considers that, in the present Portuguese legal system, companies cannot be considered social enterprises. For a different opinion, see Farinho (2015), pp. 247–270.

⁵³Regulation (EU) no. 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Program for Employment and Social Innovation (“EaSI”) and amending Decision No. 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion. On the characteristics of social enterprises, for the purposes of this regulation, see Gonçalves (2019), pp. 197–228.

In this context, we consider that on a case-by-case basis, we can identify some points of contact between certified B-Corps and this concept of social enterprise, which are still not fully elaborated.

10 Registration and Control

There is no legal regime of registration or control specifically dedicated to social enterprises in Portugal.

There is no public register dedicated to B-Corps in Portugal, nor are there public mechanisms to control B-Corps. Any company in Portugal can apply for the B certification provided by B-Lab, a global non-profit organization that aims to create a movement of people who use companies for socially valuable purposes.⁵⁴ B certification measures the following areas of impact of companies: “Community”, “Environment”, “Customers”, “Governance” and “Workers”.

In Portugal, several companies have already obtained this certification.⁵⁵ Being a B-Corp does not give the company a new legal regime (whether it is a Portuguese or an international company). Rather, it is a commitment by each company (voluntarily assumed) to the values set by B-Lab.

Why would a company want to become a certified B-Corp? According to B Lab Europe, there are seven reasons to get this certification: 1) for market differentiation, 2) to measure and improve performance, 3) to attract and retain talent, 4) to foster and improve economic results, 5) to attract and inspire investors, 6) to integrate a global movement of leaders who want to change the world for the better and 7) to drive change.⁵⁶

The certification process involves several steps. First, the value that the company creates for society is measured. Stakeholders can use the free B Impact Assessment electronic platform to measure the company’s performance. In this process, the impact of the company (in various relevant areas) is assessed after answering the questions included in the B Impact Assessment. The nature of the questions is determined by the size of the company, sector and market, and there is a total of approximately 200 questions. If the company scores 80 out of 200, it can then proceed to validate the result with B-Lab, which is the B-Corp certification body. The results of the B Impact Assessment are then reviewed by the B Lab’s independent Standards Advisory Council.

Finally, the B Corp Declaration of Interdependence must be signed, and certified companies must pay a fee each year. Fees vary according to region and sales volume.

⁵⁴<https://bcorporation.net/about-b-lab> (accessed on December 17, 2019).

⁵⁵For the list of certified companies in Portugal, see <https://bcorporation.eu/about-b-lab/country-partner/portugal> (accessed on December 17, 2019).

⁵⁶<https://bcorporation.eu/about-b-lab/country-partner/portugal> (accessed on December 17, 2019).

In order to maintain B-Corp certification, companies are required to go through a periodic “recertification”.⁵⁷ “Companies recertify as B Corps by completing an updated, verified B Impact Assessment, demonstrating that they continue to meet the high performance standards for Certification.”⁵⁸ “As of July 1st, 2018, B Lab is changing the B Corp Certification term from two years to three years. This means that companies will be required to recertify every three years to maintain Certification.”⁵⁹

11 Specific Tax Treatment

In Portugal, there is no specific legal provision of a fiscal nature dedicated to social enterprises or B-Corps. The general tax rules will apply, depending on the nature of the legal person established (association, cooperative or company).

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⁵⁷ <https://bcorporation.net/news/b-corp-certification-term-changed-three-years> (accessed on December 17, 2019).

⁵⁸ <https://bcorporation.net/news/b-corp-certification-term-changed-three-years> (accessed on December 17, 2019).

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Finding Space for the B Corporation Within the South African Legal Landscape



Richard S. Bradstreet and Helena Stoop

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1 Introduction

To date, South African law has dealt with “for-profit” entities and “non-profit” entities as two distinct concepts. The former could generally take the shape of an unincorporated partnership or could be an incorporated company, either public or private.¹ On the other hand, an entity with a social benefit objective that did not operate primarily to make a profit, could operate as an unincorporated voluntary association, or take the form of either a *universitas personarum* with separate

¹Prior to 2011, South African law also allowed for closely held, member-run businesses to incorporate under the Close Corporations Act 69 of 1984, which provided for a distinct type of juristic entity with a governance structure that combined characteristics of a company and a common law partnership.

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personality under the common law or a non-profit company (“NPC”) under company legislation.

The South African Companies Act 71 of 2008 (“Companies Act 2008”) keeps the traditional distinction in place.² While it is permissible for a non-profit company to generate profit from income-producing operations, any such profit may not be paid to members as dividends or otherwise.³ Although an NPC is permitted to pay remuneration to directors and employees,⁴ the existing framework does not make substantive provision for the needs of the type of companies that would traditionally be associated with B corporation status.⁵ The two forms of profit companies made available by the Act are also not ideally suited to the B corporation model in that the legislation does not expressly accommodate profit ventures with social benefit objectives, leading to predictable stumbling blocks.⁶

Given the unique context of the South African legislation and the role of the Constitution⁷ in the interpretation of the Act, however, a policy argument could certainly be advanced in support of an interpretation of the existing legislation in a manner that might effectively accommodate and support a B corporation type entity.

This chapter will briefly consider the context within which South African company law has regulated non-profit entities and offer an overview of the approach to regulating profit companies. It will then discuss whether the current legal framework in South Africa would allow for a company to operate according to the model of a benefit corporation, or whether legislative intervention would be necessary.

²Section 8(1) provides that “[t]wo types of companies may be formed and incorporated under this Act, namely profit companies and non-profit companies”, and subsection (2) distinguishes types of profit companies. Under subsection (3), “[n]o association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members is or may be a company or other form of body corporate unless it – (a) is registered as a company under this Act; (b) is formed pursuant to another law; or (c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962”.

³Definition of “non-profit company” in Section 1, read with Item 1(3) of Schedule 1.

⁴Schedule 1, Item 1(3)(a).

⁵This chapter considers the position in relation to both certificated B corporations and benefit corporations in the broader sense (i.e. any entity pursuing a public benefit object alongside a profit objective). The term “B-Corporation” is therefore used to refer to any benefit corporation that, within an appropriate legal framework, could obtain the status of a certificated B corporation.

⁶While profit companies have the freedom to include social benefit goals in their objects clauses, the legislation does not support this by defining how such objects would be interpreted alongside statutory directors’ duties, for example. Likewise, shareholder remedies were not drafted to consider such additions to the objects clause. See further the discussion below.

⁷Constitution of the Republic of South Africa, 1996.

2 Historical Perspective on Social Enterprises

Since long before the advent of statutory corporations, the South African common law has recognised the voluntary association in the sense of the legal relationship arising from an agreement akin to that of a common law partnership. Although also conceptually rooted in Roman-Dutch law,⁸ this relationship is distinct from that giving rise to a partnership in that the common object of such association of persons is primarily one “other than the making and division of profits”.⁹ Where such an association does not obtain the separate personality of the Roman *universitas personarum*, the law is somewhat unclear on the instance of contractual liability where members purport to act as agents of the association.¹⁰

In the second half of the 19th century, the economic development in South Africa necessitated recourse being had to the more developed and readily accessible provisions of English Company Law,¹¹ resulting in strong similarities between the South African system of corporate governance and English law.¹² The Companies Act 46 of 1926 provided for the registration of voluntary associations, granted them separate legal personality, and brought them within the regulatory framework applicable to companies. A more nuanced regulation of so called “non-profit” companies, established under the general company legislation, only emerged more recently, in the second half of the 20th century.¹³ A non-profit association could thus in principle, by registration, obtain statutorily recognised separate legal personality, and enjoy the benefits of limited liability, as well as minority protection, and certain tax exemptions.¹⁴

3 Current Regulatory Framework

A review of company law, taking up almost the entire first decade of the 21st century, culminated in a new piece of legislation to govern all South African corporate entities: the Companies Act 2008.¹⁵ The Act made sweeping changes,

⁸See, e.g., Voet (1698), 17.2.2; the two concepts may seem to have once overlapped.

⁹Bamford (1971), p. 190. Unlike partnerships which arise from an agreement between two or more persons, a voluntary association requires at least three contracting parties.

¹⁰See Bamford (1971), p. 160.

¹¹Naudé (1970), p. 8.

¹²Cilliers and Benade (1985), p. 15; the first company legislation in South Africa was the Cape Joint Stock Companies Limited Liability Act 23 of 1861, “an almost verbatim adoption of the English Joint Stock Companies Act 1844” (*idem*).

¹³Section 21 of the Companies Act 61 of 1973 provided expressly for what became known as “section 21 companies”.

¹⁴Bamford (1971), p. 190.

¹⁵Cassim et al. (2012), p. 2.

and broke ranks with English law in several respects, choosing instead to borrow concepts from jurisdictions such as Australia, and the United States.¹⁶ The current legislation expressly recognises a “non-profit company” as a distinct category of company,¹⁷ and provides for a modified application of the Act in respect of NPCs, specifically to exclude parts dealing with capitalisation, securities registration and transfer, and certain provisions relating to audit and shareholder rights.¹⁸ There is no further distinction drawn between charitable organisations and those which achieve a “primary social or environmental mission using business methods”.¹⁹ Since it is the latter category that would typically fall to be regulated as benefit corporations,²⁰ it can be said that the South African framework lacks any direct regulation of social enterprise.

The Companies Act 2008 has at its foundation several public benefit goals. The purposes of the Act expressly include “promot[ing] compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”,²¹ and “reaffirm[ing] the concept of the company as a means of achieving economic and social benefits”.²² These purposes equally apply to NPCs and to profit companies, and, while NPCs by their nature focus on the achievement of social benefits, one may anticipate that economic and resultant social benefits would ensue generally to some extent, given the application of the enlightened shareholder value approach to the governance of profit companies.

On a reading of the provisions of the Act, however, a lack of concrete handles for achieving these goals is apparent. Although there may be room for a court to interpret its provisions permissively to allow for the development of a more stakeholder-inclusive corporate law jurisprudence, more concrete parameters for the exercise of managerial discretion may be necessary, considering that strategic decisions taken in the furtherance of public benefit objects fall within the scope of such discretion. Arguably, the directors of a for-profit benefit corporation should be guided and supported by clearly formulated rules of law. If this is not the case, they may find themselves hamstrung by litigation and other remedial procedures which may frustrate efforts to give effect to the company’s public benefit objectives. This would especially be the case for companies attempting to convert from a more traditional, profit driven objective to one that also includes public benefits.

¹⁶Ibid. Despite this, many similarities between South African and English company law remain. The discussion of some of the changes in this section has been adapted from Stoop (2020).

¹⁷Section 8(1).

¹⁸Section 10(2).

¹⁹Social enterprise defined by Katz and Page (2010), p. 85.

²⁰Namely, those entities that make use of some revenue-generating business rather than benevolent funding to raise capital for its primary mission.

²¹Section 7(a).

²²Section 7(d).

Although “public benefit organisations” (“PBOs”) are provided for in tax legislation,²³ for an entity to enjoy the associated tax advantages, it must meet a few stringent requirements. For a South African entity²⁴ to obtain PBO status under the legislative definition, it must first be either an NPC under the Companies Act 2008, or “a trust or an association of persons that has been incorporated, formed or established in the Republic”.²⁵ Second, “the sole or principal object” of such entity must be the carrying on of “one or more public benefit activities,²⁶ where—(i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent; [and] (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee”.²⁷ Furthermore, the “public” nature of a PBO is broadly construed by requiring that “each such activity carried on by that organisation [be] for the benefit of, or . . . widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups)”.²⁸

Although the restriction on financial self-interest of insiders appears to be limited to the controllers of the entity, notionally leaving open the possibility of returns for investors, one of the requirements for a PBO to obtain approval from the Commissioner is that it submits “a copy of the constitution, will or other written instrument under which it has been established and in terms of which it is . . . prohibited from directly or indirectly distributing any of its funds to any person (otherwise than in the course of undertaking any public benefit activity) and is required to utilise its funds solely for the object for which it has been established”.²⁹ It therefore appears that, even to the extent that the South African framework may allow for the operation of a B corporation, such an entity would be excluded from enjoying tax advantages as a PBO, as currently defined. Perhaps most notably, if a for profit entity were to register as a PBO, it would only be entitled to the concomitant tax benefits if no more than 5% of its revenue is generated through trading.³⁰

²³Income Tax Act 58 of 1962; Section 30 deals specifically with “public benefit organisations”.

²⁴The first leg of the definition also includes “any branch within the Republic of any company, association or trust incorporated, *formed or established in any country other than the Republic* that is exempt from tax on income in that other country” (emphasis added).

²⁵Section 30(1)(a).

²⁶The term “public benefit activity” is defined with reference to an extensive list of activities in the ninth schedule to the Act, under the categories of “welfare and humanitarian”, “health care”, “land and housing”, “education and development”, “religion, belief or philosophy”, “cultural”, “conservation, environment and animal welfare”, “research and consumer rights”, “providing of funds, assets or other resources” (to certain other categories of entity involved with public benefit objects), and well as a few further specific instances under “general”.

²⁷Section 30(1)(b).

²⁸Section 30(1)(c).

²⁹Section 30(3)(b)(ii).

³⁰Klaaren (2020), p. 462.

South Africa's Competition Act³¹ applies to "economic activity", as opposed to profit making, which occurs or has an effect within the country.³² As such, the Act will regulate the activities of both profit companies and non-profit companies alike.³³ Although public interest considerations are included in the stated purposes in the Act,³⁴ the potential for the application of the competition law public benefit doctrine to social benefit corporations has perhaps been exaggerated. Although Section 2 (c) does make provision for the advancement of social and economic welfare, most of the stated purposes speak more towards inclusivity and the redress of historic injustices. The doctrine thus finds only limited direct application: first, public interest considerations are relevant in the context of the substantive analysis of mergers and acquisitions only, and what constitutes public interest is also specifically defined.³⁵ Arguably, some of the beneficial impact that a B corporation might have would be relevant, but not more so than for any other firm. Statutory grounds that the courts will consider make reference to only some of the many issues that a typical B corporation may face.³⁶ Second, public interest considerations play an indirect part in determining whether certain conduct should be exempted from regulation.³⁷ Yet again, here the ambit of application is limited and narrowly defined.³⁸ In most cases, therefore, a B corporation could behave in a manner that would traditionally be considered anti-competitive, and it is unlikely that it there will be any viable defence centred in its status as a public benefit company.

From a regulatory perspective it must finally be noted that South African regulators have embraced a scheme similar to that adopted in the United Kingdom, in the form of a voluntary Code of Governance principles: the King Report and Code ("King IV").³⁹ Although King IV states that it applies to all entities (regardless of type and size), it is only enforced indirectly (in the case of listed entities) as part of the Johannesburg Stock Exchange's Listing Requirements.⁴⁰ The only direct reference to it in the South African companies legislation is contained in the regulations to the Act,⁴¹ which require that a prospectus include a narrative statement setting out

³¹ Act 89 of 1998.

³² Section 3(1).

³³ Sutherland and Kemp (2021), par 4.4.

³⁴ Section 2.

³⁵ Section 12A(3).

³⁶ *Minister of Economic Development v Competition Tribunal (Walmart/Massmart merger)* 110/CAC/Jul11; Sutherland and Kemp (2021), par 10.11 *et seq.*

³⁷ Particularly, see the list of consideration in Section 10(3)(b).

³⁸ Sutherland and Kemp (2021) at 5.10.1.

³⁹ King Committee on Corporate Governance *Report on Corporate Governance for South Africa* (Institute of Directors in Southern Africa, 2016). For an overview of the development and history of the King Report and Code, see <https://www.iodsa.co.za/page/OurTimeline>. The most recent version, King IV, was published in 2016.

⁴⁰ Esser and Delpont (2018), p. 378.

⁴¹ Regulation 54.

how the company has applied the principles of the King Report and Code⁴² and any reasons for a failure to apply them.⁴³

The King committee has grappled continuously with issues surrounding the appropriate application and enforcement of the Codes. South African courts have also increasingly been making statements in obiter that may imply an indirect application of the codes in proceedings seeking to hold company directors personally liable for breaches of their statutory and common law duties.⁴⁴ Such references to the King Code in the cases decided to date have been cursory and the courts do not give any clear indication of the extent of the interaction between the statutory and common law provisions and the governance code. King IV refers expressly to these decisions and developments in emphasising the code's importance and application outside the traditional sphere of the listed company.⁴⁵ The code also contains so-called "sectoral supplements", that are clearly not aimed at listed companies.⁴⁶ There is no special provision for the governance of profit companies with public benefit objects, which is unsurprising considering that this type of vehicle is not envisaged in the primary companies legislation.

The interplay between the judicial attitude towards directors' duties and the legislative agenda relating to corporate governance will be discussed later before a final assessment of the South African regulatory framework's potential to support public benefit companies to the same effect as the B corporation model of regulation.

3.1 Available Statutory Vehicle

Beyond providing for a corporate structure appropriate to the governance needs of non-profit companies, there has been no attempt made at the specific regulation of incorporated social enterprises. While the idea was considered during the drafting phase of the Companies Act, it was ultimately rejected—possibly due to the fact that the addition of another corporate form contradicted one of the key aims of the legislation: simplifying the regulatory regime.⁴⁷ Although one of the purposes of the Act is to "provide for the formation, operation and accountability of non-profit

⁴²This is in turn defined by regulation 47(a) as "the King Report on Governance for South Africa and the King Report and Code of Governance Principles (King III), as amended or replaced from time to time".

⁴³See also: Esser and Delpont (2018), p. 384.

⁴⁴See for example: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* (2006) 5 SA 333 (W), *Levenstein v S* [2013] 4 All SA 528 (SCA); *Kalahari Resources (pty) Ltd v Arcelormittal SA and others* [2012] 3 All SA 555 (GSJ); *Council for Medical Schemes and Another v Selfmed Medical Scheme and Another* [2011] ZASCA 207; *South African Broadcasting Corporation Ltd and another v Mpofu* [2009] 4 All SA 169 (GSJ).

⁴⁵King IV, 17.

⁴⁶King IV, 74–117.

⁴⁷Klaaren (2020), p. 462.

companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions”, there does not appear to be any significant focus on the governance of the NPC as a vehicle for social enterprise. The question is whether the existing framework allows for a “hybrid” model of governance that would support a benefit corporation with dual objectives.

The most suitable vehicle for the adoption of a model analogous to a benefit corporation under the Act would not be the NPC, but rather the ordinary profit company (whether public or private). The legislation does not, however, envisage that such companies would be used for any purpose beyond the ordinary corporate objective of generating profit for shareholders. Although directors are obliged in some cases to consider other stakeholders,⁴⁸ the traditional approach of requiring directors to consider the interests of shareholders when acting in “best interests of the company” remains. This aspect will be dealt with in more detail below.

The structure most similar to that of a benefit corporation available in South Africa is probably the (unincorporated) “business trust”, which may operate either for profit or not for profit. The operation of trusts is primarily regulated by the common law, with legislation in place to deal with matters ancillary⁴⁹ to the core principles of trusts law that were inherited from English law.⁵⁰ Aside from regulating certain administrative aspects of trusts,⁵¹ this legislation imposes some basic substantive obligations on trustees,⁵² and provides for the resignation and removal of persons so appointed. The analysis of the South African framework, however, will be directed towards the incorporated entities available for furthering public benefit objects, and comparisons with trusts law are therefore of limited value for present purposes.

Finally, it must be noted that it is also possible to make use of cooperatives, and while there have been interesting developments in this context, a cooperative is generally a “small-scale legal form used for community development, usually at local level”.⁵³

A recent report prepared by the Bertha Centre for Social Innovation and Entrepreneurship at the UCT Graduate School of Business, highlighted four main ways in which for profit entities in South Africa can operate “like social enterprises”. First, it is suggested that the company “establish a board to safeguard the social mission”; secondly, the company could “change the Memorandum of Incorporation to reflect

⁴⁸For example, creditors when applying the solvency and liquidity test under Section 4 of the Act, or employees primarily in the context of Business Rescue provided for in Chapter 6 of the Act.

⁴⁹For example, the Trust Property Control Act 57 of 1988 was promulgated “[t]o regulate further the control of trust property; and to provide for matters connected therewith” (preamble).

⁵⁰“Trusts were introduced to South Africa after the British occupation of the Cape in 1815, but there has been only a partial reception of the English law of trusts” Gauntlett (2013), para 529.

⁵¹For example, appointments and authorisation of trustees by the Master of the High Court, the filing of trust documents, and standing to challenge decisions of the Master.

⁵²Such as a duty of care diligence and skill (Section 9), and certain accounting obligations in relation to property held in trust.

⁵³Klaaren (2020), p. 457.

the dual mission and how profits will be reinvested in the business”; thirdly the company could “get an international accreditation as a social enterprise [or] use international rating systems to measure the impact”;⁵⁴ and finally the company could “openly share financial statements and social impact reports”.⁵⁵ While there are a number of companies registered in South Africa which have obtained B corps certification, an analysis of a sample of the Memoranda of Incorporation of the registered B corporations, curiously, showed no reference to any social benefit objectives.⁵⁶ This may seem to be a potentially critical oversight, in view of the significance of the objects clause, as discussed below.

3.2 Requirements as to Purpose: Public Benefit Object (Clause)

One of the significant changes brought about by the recent reform of the South African companies legislation is the abolition of the external consequences of the historical ultra vires doctrine.⁵⁷ While a company was previously required to include an objects clause in its constituent document, rendering any action falling outside of the scope of such a clause void for being ultra vires, objects clauses are no longer mandatory.⁵⁸ An expression of a South African company’s objects in its memorandum of incorporation (“MOI”)⁵⁹ will have no effect on the validity of transactions with third parties—although shareholders are empowered to prevent a director from breaching any term of the MOI by causing the company to act ultra vires (subject to a claim for damages that arises where a bona fide third party is adversely affected).⁶⁰ Moreover, each shareholder of a company has a claim for damages against any person who fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act; or a limitation, restriction or qualification contained in the MOI (unless ratified).⁶¹ The Act does not allow for contractual variation of the obligations of directors.⁶²

⁵⁴The report notes the following examples: The Trading for People and Planet accreditation by the Social Enterprise Mark, B-Corporation Certification, the Global Reporting Initiative’s Sustainability Reporting Framework, or the Impact Reporting and Investment Standards (IRIS) by the Global Impact Investing Network.

⁵⁵Bertha Centre (2016), p. 11.

⁵⁶Klaaren (2020), p. 465.

⁵⁷Cassim et al. (2012), p. 163.

⁵⁸Section 20(1).

⁵⁹The Companies Act 2008 has also done away with the traditional distinction between the memorandum of association and articles of incorporation, providing for a single “memorandum of incorporation”.

⁶⁰Section 20(5).

⁶¹Section 218(2).

⁶²Section 78(2).

A public benefit corporation would therefore have two options. It could choose not to include an objects clause at all, in which case the discretion of the board would have to be exercised “in the best interests of the company”. Alternatively, a public benefit aim could be included in the objects clause; however, the legislation does not expressly provide for this to alter the application or interpretation of the duty to act in the best interests of the company. The prevailing definition of “the company” in this context will inevitably require a prioritisation of shareholder interests.⁶³ This creates an interesting tension, given that a company can legally include, and give effect to, an objects clause allowing for reinvestment to effect a public benefit.⁶⁴

The effect of including a public benefit object on that duty would remain open to judicial interpretation, leaving directors in an unenviable position where liability remains uncertain. As the discussion below will highlight, South African courts have tended to interpret the phrase “in the best interests of the company” with an emphasis on shareholder interests. In both cases (in the absence of an objects clause and where an objects clause with a public benefit objective is inserted) directors would face further practical impediments given that the legislation offers no solution to shareholder actions such as the removal of directors, or exercising other shareholder remedies that could undermine the board’s attempts at achieving any public benefit object.⁶⁵ Although the Act, in principle, allows for public benefit objects, the practical ability of a company to actively pursue such object will, at least to some extent, be dependent upon the flexibility of the legislation in allowing for management’s responsibilities to be towards stakeholder groups specified in an objects clause.

3.3 *Responsibilities of Management/Duties of Directors*

The Act has partially codified⁶⁶ the South African common law principles relating to directors’ duties and does not entirely supersede existing common law. This is not least because the duties under the Act are described in very broad terms, and the common law will still impact their interpretation. On the core obligation of the

⁶³ Although not defined in the Act, when considering the interests of “the company”, the board must consider interests of the company “as a whole”, meaning “the collective body of present and future shareholders” Cassim et al. (2012). See *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 All ER 1120 at 1126E.

⁶⁴ Klaaren (2020), p. 467.

⁶⁵ For example, the right to demand that the company buy shares back under the so-called “appraisal remedy” (Section 164).

⁶⁶ In Section 67.

ordinary director who, by virtue of his or her position vis-à-vis the company, is required to act in the interests of the latter⁶⁷ and to exercise good faith in doing so, South African law has been relatively settled in its approach.⁶⁸

Under the statutory formulation of this duty, a director of a South African company is required “when acting in that capacity, [to] exercise the powers and perform the functions of director . . . in the best interests of the company. . . .”⁶⁹ Neither the meaning of “interests”, nor “the company” has been defined in the Act to require consideration of a broader range of stakeholders, and nor does the Act make any express reference to stakeholder interests as part of its stated aims—apart from the interests of stakeholders in the context of financial distress and business rescue.⁷⁰ There are some indications elsewhere in the legislation that the Act embodies a more progressive, and enlightened approach to stakeholder interests, but mostly this conclusion can be inferred from its aims and legislative context rather than any express provisions.

In this regard, the courts have conceded on various occasions that “the interests of the company” remains “as unprecise a phrase as any, [which] is at times misunderstood, and [which] may have slightly different meanings depending on the context”.⁷¹ Requiring a board of directors to act “in the best interests of the company” may necessitate the alignment of their strategies with any one or more of a number of interests—interests that may conflict. From this perspective, the central question becomes about whose interests should be on the mind of a company director making a strategic decision. A profit company with a public benefit object presents a challenge insofar as the existing jurisprudence emphasises the interests of shareholders where any conflict with other stakeholders’ interests exists.

The relevance of the stakeholder debate to this discussion is that its current formulation potentially constrains directors of profit entities where they apply company funds to further public benefit objects. As mentioned, even if a company were to choose not to include an objects clause that allows for such expenditure by stating the furtherance of a social benefit as one of the company’s objects, a conservative approach to the directors’ duty to act in the best interests of the

⁶⁷ See *Percival v Wright* [1902] 2 Ch 421 Ch D. In the United Kingdom, this formulation has changed, and the modern codified version of the duty requires the director to promote the success of the company. The statutory version of the duty in South African law continues to refer to the “interests” of the company.

⁶⁸ See for example: *African Claim & Land Co Ltd v W J Langermann* 1905 TS 494 (dictum by Innes CJ at 504).

⁶⁹ Section 76(3)(c).

⁷⁰ See Section 7(k).

⁷¹ Nourse LJ made the following telling observation: “[t]he expression ‘the interests of the company’ is one which is often used but rarely defined . . . [i]t seems quite likely that it is sometimes misunderstood and . . . possibly . . . has slightly different meanings in different contexts” *Brady v Brady* [1988] 2 All ER 617 HL.

company would effectively tie the board's hands, or—at the very least—leave board members open to liability, takeovers, or objections and legal action by shareholders.⁷² Where the objects clause is included, the board would ostensibly be on a more solid footing but likely still subject to a restrictive interpretation of any such clause.

Although societal and legal norms have been moving slowly in a more stakeholder-centric direction, the existing legal position still focusses on the interests of the company's shareholders and maximising wealth and shareholder return remains the dominant corporate objective.⁷³

King IV aims—inter alia—to promote a more stakeholder-inclusive approach to corporate governance. As already mentioned, the code is only mandatory for listed companies, but designed to be applicable to all governing bodies. It may therefore be that certain governance principles contained in King IV would facilitate a governance framework more conducive to the B corporation model than the existing hard law framework. The more pluralist approach to corporate governance inherent in the notion of “corporate citizenship”, enshrined by the code, will be explored in more detail as an alternative mechanism for stakeholder inclusion, along with the so-called “social and ethics committee” envisaged by the Act, which is also only mandatory for certain companies.

4 Mechanisms for Stakeholder Inclusion

4.1 *The Social and Ethics Committee*

Perhaps the most notable step that the legislature took towards facilitating stakeholder-inclusive governance under the Companies Act 2008 is the creation of a mandatory social and ethics committee for certain companies.⁷⁴ Under the Act, the Minister may prescribe by regulation that a category of companies “must each have a social and ethics committee, if it is desirable in the public interest”.⁷⁵ This must be

⁷² Various shareholder remedies come to mind in this regard, but the most pertinent stumbling block is the initial amendment of the Memorandum of Incorporation which would require a special resolution, under Section 16 of the Act.

⁷³ Keay (2013), p. 16. Keay notes that this might amongst other things be attributable to so-called “path-dependence theory” which contends essentially that persistent differences in corporate rules and structures from one economy to the next are the result of the structures that were initially in place. See Bebchuk and Roe (1999).

⁷⁴ For a more comprehensive discussion of the role and impact of the social and ethics committee, see Botha (2016); De Lange (2015); Esser and Delpont (2017); Kloppers (2013); Stoop (2013).

⁷⁵ Section 72(4)(a). The rest of the section details the fact that it is possible for companies falling within this category to apply for an exemption to the Companies Tribunal.

done having regard to annual turnover, the size of the company's workforce, or the "nature and extent of the activities of such companies".⁷⁶

The social and ethics committee has a broad mandate and is required to (inter alia) monitor compliance with legislation, codes of best practice, and mechanisms such as the UN Global Compact Principles. It must also monitor activities related to good corporate citizenship, which consider employee relations and environmental impact amongst other matters and criteria.⁷⁷

The committee is thus poised to consider how the company affects a broad number of constituencies and stakeholders, and to liaise with and advise the board on these matters. The legislation also mandates that the committee reports back to the shareholders which creates some measure of accountability. Although this is clearly an attempt to encourage companies to focus beyond the immediate interests of shareholders and the financial bottom line, it stops short of being an official embrace of stakeholder theory. The matters listed are similar to those that boards of directors in the United Kingdom are required to consider under Section 172 of the UK Companies Act 2006, although under that Act, they are not included in the context of directors' duties but are instead introduced by means of an advisory committee.

Although such a committee may facilitate corporate accountability, "the benefit corporation derives its moral legitimacy from the values of its owners and the oversight of a third-party evaluator",⁷⁸ and accountability to an independent body—even an independent advisory committee—would not equate to certification by a truly independent body which is uninvolved with the company's management; notwithstanding that such accountability may go some way to vouch for the values of corporate owners.

4.2 *King IV*

King IV advocates expressly for a more pluralist approach to the interests of the company,⁷⁹ Part 5.1 of the Code being devoted to "leadership, ethics and corporate

⁷⁶Section 72(4)(a)(i)–(iii). The Regulations to the Act put in place a system to measure the nature and extent of the activities in companies in general. The so-called "public interest score" (see Regulation 26) is also used in instances where it must be determined which accounting standard and financial reporting standards will apply to particular companies (see Sections 29(4) and 30(2) and (7) read with regulations 26–29). Broadly speaking, the public interest score tallies the number of shareholders, the number of employees, annual turnover and annual third-party liability to arrive at a total score representative of the company's impact to determine the extent to which regulation is required (see Regulation 26). At the moment, the Regulations require all public listed companies to put in place a social and ethics committee as well as any company that has in any two of the preceding five years had a "public interest score exceeding 500 points". This is not an insignificant score, and it is likely that only sizeable private companies would be affected.

⁷⁷Companies Act 2008, Section 72(4)–(10) read with regulation 43.

⁷⁸André (2012), p. 133.

⁷⁹As did its predecessor, King III.

citizenship”, and providing—inter alia—that “[t]he governing body should ensure that the organisation is and is seen to be a responsible corporate citizen”.⁸⁰ The recommendations that support this principle emphasise that it is the responsibility of the governing body to “ensure that the organisation’s responsible corporate citizenship efforts include compliance with the Constitution of South Africa (including the Bill of Rights), the law, leading standards, and adherence to its own codes of conduct and policies”.⁸¹ This corresponds to the loftily framed purposes of the Act,⁸² drawing corporate law back towards the values enshrined in the Constitution.

Specifically, it is recommended that “[i]n the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time”.⁸³ To give effect to this, it is recommended that the governing body exercise “ongoing oversight of stakeholder relationship management” and that it should oversee that this gives rise to methodologies by means of which stakeholders and stakeholder groupings can be identified—particularly so-called “material stakeholders”, based on the extent to which they either affect or are affected by the company’s activities, outputs, and outcomes.⁸⁴

5 Judicial Enforcement of Legislative Agenda?

One of the problems that arise when trying to position B corporations within the existing South African legal framework, is the apparent disconnect between the applicability and the legal force of soft law principles in determining the scope of directors’ duties—particularly insofar as these duties may be owed to external stakeholders.

Since the earliest decisions considering where the focus of the board should be, opinion has shifted, and there has been some evolution in both judicial attitude and the legislative agenda. The so-called “stakeholder debate” has generated extensive literature. Perhaps one of the most contentious questions in company law has been, and continues to be, the extent to which company directors should consider stakeholders other than the company’s shareholders, and particularly, which stakeholders ought to be considered. Given the potential impact that a company’s activities may have, it is perhaps this second part of the inquiry that is the most vexing of all. It is less contentious to accept that there may be some duty owed to the

⁸⁰King IV, Part 5.1: Principle 3.

⁸¹Part 5.1, Principle 3: Recommended Practice 12.

⁸²Contained in Section 7.

⁸³Part 4 & Part 5.5, Principle 16. Part 5.5 of the Code deals more extensively with stakeholder relationships.

⁸⁴Part 5.5, Recommended Practice 4.

company's creditors (especially in instances where the company faces financial difficulties). In the context of the somewhat conservative current legislative framework, it is harder to make the case for directors being required to consider other potential stakeholders such as the environment or the communities within which the company operates.⁸⁵

It is apparent, even at face value, that the principles and recommendations of King IV make far more onerous demands than the relevant statutory provisions or common law insofar as the directors' responsibilities to act in the company's best interests are concerned. Its (arguably) progressive ethos has certainly not yet been fully embraced by black letter law, even though the legislature had the clear opportunity to do so when drafting the most recent Companies Act of 2008. Indeed, several of the recommendations contained in King III were included in the 2008 Act, and yet—in spite of a general commitment to good governance in the stated purposes contained in Section 7 of the Act—the legislature chose not to more inclusively define the phrase “best interests of the company”, and nor did it include a provision similar to Section 172 of the UK Companies Act 2006 to give guidance on specific matters for consideration by the board in making stakeholder-inclusive corporate decisions.⁸⁶

When interpreting the legislation, one must therefore weigh two competing principles: on the one hand, there is clear mandate that the principles underlying the Constitution should inform all interpretation, whether this be of the common law or statute. On the other, one must be mindful of the fact that the purpose of the legislative provisions in question was apparently not to mandate a pluralist approach to interpretation by the directors of a company. Consequently, the judicial interpretation of directors' duties, particularly insofar as the ultimate beneficiaries of such duties are concerned, will inevitably tend towards a construction that excludes external stakeholders. This is not to say that the courts have been obdurate in the application of governance principles, and indeed, heed has been taken of the precepts of the King Code in a number of decisions, particularly where the subject of the litigation is a listed company.⁸⁷ However, without obligations to external stakeholders being more clearly defined in the primary legislation, a company with a social enterprise as its primary object would run, in principle, against the grain of the Act—at least technically, if not philosophically. In the case of a private company, a court would be hard pressed to find a firm basis in law to require compliance with

⁸⁵ Although this is becoming increasingly less contentious as the impact on human activities on the environment becomes more difficult to ignore. Du Plessis et al. (2018), pp. 7–8.

⁸⁶ This is pertinent since the UK Companies Act 2006 Act was already in operation at the time of drafting the Companies Act 2008 (and when subsequent amendments were made to it in 2011). It is also clear from the South African legislation that statutes of various jurisdictions, including the United Kingdom, were consulted and in some instances incorporated into the Companies Act 2008. The failure to take a more outspoken stance seems then to have been intentional, with the legislature stopping short of imposing a more onerous standard on directors where stakeholder interests are affected by board decisions.

⁸⁷ See, for example, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006 5 SA 333 (W), which was the first case to prominently reference the King Code.

voluntary principles unless it is prepared to circumvent existing interpretations and precedent and accept a radically different interpretation of the phrase “best interests of the company”. Klaaren summarises the current legislative position as follows:

The result is that only a weak and non-distinctive form of incorporation as a benefit corporation is available in South Africa. It is non-distinctive because it is in form not distinguishable from the dominant for-profit traditional corporation. It is weak because the public benefit mission cannot be irrevocably designed – cannot be ‘hard-wired’ – into the corporation.⁸⁸

6 Assessment of Governance Framework

South African law allows company boards to engage in altruistic activities to attract prospective shareholders who are socially conscious, and the constitution of a profit company may include an altruistic object; but in the context of the restraints of shareholder primacy, this may seem like little more than corporate virtue signalling for the sake of profit. The board, in principle, remains duty-bound to act in furtherance of the financial interests the shareholders.

Although there does not currently appear to be any binding authority that changes the common law definition of the “best interests of the company”, given the persuasive impact of King IV, the objects of the Act, and the imperatives of the Constitution, it is likely that a court will—at the very least—acknowledge that the legislation moves beyond shareholder value and implements an enlightened shareholder value approach. Nevertheless, courts would still require the interests of shareholders (traditionally associated with profit maximisation) to trump the interests of other stakeholders should there be a conflict of interests. This may impede the board of a company following the B corporation model. It is unlikely that it would be legally tenable for a court to use King IV as a basis to justify a fully pluralist approach.⁸⁹ It is also unlikely that a fully pluralist approach could be introduced based on an interpretation of the Act in the light of the Constitution, but it is possible that the common law might be developed in this way.⁹⁰

⁸⁸ Klaaren (2020), p. 464.

⁸⁹ In South Africa, rules related to interpretation of statutes form part of the common law. Recent Supreme Court of Appeal ruling allows the courts to consider some context and extrinsic sources, but it is unlikely that the boundaries of such a discretion are wide enough to allow recourse to a source such as King IV. A comprehensive discussion of the issues falls outside of the scope of this chapter, but see, for example, the following relevant cases: *Bothma-Bato Transport (Edms) Bpk v S Bothma & Seun Transport* [2013] ZASCA 176; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁹⁰ While all law in South Africa must be interpreted to align with the Constitution, this does not give a court an unfettered discretion where the law is clear and not in violation Constitutional principles. In this regard, see for example *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) where the Constitutional Court explains at par [20]: “Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning

The framework leaves room for a director to positively act in furtherance of a social objective, and a carefully worded objects clause would make this legally tenable. The legislation however puts no substrata in place to practically support and/or facilitate the operation of such entities. Existing shareholder remedies do not carve out any exceptions for instances where a company decides to pursue a public benefit object, and dissent by even a small minority of shareholders could impede any attempts to do so. It is also apparent that the South African legislative environment more broadly does not make any special attempt to make corporate ventures with public benefit objects more attractive to investors. There are no tangible benefits under the tax law regime and competition law would not excuse conduct otherwise considered anti-competitive simply because a company is operating in furtherance of a public benefit objective.

South Africa's unique legislative framework, constitutional dispensation, and interactions between hard law and soft law norms make it an interesting case study. While the legal landscape is well poised to accommodate a B corporation type structure, it is clear that certain legislative amendments would be necessary for such an entity to function optimally within the existing formal legislative framework.

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Social Enterprises and Benefit Corporations in South Korea



Hyeon Jong Kil

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1 Introduction

Unlike a few other countries, Benefit Corporations (B Corps) are not widely institutionalized in Korea. It has been almost ten years since the term *Benefit Corporation* was introduced in Korea, but only a very few companies are using

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this name within the country.¹ In Korea, it is extremely difficult to find cases that use the term except for certified B corporations. As of the second half of 2021, there are only 15 businesses that are certified B corporations.² There is no law related to Benefit Corporations, let alone separate Korean terms related to Benefit Corporations.

However, it is difficult to say that this slow development of the benefit corporation is due to the overall low growth of the social economic organizations, which can be broadly defined as organizations that pursue both social and economic goals. Korea's social economy has made a rapid growth institutionally and socioeconomically since the 2000s. During this period, social economy-related laws such as the Social Enterprise Promotion Act and Framework Act on Cooperatives were enacted, and various types of social economy organizations such as community business and social venture have newly emerged. The fact that the number of certified social enterprises currently in operation has reached 3000 since 2007 is a representative example of the expansion of social economy in Korea.³

The relative underdevelopment of the Benefit Corporation in Korea can be attributed to various reasons. First, it is not that useful in Korea. The development of social economy in Korea has been mainly caused by the state-led efforts including direct financial support.⁴ To this end, the government tried to nurture unique social economy organizations that are connected to various social issues of Korea. In this process, the Korean government needed to clearly distinguish social economy organizations from non-social economy organizations, and the government has used its own unique social economy accreditation system instead of overseas cases. All the major types of social economy organizations mentioned above have their own social economy organization accreditation system. Among them, social venture is the only organization type that considers certified B corporation as one of the accreditation criteria, and even then, the B corporation is not an essential component for the accreditation.⁵ In other words, from the government's point of view, there is no need to utilize the Benefit Corporation because it has native social economy accreditation systems, and social economy organizations do not have much material gain in obtaining or maintaining the certification of the Benefit Corporation for direct government support.

However, in reality, it is evident that there are a number of Benefit Corporations that “*meet the highest standards of verified social and environmental performance, public transparency, and legal accountability*” currently operating in Korea.⁶ This chapter will discuss, in addition to the current status of certified B corps, the current status, system, and future pathway of Korea's social economy including Benefit

¹Han (2012), October 9.

²<https://bcorporation.net>.

³Ministry of Employment and Labor (2021), September 8.

⁴For example, see Defourny and Kim (2011).

⁵Ministry of SMEs and Startups (2021), July 21.

⁶<https://bcorporation.net>.

Corporations in a tangible sense. First, it outlines the status of certified B corps. Thereafter, the development of social economy organizations in Korea and related systems will be described. Finally, the argument will be summarized before presenting the author's thoughts on the future directions.

2 Current Status of Certified B Corporations

The term Benefit Corporation was first used for a Korean company in 2012. A company called Delight, which distributes hearing aids at affordable prices to the underprivileged, received B corp certification for the first time in Northeast Asia.⁷ After that, as Tree Planet, a social economy organization for forestation, and Hope Makers for household debt resolution became certified in 2013 and 2014, respectively, an increasing number of companies became interested in B corps.⁸ In 2019, MYSC, a consulting and impact investment organization specializing in social innovation that had received B corp certification in 2016 was officially authorized from B Lab in the United States to establish B Lab Korea. Since then, it has been supporting the expansion of Benefit Corporations within the country.⁹

The process of B corp certification in Korea is not different from other countries. Companies that want to be certified must obtain 80 points or more in the B Impact Assessment and can be certified only after the verification process on the score by the B Lab. Re-certification is required every three years to keep the certification valid.¹⁰

As of October 2021, a total of 15 institutions maintain B corp certification in Korea. As can be seen in the Table 1, companies in various industries such as manufacturing, service, and finance have been certified. Particularly, there are many certified B corps are related to finance and impact investment given the overall industrial composition. By region, most of the companies are concentrated in Seoul, the capital of the Republic of Korea, except for a few.¹¹

One of the characteristics of Korea's social economy policies is that various ministries are fostering their respective social economy organizations. Among them, the Ministry of SMEs and Startups, which is in charge of SMEs and venture businesses, is promoting a social economy organization called social venture. Here, the social venture that the Ministry of SMEs and Startups (MSS) refers to is a policy term rather than an academic and social term. In addition, the MSS creates a social venture identification index for government support and identifies companies that exceed a certain score for each of the two criteria of social value and innovative growth potential as social ventures. Companies that are certified as B corps are

⁷Han (2012), October 9.

⁸<https://bcorporation.net>.

⁹<https://bcorporation.co.kr>.

¹⁰<https://bcorporation.net>.

¹¹<https://bcorporation.net>.

Table 1. Certified B corps in Korea (October 12, 2021)^a

Company name	Initial certification	Business sector	Region
Tree Planet	2013	Environment	Gwangjin-gu, Seoul
Hopemakers	2014	Credit counselling	Gangnam-gu, Seoul
Impact Square	2014	Social innovation consulting, impact investment	Seongdong-gu, Seoul
General Bio	2015	Cosmetic manufacturing	Wanju-gun, Jeollabuk-do
Merry Year Social Company (Mysc)	2016	Social innovation consulting, impact investment	Seongdong-gu, Seoul
Instinctus	2016	Contraception, adult toy manufacturing	Seongdong-gu, Seoul
Dot	2018	Braille smartwatch manufacturing	Geumcheon-gu, Seoul
The bread and butter	2018	Brand consulting	Seocho-gu, Seoul
Tella	2019	Online education	Gangnam-gu, Seoul
Oyori Asia	2019	Food service	Jongno-gu, Seoul
MoreDream	2019	Foreign language education for the blind	Daegu
Ark Impact	2019	Impact investment	Yeongdeungpo-gu, Seoul
Todo Works	2019	Wheelchair manufacturing	Siheung City, Gyeonggi Province
Crevisse Partners	2019	Various areas	Seongdong-gu, Seoul
Rootenergy	2020	Renewable energy funding	Seongdong-gu, Seoul

^a <https://bcorporation.co.kr>

identified to have a social value as a social venture. However, this is not limited to certified B corps as companies certified as major social economy organizations of other ministries are considered to have the same social value as certified B corps.¹²

A group of social economy organizations that call themselves social ventures in Seongsu-dong, Seongdong-gu, Seoul, have had a significant impact on the government-led revitalization of social ventures as policy stakeholders.¹³ Several companies that were certified as B corps in the early stage in Korea were social economy organizations located in Seongsu-dong. Therefore, it can be assumed that the efforts of these companies had a major impact on inclusion of B corps in the accreditation criteria. It is also assumed that the corporate network in Seongsu-dong is contributing to the expansion of B corp certification to some extent. Other than social venture, no other major social economy organizations of the central government explicitly include Benefit Corporations in their certification system.

¹²Ministry of SMEs and Startups (2021), July 21.

¹³Joo et al. (2018).

3 Social Economy Model of Korea

Although the term social economy started to be widely used only recently, organizations that can be broadly defined as organizations that pursue both social and economic goals had been already running in Korea for a long time. For example, in the case of Aedok Self-Help Center for the Deaf established by Sister Ae-deok Heo at St. Benedict's Order in 1960, families of the deaf lived in the institution, running various businesses including US Army golf course cleaning, rabbit farming, a noodle factory, a restaurant for the poor, and a doll factory.¹⁴ Another example can be Ilkoon Dure (*Workers' Community*), established in 1991 led by Pastor Byeong-seop Heo. It gathered construction dayworkers living together in poor areas to form a productive community, and promoted the interests of both building owners and workers while raising sense of community through direct business between building owners and the community.¹⁵ These companies can be defined as social economy organizations in that they were for-profit enterprises led by the private sector to realize the social goal of improving the quality of life of the underprivileged.

However, the social economy that is currently being discussed in Korea first began and emerged in 2000. At that time, the term *social enterprise* first appeared at an international forum on poverty and unemployment.¹⁶ Also, self-support communities, which are now referred to as one of the major social economy organization forms, were established based on the National Basic Living Security Act in Korea. Since then, various social economy organizations have been newly created and expanded to the present.

As in other countries, there are different views regarding the scope of the social economy in Korea. However, there are a few organizations that many recognize as major social economy organizations: Social Enterprise (Ministry of Employment and Labor), Cooperatives (Ministry of Economy and Finance), Community Business (Ministry of Interior and Safety), Self-support Enterprise (Ministry of Health and Welfare), and Social Venture (Ministry of SMEs and Startups, see Table 2). All these organizations have one thing in common: they are the organizations that appeared after 2000 as mentioned above. In other words, social economy in Korea is perceived as a different social system that is distinct from the traditional civil society or the third sector. Also, these organizations are all social economy organizations that are nurtured by the state, that is, through various policy support including direct support from several central ministries. This is why several existing studies are claiming that Korea's social economy is based on a state-led model. Since these organizations are not strictly mutually exclusive, several social economy enterprises fall under the definitions of multiple organizations.

¹⁴Shim (1991).

¹⁵Heo (1992).

¹⁶Korea Labor Institute et al. (2000) December.

Table 2 Status of major social economy organizations^a

Name of social economy organization	Competent ministry	Planning for or timing of appearance	Current status
Self-support enterprise	Ministry of Health and Welfare	A company that operates a self-support business for eradication of poverty in the form of a cooperative or entrepreneur based on mutual cooperation between two or more public assistance recipients or people with low-income	1,022 enterprises in operation (2020)
Social enterprise	Ministry of Employment and Labor	A company that engages in business activities such as production and sale of goods and services while pursuing social goals, such as improving the quality of life of local residents by providing social services or jobs to the underprivileged or contributing to the local community (Social Enterprise Promotion Act)	2,704 enterprises in operation (2020)
Community business	Ministry of Interior and Safety	A community-based enterprise established and operated by local residents to effectively realize the benefits of the local community by solving common local issues and creating income and jobs through profitable businesses using various local resources	1,556 enterprises in operation (2019)
Cooperatives	Ministry of Economy and Finance	General cooperatives: Business organizations that seek to improve the rights and interests of members and contribute to the local community by cooperatively operating the purchase, production, sale, and provision of goods or services Social cooperatives: Among the above cooperatives, cooperatives that are not for profit and are conducting businesses related to the promotion of the rights and welfare of local residents or providing social services or jobs to the underprivileged (Framework Act on Cooperatives)	16,633 general cooperatives reported (2020) and 2,456 social cooperatives approved (2020)

(continued)

Table 2 (continued)

Name of social economy organization	Competent ministry	Planning for or timing of appearance	Current status
Social venture	Ministry of SMEs and Startups	A company that solves social problems with innovative ideas and technologies	1,509 enterprises confirmed (2020)

^a Kil et al. (2020); Ministry of Health and Welfare (2021), p. 111; Ministry of Interior and Safety (2021), p. 3; Ministry of SMEs and Startups (2021), July 21; <https://www.coop.go.kr>; <https://www.kdisw.or.kr>; <https://www.socialenterprise.or.kr>

To explain them in more detail, self-support enterprises are social economy organizations supported by the Ministry of Health and Welfare. It is based on the National Basic Living Security Act, which regulates the public assistance system in Korea. It first appeared along with a significant change in the system in 2000 when Korea’s public assistance began to cover the low-income class with the ability to work. As mentioned above, the initial name was self-support community, which was changed to the current name, self-support enterprise in 2012. Self-support enterprises are companies established by low-income people, including public assistance recipients, for their own self-sufficiency with a social goal of independence of the low-income class.¹⁷ As of December 31, 2020, a total of 1,022 self-support enterprises are in operation.¹⁸

Social enterprises are social economy organizations supported by the Ministry of Employment and Labor. It is based on the Social Enterprise Promotion Act, which was enacted for the purpose of fostering social enterprises. The government enacted the law in 2007 to achieve the social goal of job creation and began to nurture social enterprises. It focused on the social economy as an alternative to overcome jobless growth. Under this Act, a social economy organization is defined as “an entity certified to be the one that pursues a social goal aimed at enhancing the quality of life of community residents by providing vulnerable social groups with social services or job opportunities or by contributing to the communities while conducting its business activities, such as the manufacture or sale of goods and services.”¹⁹ Although there are companies for various purposes, around 2/3 of the enterprises are organizations that mainly aim to create jobs. As of November 2020, a total of 2,704 certified social enterprises are in operation.²⁰

Community businesses are social economy organizations supported by the Ministry of Interior and Safety. Similar to the social enterprises above, community businesses have been promoted since 2011 for job creation. However, they focus more on the community compared to social enterprises, and in turn, consider

¹⁷ Ministry of Health and Welfare (2021).

¹⁸ <https://www.kdisw.or.kr>.

¹⁹ Social Enterprise Promotion Act.

²⁰ Kil et al. (2020).

creation of local jobs, revitalization of local economy, and recovery of local community all together. Unlike the enterprises mentioned above, community businesses do not have a legal basis, and related policies are carried out every year based on the implementation guidelines of the Ministry of Interior and Safety. According to the guidelines, a community business is “*a community-based enterprise established and operated by local residents to effectively realize the benefits of the local community by resolving common local issues and creating income and jobs through profitable businesses that utilize various local resources.*” As of December 2019, 1,556 community businesses are in operation.²¹

Cooperatives are social and economic organizations governed by the Ministry of Economy and Finance. In pursuit of alternative solutions to social problems after the global financial crisis in the late 2000s, civil society, political circles, and the government all paid attention to the role of cooperatives. The organization of cooperatives had been in existence even before the establishment of the Republic of Korea, but there were only laws related to cooperatives in individual industrial sectors. Accordingly, the Framework Act on Cooperatives was enacted in 2012.²² The law divides cooperatives largely into general cooperatives and social cooperatives. Some view both as social economy, while others include only the latter in the domain of social economy. Under the Act, a cooperative is defined as “*a business organization that intends to enhance its partners’ rights and interests, thereby contributing to local communities by being engaged in the cooperative purchasing, production, sales, and provision of goods or services.*”²³ Of them, a social cooperative is defined as “*a cooperative that is not run for profit and carries out business activities related to the enhancement of rights, interests, and welfare of local residents or provides social services or jobs to disadvantaged people.*”²⁴ In a legal sense, cooperatives can be established by reporting, whereas social cooperatives require approval, so there is a difference in the difficulty of establishment. As of November 30, 2020, there are 16,633 general cooperatives that have been reported, and 2456 social cooperatives that have been approved.²⁵

Lastly, social ventures are social economy organizations governed by the Ministry of SMEs and Startups. Although the name of and the support system for social ventures had been in place before, it was only after 2010 that social ventures in the present sense emerged. In the early 2010s, a group of social problem-solving companies and investors investing in them settled in Seongsu-dong, Seongdong-gu, Seoul, and named themselves social ventures. It is presumed that this naming was to emphasize their intent to solve social problems through innovative ideas distinct from other social economy organizations. Then, in 2017, the government announced a plan to expand these social ventures in its Social Economy

²¹ Ministry of Interior and Safety (2021), p. 3.

²² Kil and An (2014).

²³ Framework Act on Cooperatives.

²⁴ Framework Act on Cooperatives.

²⁵ <https://www.coop.go.kr>.

Revitalization Plan, and the Ministry of SMEs and Startups took charge of this work.²⁶ Until recently, there was no legal basis for fostering social ventures, but the Act on Special Measures for the Promotion of Venture Business was amended in April 2021 to include social ventures in the law. Under the Act, a social venture is defined as “*a company that comprehensively pursues social and economic values.*”²⁷ Compared to other major social economy organizations, social ventures have a characteristic of emphasizing innovative ideas or technologies. The total number of companies identified as social ventures in the 2020 survey is 1,509.²⁸

The Ministry of Economy and Finance is in charge of the overall policies for these social economy organizations. The need for a law for all social economy organizations has been discussed since 2014. In Korea, two large political parties have historically led politics, and as both parties simultaneously raised the need for revitalization of social economy in 2014, the Framework Act on Social Economy (draft) was proposed.²⁹ However, as of August 2021, it has not been enacted for various reasons such as the content of the bill or the political circumstances. Although the Ministry of Economy and Finance has been a de-factor coordinator of policies to some extent since 2017, its role is limited in the absence of a legal basis.

Under the above social economy structure, it is difficult to view a certified Benefit Corporation as an organization that has the same status as the social economy organizations. Compared to the size of other social economy organizations, the number of B corps is significantly small. Moreover, as mentioned above, it is difficult to say that the B corp is one of the widely used criteria to identify social economy organizations. Individual social economy organizations use their own standards, and the B corp is only included as a part of the criteria for social ventures. Even the inclusion of B corps in the criteria for identification of social ventures is not stipulated by law, so it can be easily changed at the discretion of the Ministry of SMEs and Startups. In other words, B corps have extremely insignificant influence in the field of social economy in Korea.

4 Legal Forms of Social Economy Organizations

In Korea, there is no unique legal form or legal entity that encompasses the entire social economy organizations. Also, since there are various legal grounds for social economy, the legal forms of individual social economy organizations also vary. This section summarizes the legal forms of organizations and the social economy organizations including Benefit Corporations in Korea.

²⁶ Job Committee and Related Ministries (2017), October.

²⁷ Act on Special Measures for the Promotion of Venture Business.

²⁸ Ministry of SMEs and Startups (2021), July 21.

²⁹ Kil and An (2014).

4.1 Legal Entity and Non-Legal Entity

Entities performing specific activities can be divided into individuals and groups. When an individual or group engages in social or economic activities in Korea, the individual or the group must register as an entrepreneur under the Value-Added Tax Act. In addition to this, if a group intends to carry out such activities, the group must use either a legal entity or non-legal entity. Individuals can also use single-person legal entity, so individuals can choose individual entrepreneurs or legal entities.

First, there are various types of legal entities with legal rights and responsibilities in Korea. In a broad framework, legal entities under the Commercial Act and the Civil Act are representative legal forms of organizations in Korea. The Commercial Act stipulates partnership company, limited partnership company, limited liability company, stock company, and limited company as legal entities. Although they have different scopes of responsibility, operation method, and scale, they are all for-profit legal entities. These for-profit legal entities can obtain the status of legal entities simply by reporting.

Under the Civil Act, there are regulations related to associations and foundations. These two can be easily distinguished as associations refer to legal entities related to people while foundations refer to legal entities related to properties. The two entities stipulated in the Civil Act differ from companies under the Commercial Act in that they are both non-profit legal entities. Another difference is that these two legal entities require an approval from the government for establishment instead of reporting.

In addition, there are legal entities according to individual laws in specific industrial areas. Agricultural or Fisheries Partnerships and Agricultural and Fisheries Companies under the Act on Fostering and Supporting Agricultural and Fisheries Business Entities would be the representative examples of for-profit legal entities. Non-profit legal entities can be exemplified by the School Foundation under the Private School Act, the Social Welfare Association under the Social Welfare Service Act, the Medical Association under the Medical Service Act, and the Public Service Association under the Establishment and Operation of Public Service Association Act.

On the other hand, there are groups that engage in activities as a group but simply seen as a group of individuals without any legal rights and obligations. A typical example is a partnership under the Civil Act. Although a partnership is clearly a group of individuals, it does not have any legal rights and obligations in itself. This includes gatherings simply for socializing. Same applies to the non-profit and non-governmental organizations under the Assistance for Nonprofit and Non-governmental Organizations Act. This law was created to support non-profit non-governmental organizations, and groups must register as non-profit non-governmental organizations to receive support under the law. Even a non-legal entity can be registered as a non-profit non-governmental organization because the definition of a non-profit non-governmental organization is irrelevant with whether or not a group is a legal entity. Based on the level of strictness, the

registration procedure can be viewed as an administrative process somewhere between the reporting procedure for for-profit legal entities under the Commercial Act and the approval procedure for non-profit legal entities under the Civil Act. A legal entity should register as an entrepreneur under the Value-Added Tax Act just like a sole proprietor, but non-profit non-governmental organizations can be regarded and operated as legal entities based on and with the application of the Framework Act on National Taxes even though they are not formally legal entities.

4.2 Legal Forms of Social Economy Organizations

Among the five types of social economy organizations mentioned above, cooperatives are the only ones that have a unique legal entity defined. The Framework Act on Cooperatives defines cooperatives as legal entities and clarifies that they are for-profit legal entities by stipulating that the legal entities concerned follow the Commercial Act. On the other hand, social cooperatives are defined as non-profit legal entities that follow the Civil Act. It seems that there is a separate regulation on legal entities for cooperatives since they have unique principles for organization and operation. Of course, a sole proprietor cannot be a cooperative. As in the case of for-profit and non-profit legal entities mentioned earlier, cooperatives and social cooperatives can each become legal entities through the reporting process and approval process, respectively.

Other social economy organizations have comprehensive and flexible standards regarding legal forms. First, under the National Basic Living Security Act, self-support enterprise can be established and operated by a partnership or an entrepreneur under the Value-Added Tax Act. Here, a partnership is an aforementioned organization stipulated in the Civil Act, and unlike an association or foundation, it is a group of individuals regarded as a non-legal entity, not a legal entity that has legal obligations and rights. In addition, an entrepreneur under the Value-Added Tax Act encompasses any individual or group that supplies goods or services. After all, in a widely comprehensive sense, individuals, groups, legal entities, and non-legal entities can all establish self-support enterprises. The actual operational status shows that among self-support enterprises, the majority are sole proprietors. As of the end of December 2019, over 700 companies out of about 1,200 self-support enterprises are sole proprietors.³⁰

For social enterprises, almost all legal forms are accepted. The aforementioned legal entities under the Commercial Act and the Civil Act, partnerships, legal entities under individual industry laws, cooperatives, and non-profit non-governmental organizations are all included. However, unlike self-support enterprises, sole proprietors cannot be social enterprises.³¹ That is, similar to cooperatives, only the

³⁰Seo (2021).

³¹Ministry of Employment and Labor (2021).

organizations with a number of people can be certified as social enterprises. As mentioned above, the start of social enterprises is directly related to job creation. Therefore, it can be assumed that such a value is reflected to the legal form of social enterprises. The current status of social enterprises shows that there are more for-profit legal entities than non-profit legal entities. Particularly, companies under the Commercial Act account for approximately 60% of the total social enterprises, which is the largest proportion.³²

Community businesses are not operated based on the law but follow the implementation guidelines for fostering community businesses. According to the guidelines, sole proprietors cannot be community businesses as with the cooperatives and social enterprises above. Also, only the legal entities that generate profits through business activities are eligible to apply for community businesses. The legal entities here include both for-profit and non-profit legal entities of various types mentioned above under the Civil Act and Commercial Act, etc. The current status of community businesses shows that as of the end of 2019, agricultural partnerships account for more than 40% of the total community businesses by legal form, followed by cooperatives at 25.5%. The largest share of the agricultural partnerships proves that many community businesses are in rural areas.³³

For social ventures, the details on their legal form are not stipulated in the criteria for identification or in the applicable law. Conversely, this also means that there are no restrictions regarding their legal form as long as the criteria for identification are fulfilled. Therefore, it is interpreted that any individual or group can establish a social venture company without any special restrictions. The result of the 2020 survey confirms that stock companies account for the largest share while some other types such as sole proprietors or non-profit legal entities can also be social ventures.³⁴

As in other countries, the certification of B corps is limited to for-profit enterprises in Korea. As a result, enterprises that utilize Benefit Corporation in Korea are all for-profit companies. According to the information on the website of the companies or corporate information, they are all legal entities under the Commercial Act. Particularly, most of these companies have a legal form of stock company.³⁵ Based only on their legal forms, all these certified B corps can be any social economy organizations except cooperatives.

³² Kil et al. (2020).

³³ Ministry of Interior and Safety (2021).

³⁴ Ministry of SMEs and Startups et al. (2020).

³⁵ Available Korea B Corps websites; <https://saramin.co.kr>.

5 Support System for Social Economy Organizations

It would be difficult to deny that one of the most important factors that has enabled the rapid development of Korea's social economy over the past 20 years is the active policies by the state. Individual central ministries in charge of major social economy organizations have developed support policies that are complete in themselves. Particularly, the Moon Jae-in administration launched in 2017 has implemented more active social economy revitalization policies by including development of social economy as one of the 100 national agenda. Specifically, since 2017, policies for the development of not only individual social economy organizations but also the entire social economy have been announced.³⁶ However, despite such a direction of development, it is difficult to find a strategy to expand or develop Benefit Corporations as social economy organizations. In this section, the support policies for the five major social economy organizations mentioned above will be summarized.

5.1 *Self-Support Enterprise (Ministry of Health and Welfare)*

The Ministry of Health and Welfare provides various government support throughout the entire process from the establishment to maintenance of self-support enterprise. To ensure the government's support for self-support enterprises, the National Basic Living Security Act has the following provisions:

Article 18 (3) (Government) may render any of the following benefits to Self-support Enterprises directly or through the Development Institute for Self-Sufficiency and Welfare, metropolitan self-support centers

1. Loan of business funds for self-sufficiency;
2. Preferential lease of State or public land;
3. Preferential entrustment of projects of the State or local governments;
4. Preferential purchase of products of the Self-support Enterprises in the procurements by the State or local governments;
5. Other benefits for the promotion of self-sufficiency of recipients.

The support can be broadly divided into direct and indirect support (see Table 3). Direct support includes support for start-up funds, start-up consulting in connection with professional consultants, working expenses for machine equipment and facility enhancement, business development expenses, labor costs, social insurance premiums for institutions, special guarantees for self-support enterprises, management consulting, and support for excellent self-support enterprises. In addition to these, indirect support is provided including preferential lease of state-owned or public land, preferential consignment of government programs, preferential purchase for government procurement, business funds financing, and Jeonse (lump-sum rent)

³⁶Job Committee and Related Ministries (2017), October.

Table 3 Support programs for self-support enterprises^a

Type	Details and conditions of support
Startup Fund for Self-Support Enterprise	Fund amount determined according to the number of people under an entity converted into a self-support enterprise (accumulated startup fund) <i>Jeonse</i> deposit and rent, facility, and equipment, etc. (not allowed to be used for labor cost)
Financing for Business	Up to 100 million KRW per self-support enterprise Deferment for one year & equal installment repayment for four years or a lump-sum repayment within same term with an interest rate defined by the ordinance of the local government up to a fixed interest rate of 3.0% p.a. Loan guarantee support by the Korea Credit Guarantee Fund
<i>Jeonse</i> Store Lease	Up to 200 million KRW per self-support enterprise Term contract of up to five years (can be extended to a maximum of ten years), a fixed rate of up to 3.0% p.a.
Compensation for Business Fund Interest Gap	Compensation for the difference in interest rates for the business funds loaned to self-support companies from general financial institutions and from the fund (up to 5%) Interest gap compensation rate: A loan interest rate of a financial institution—a loan interest rate of the fund
Consulting Support	Co-pay support for consulting by the Small Enterprise and Market Service
Machine and Equipment Cost	self-support enterprises eligible for application' recognized three years or more ago, up to 50 million KRW
Facility Enhancement Cost	Excluding purchase of simple fixtures, support ceiling for consumables such as facility enhancement and interior, etc.
Temporary Labor Cost	(Benefit receiving participants) Support market entry-type self-support benefits and other allowances (parking, monthly leave allowance and actual expenses) every six months (up to five years) (Non-receiving participants) Support for market entry-type self-support benefits and other allowances (parking, monthly leave allowance and actual expenses) for one year after recognition (Professional manpower) Support within the limit of 2.5 million KRW per month for each self-support enterprise every six months (up to five years) (including four major insurance premiums borne by the company)
Metropolitan and National Self-Support Enterprise Working Expenses	No ceiling in support, for carrying out necessary programs for revitalization such as utilization of experts (up to 5 experts per company) and publicity, etc.
Business Development Expense Support	No ceiling in support, for carrying out necessary programs for revitalization such as business development

(continued)

Table 3 (continued)

Type	Details and conditions of support
	and publicity, etc. Ex-post management such as monitoring by metropolitan self-support center, etc.
Support for Excellent Self-Support Enterprises	Support for functional enhancement cost, scale-up of self-support enterprises, enlisting at shopping malls of public institutions, etc.
Support for Self-Support Enterprise Hit by COVID-19	Support for anti-COVID-19 products, sales channel, and other operational support to overcome COVID-19 for regional self-support enterprises experiencing difficulties due to COVID-19 including a decrease in sales.
Preferential Lease of State-owned and Public Land	Preferential lease of state-owned and public land for working sites of self-support enterprises
Preferential Consignment of Program	Preferential consignment support for self-support work business and private consignment business
Preferential Purchase of Products	Active promotion and preferential purchase of products and services of self-support enterprises

^a Ministry of Health and Welfare (2021), pp. 127–128

lease support for stores. These support programs as a whole prove that the government offers active support for the overall activities of self-support enterprises from their establishment to operation. However, there are no separate tax benefits for self-support enterprises. Nevertheless, depending on the characteristics of the self-support enterprise as a legal entity, that is, if the self-support enterprise is a non-profit legal entity for example, it may receive tax benefits for non-profit legal entities.

5.2 Social Enterprise (Ministry of Employment and Labor)

Social enterprises are also receiving various government support and benefits from the Ministry of Employment and Labor from their establishment to operation. The Social Enterprise Promotion Act, which regulates the entire social enterprise policies, provides the following provisions to support social enterprises.

Article 10 (1) The Minister of Employment and Labor may provide various support to a Social Enterprise, such as professional consultation and supply of information on the fields of business management, technology, taxation, labor relations, and accounting as necessary for the establishment and operation of the Social Enterprise.

(2) The Minister of Employment and Labor may entrust the support affairs prescribed in paragraph (1) to a government-funded institution or non-governmental organization prescribed by Presidential Decree.

Article 10-2 The Minister of Employment and Labor may provide education and training for nurturing specialized personnel necessary to establish and operate Social Enterprises and to enhance the abilities of employees of Social Enterprises.

Article 11 The State and a local government may subsidize or finance land purchasing costs, facility costs, etc. as necessary for the establishment or operation of a Social Enterprise, or lend or permit the use of State or public property or articles.

Article 12 (1) The head of each public institution as defined in subparagraph 2 of Article 2 of the Act on Facilitation of Purchase of Small and Medium Enterprise-Manufactured Products and Support for Development of their Markets (hereinafter referred to as “head of each public institution”) shall encourage preferential purchases of goods or services produced or provided by Social Enterprises (hereinafter referred to as “Social Enterprise-produced products”).

(2) The head of each public institution shall notify the Minister of Employment and Labor of a purchase plan to increase purchases of Social Enterprise-produced products and a record of purchases in the preceding year.

(3) The Minister of Employment and Labor shall compile and publicly announce the purchase plans and the record of purchases notified under paragraph (2).

(4) Matters necessary to notify and publicly announce the purchase plans and the record of purchases referred to in paragraphs(2) and (3) shall be prescribed by Presidential Decree.

Article 13 (1) The State and local governments may grant reduction of or exemption from national or local taxes to Social Enterprises, as provided in the Corporate Tax Act, the Restriction of Special Taxation Act, and the Restriction of Special Local Taxation Act.

(2) The State may subsidize part of the premiums for employment insurance and industrial accident compensation insurance under the Act on the Collection of Insurance Premiums, etc. for Employment Insurance and Industrial Accident Compensation Insurance, the insurance premiums under the National Health Insurance Act, and the pension premiums under the National Pension Act with respect to Social Enterprises.

Article 14 (1) The Minister of Employment and Labor may provide financial support to Social Enterprises providing social services within budgetary limits, for personnel expenses, operating expenses, advisory fees, and other expenses incurred in operating such Social Enterprises by means of an open invitation and screening.

(2) When the Minister of Employment and Labor provides support under paragraph (1) to a Social Enterprise supported by an associated enterprise or associated local government, he/she may provide additional support in the working expenses, considering the state of financial support provided by the associated enterprise or associated local government.

(3) Matters necessary for requirements for the selection of enterprises eligible for financial support, screening procedures and other relevant matters shall be prescribed by Ordinance of the Ministry of Employment and Labor.

Article 16 The State and local governments may grant reduction of or exemption from national taxes or local taxes to associated enterprises, corporations or individuals that make donations to Social Enterprises, as prescribed by the Corporate Tax Act, the Income Tax Act, the Restriction of Special Taxation Act, and the Local Tax Act.

The support provided based on this can be broadly divided into support for start-up, support for business operation, and other support (see Table 4). First, the support for start-up includes support program for social venture clubs at universities, social

Table 4 Support programs for social enterprises^a

Type	Support	Details	
Discovery of ideas and commercialization	Support for social venture clubs at universities	A university club with three or more members Provide operation expense worth 1.5 million KRW and mentoring	
	Social venture contest	Prize money of 200 million KRW in total, support in connection with social entrepreneur promotion program	
	Social entrepreneur promotion program	Startup preparation team, initial startup team of less than two years since establishment, restart startup team Start-up space, start-up funds, mentoring, networking, follow-up support, etc.	
	Social enterprise growth support center	Social entrepreneur nurturing program startup team, support for office space for social economy startups in the early stage, regular counseling, education, resource connection, support for cooperation, etc.	
Social enterprise and prospective social enterprise	Labor cost support	Job creation	Support for part of the labor cost for new hires (minimum wage-level labor cost and part of the four major social insurance premiums)
		Labor cost for professionals	Labor cost support for hiring professional manpower two people per company for social enterprises (three people for companies with 50 or more paid workers), one person per company for prospective social enterprises
	Business development expenses	Support for current working expenses such as R & D, marketing, and branding (up to 100 million KRW per year for social enterprises, 50 million KRW per year for prospective social enterprises, but expanded to all social economy enterprises from 2018)	
	Management consulting	Technical support by professional consulting agency and support for consulting fee	
	Social insurance premium support	Partial support for four major social insurance premiums for four years	
	Tax support	Reduction of income tax, corporate tax, acquisition tax, registration tax, and property tax	
	Preferential purchase by public institutions	Purchase by public institutions to provide a protected market to social enterprises	
	Sales channel support	Product assessment and support for improvement Support for entering online and offline distribution channels such as home shopping, department stores, expos, and e-store 35.6+ Establishment and expansion of market	

(continued)

Table 4 (continued)

Type	Support	Details
		support infrastructure through the integrated platform for social economy market support (e-store 35.6+)
	Financial support	Provide microfinance, SME policy funds, social enterprise sharing guarantee, special guarantee exclusively for social enterprises, etc. as major policy funds for social enterprises
	Private resource-linked program	Establishment of the basis for public-private partnership, discovery of participating companies, etc.
Others	Loan support	Connect with various loan systems for support
	Education and network	Education on social economy and expansion of social economy network
	Pro bono support	Business management advice from experts in various fields or cooperation with local communities

^a Korea Social Enterprise Promotion Agency (2020), p. 31

venture contest, social entrepreneur promotion program, and social enterprise growth support center program. After the certification of social enterprise, companies can receive support for labor costs, business development expenses, management consulting, social insurance premiums, taxation, preferential purchases from public institutions, sales channels, finance, and support in linkage with private resources. In addition, social enterprises can receive loan support, education and network support, and pro bono support. In relation to tax benefits, certified social enterprises can also be provided with various types of tax benefits as social enterprises regardless of their legal forms.

5.3 *Community Business (Ministry of Interior and Safety)*

Community businesses governed by the Ministry of Interior and Safety do not have a legal basis. However, stable government support programs have been running since the first emergence of community businesses. A representative support policy is the support for working expenses, and the government provides a total of 100 million KRW up to three times (see Table 5). In addition, support for sales channels, distribution, education, consulting, and publicity are offered along with a support program for stronger network for community businesses. In some cases, community businesses designated as excellent enterprises or enterprises in crisis receive intensive support. It is confirmed that these community businesses also get comprehensive government support. Regarding tax benefits, there is no separate tax benefit for

Table 5 Support programs for community businesses^a

Support item	Details of support
Support for Working Expenses	Support of 100 million KRW in total, up to three times (1st round 50 million, 2nd round 30 million, 3rd round 20 million KRW)
Support for Self-Reliance	Support for sales channel & distribution, education & consulting, publicity for better awareness, creation of community business network
Selection of Excellent Community Business	Support for working expenses, publicity, and sales channel for community businesses with excellent community value and public value
Selection of Model Community Business	Support for working expenses, publicity, and sales channel for community businesses that can grow into the representative community businesses
Support for Rebound of Community Business	Support for working expenses for companies in financial difficulties (1st round 10 million, 2nd round 30 million KRW)

^a Ministry of Interior and Safety (2021)

community businesses. However, the tax benefits for different legal forms of community businesses are valid. Particularly, agricultural cooperatives, which account for the majority of community businesses, are receiving various tax benefits such as corporate tax exemption, etc.

5.4 Cooperatives (Ministry of Economy and Finance)

Cooperatives and social cooperatives governed by the Ministry of Economy and Finance can also receive government support based on the law. Under the Framework Act on Cooperatives, the Minister of Economy and Finance is authorized to provide support such as professional advice and information on management, technology, taxation, labor, and accounting that are necessary for the establishment and operation of cooperatives. However, unlike other ministries, there are not many direct support programs by the Ministry of Economy and Finance. This is to uphold the principle of independence and self-reliance, which is the basic principle of cooperatives that the Ministry of Economy and Finance has consistently emphasized since the establishment of the law. This principle is set out in Article 1 of the Act:

Article 1 The purpose of this Act is to facilitate independent, self-supportive, and autonomous activities of cooperatives, thereby contributing to social integration and balanced development of the national economy by providing for basic matters regarding the establishment and operation of cooperatives.

Article 10-2 The Minister of Strategy and Finance may provide support, such as providing expert consultation and information in the fields of management, technology, tax affairs, labor affairs, accounting, etc., necessary for the establishment and operation of cooperatives, etc. and social cooperatives, etc.

Table 6 Support programs for cooperation of small business^a

Support item	Support details
Join Business Support	Support for all costs of product development, branding, marketing, networking, scale-up program, establishment of franchise system, and joint equipment purchase
Sales Channel Support	Support for online and offline sales channel
Academy Support	Support for counselling, education, incubating, networking, accounting, and tax

Note: Programs can also provide support to cooperatives established under the Small and Medium-sized Enterprise Cooperatives Act in addition to cooperatives pursuant to the Framework Act on Cooperatives

^a <https://sbiz.or.kr>

However, it does not mean there is no government support for cooperatives. A representative program is the small business collaboration program (see Table 6). In Korea, there are several public institutions under the ministries of the central government, and the Small Enterprise and Market Service under the Ministry of SMEs and Startups is operating the small business cooperation program. The program is to support various direct costs necessary for small business owners to collaborate and carry out businesses as cooperatives such as joint production, joint purchase, joint sale, etc. Also, it provides support for sales channels, counselling, education, incubating, network, accounting, and taxation. It can be confirmed that various benefits are offered for cooperatives consisting of for-profit small businesses, although not all cooperatives are formed in such a manner. The current status of cooperatives in Korea shows that cooperatives of entrepreneurs account for an overwhelmingly larger number than other types of cooperatives,³⁷ and it can be assumed that this support system had an impact to some extent.

On the other hand, there are no special tax benefits for cooperatives. However, since social cooperatives are defined as non-profit legal entities, they can receive various tax benefits for general non-profit legal entities.

5.5 Social Venture (Ministry of SMEs and Startups)

Although the government's plan to expand social ventures was announced in 2017, the Ministry of SMEs and Startups started to carry out programs targeting social ventures in full force with the social venture status survey in 2019. As such, compared to other social economy organizations, the government's efforts to vitalize social ventures are at a very early stage. The Act on Special Measures for Promotion of Venture Business amended in April 2021 newly includes the provisions on support for social ventures. Under this Act, the government can provide support of

³⁷ <https://www.coop.go.kr>.

Table 7 Support programs for social ventures^a

Support item	Support details
Social Venture IR Club	Support for regular IR pitching and network for social ventures that need investment-related information or opportunities
Regional Social Venture Support Program	Metropolitan area: Support for capacity building, network, etc. for social ventures and intermediary support organizations Non-metropolitan areas: Revitalization of local social ventures through discovering and intensive fostering of (prospective) social ventures
Social Venture Impact Guarantee	Exclusive guarantee product for social venture enterprises to resolve social problems and drive growth through preferential guarantee for social venture enterprises
Social Impact Funds	Impact funds to support the growth of social ventures and promote their revitalization
Prospective Startup Package	Support for commercialization funds, start-up education, mentoring, etc. for smooth commercialization of startups of prospective entrepreneurs with innovative startup technologies and ideas
Startup Growth Technology Development	Promote innovation and growth of start-ups by supporting R & D for technology start-ups that require verification of marketability, technology, and feasibility of business items

^a Ministry of SMEs and Startups et al. (2021)

technology guarantee, investment, discovery and nurturing of founders for social ventures:

Article 16-8 (2) The Minister of SMEs and Startups may provide the following support to Social Venture enterprises.

1. Technology guarantee and investment in Social Venture enterprises;
2. Discovering and nurturing prospective founders or founders of Social Venture enterprises;
3. Other matters necessary for the revitalization of Social Venture enterprises.

As of July 2021, the Ministry of SMEs and Startups is promoting programs such as investment, guarantee, start-up support, and technology development support for individual social ventures (see Table 7). Different from the support programs for other social economy organizations, support for social ventures is divided into the support for the metropolitan area (Seoul and Gyeonggi area) and for the non-metropolitan areas with different details by region. It is presumed that social ventures began in the Seoul metropolitan area and that it is a policy design that considers the current situation where the pace of development varies from region to region. Although there is no specific tax benefit, all the aforementioned social economy organizations can be social ventures. Therefore, they can enjoy the tax benefits depending on their legal form or as social economy organizations.

5.6 *Certified B Corps in Korea*

Unlike the various types of social economy organizations mentioned above, there is no direct government support for certified B corps. However, if they are recognized as one of the several social economy organizations, they can also benefit from the various government support previously mentioned. Particularly, if certified as social enterprises, B corps can receive various tax benefits for social enterprises together even though they are for-profit enterprises. In other words, at least for the government support, it is more important to be recognized as one of many social economy organizations in Korea than to be certified B corps.

6 Future Directions of Social Economy and Benefit Corporations

6.1 *Summary*

Social economy organizations in the practical sense have existed for a long time in Korea, but it was only after 2000 that the social economy being discussed today first appeared. Aside from cooperatives, various central ministries have fostered social economy organizations since the 2000s as an alternative to solving specific social problems in their respective areas. The Ministry of Health and Welfare has been fostering self-support enterprises for self-reliance of public assistance recipients, while the Ministry of Employment and Labor has promoted social enterprises to create jobs. The Ministry of Interior and Safety is nurturing community businesses for the purpose of revitalizing local communities, and the Ministry of SMEs and Startups is invigorating social ventures as part of its plan to revitalize venture businesses.

The government has provided various support programs directly and indirectly to these social economy organizations to vitalize the social economy. In selecting the targets of the support, individual central ministries have used their own accreditation standards to differentiate social economy organizations from other general enterprises. In other words, social economy organizations have been classified according to the ministries' own standards, rather than based on general standards utilized overseas such as certified B corps. It can be assumed that such individual accreditation systems were established because each government ministry wanted to foster social economy organizations to solve specific social issues rather than nurturing universal social economy organizations.

For many companies that pursue both social and economic goals, there is no reason to refuse such government support as they can secure financial resources. Therefore, these companies will actively utilize the criteria for accreditation of social economy organizations established by the central ministries. As the use of these standards increases, the standards become universal, and social economy

organizations that have passed this accreditation system gain a sort of public confidence. Eventually, these social economy organizations recognized by the central government will be recognized as major actors of the social economy in Korean society. Namely, the 20 years of Korea's social economy can be summarized as the 20 years of institutionalization of social economy organizations promoted by the central government to solve social problems as the major organizations of the social economy in Korea.

In this process of government-led expansion of social economy, the social economy accreditation system without government support such as certified B corps cannot be institutionalized to a great extent. Although it was introduced in 2012, B corps is still an accreditation system used only by a small number of companies. Even the term itself has not been translated into Korean, and there is no expansive discussion about it either.

6.2 Future of Social Economy and B Corps

Social phenomena and social problems in Korea are putting people in a more serious state of isolation and exclusion. The current major social phenomena such as low birth rate and aging population, increase in single-person households, expansion of the young NEET (Not in Education, Employment and Training), increase in digital workers, and the widening gap between the rich and the poor due to the rise in housing prices, etc. amplify conflicts while excluding and isolating individuals from others. Korea has become a society in which everybody has to find their own way for survival. Naturally, the third sector, including social economy, is a necessary social system for the Korean society because the ultimate operating principle of social economy is solidarity and cooperation. The third sector such as social economy organizations needs to be utilized more actively in Korea as a major solution to overcoming isolation and exclusion.

However, despite this necessity, it is difficult to predict whether social economy will be able to expand further in the future. This is because Korea's social economy has been developed mainly by the government and is greatly affected by the direction of the government's administration. If a political decision reverses the trend of revitalizing social economy despite the need for its expansion, the sector of social economy may be reduced compared to the present. In other words, from the perspective of path-dependency, the future of Korea's social economy is likely to be affected greatly by the presidential election held every five years. Due to the political landscape with changing ruling power, it would be difficult to predict the future direction of social economy.

There has been no sign of movement or change from the government to actively utilize B corps at least until now. If the development direction of social economy over the past 20 years does not change significantly, the B corporation is unlikely to be used more actively even if social economy is further revitalized. However, if the B corporation can be more recognized as an international standard for social economy,

or if it can be viewed to have an important business value due to an increased use around the world, more social economy enterprises will be able to consider its use separate from the government support. That is, it would not be an exaggeration to say that the expansion of B corps in Korea depends on the increased universality of the certification overseas.

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Small and Medium-sized Enterprise Cooperatives Act
Social Enterprise Promotion Act
Social Welfare Service Act
Value-Added Tax Act

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Social Enterprises and Benefit Corporations in Spain



Paula del Val Talen

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1 Introduction

This chapter provides an overview of the legal framework for social enterprises in Spain and focuses on the benefit-corporation phenomenon vis-à-vis the Spanish law. First, on the landscape of social enterprises, we describe the main conceptual and

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regulatory challenges they face in this country. Spain follows a traditional regulatory approach, which is only partially aligned with the EU's most recent initiatives and proposals for this field. We review how this is shown in *Ley 5/2011, de 29 de marzo, de Economía Social* (LES). Second, the chapter discusses whether benefit companies may be formed under the Spanish company law, and we discuss their placement within the Spanish legal framework for social enterprises. The chapter delves into the obstacles founders may face in establishing such a hybrid entity, both from a theoretical perspective and in practical terms, from the company's creation and throughout its life cycle. It also compares this background to proposals fostered by social advocacy actors. This includes a critical review of the *sociedad limitada de interés general* (S.L.I.G.) initiative and an examination of the amendments to the articles of association that certified *B Lab Spain* B-Corps shall adopt.

2 Overview and Legal Framework

This section features the legal framework for social enterprises, particularly benefits companies. To set the scene, it describes Spain's current approach to each of them as well as the foreseeable regulatory strategies for their advancement.

2.1 Social Enterprises (SEs)

The notion of social enterprises (SE) in Spain is driven by the EU's regulatory initiatives in the matter, as well as from the comparative framework. The concept is confined to particular types of private business organisations that are required by law to pursue general or community interest purposes.¹ This kind of objective renders them different from both mutual-purpose and profit-driven entities.² SEs shall carry out social utility enterprises and, as opposed to more traditional non-profits, shall not simply adopt donative models and are able to distribute profits among their members.³ Only entities that fulfill these requirements may be certified as qualified SEs. However, Spain has not taken any general legislative action in this field. In this vein, as discussed in this chapter, *de lege lata*, no general company type is particularly amenable to the features of SE, although private limited liability companies may be more easily adapted. In turn, the prevailing view considers that three available business forms in Spain fulfill the requirements of SEs: some kinds of cooperative

¹Directorate General for Internal Policies (2017), pp. 23 et seq. See also European Parliament resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

²Directorate General for Internal Policies (2017), pp. 25–26.

³Directorate General for Internal Policies (2017), p. 26.

societies, work-integration enterprises, and special employment centers may qualify as SEs.⁴ Each entity is regulated separately. First, not any cooperative society, but only social initiative cooperative societies, as established in Article 106 of *Ley 27/1999, de 16 de julio, de Cooperativas* qualify as SEs. Cooperative societies that mainly pursue mutualistic purposes are excluded. Second, under Article 4 *Ley 44/2007, de 13 de diciembre, para la regulación del régimen de las empresas de inserción*, work integration enterprises are either business partnerships and companies (*sociedades mercantiles*) or cooperative societies that are established to integrate and educate persons at risk of social exclusion. Special employment centers are provided for in *Real Decreto 2273/1985, de 4 de diciembre, por el que se aprueba el Reglamento de los Centros Especiales de Empleo definidos en el artículo 42 de la Ley 13/1982, de 7 de abril, de Integración Social del Minusválido*. According to Article 1 of the royal decree, their goal is to engage in entrepreneurial activities with the purpose of employing people with disabilities.

Cooperative societies, work integration enterprises, and employment centers are also social economy entities, but the latter is a broader category than SE.⁵ Social economy entities are defined under the Spanish law as the ensemble of economic and business activities undertaken by private organisations to pursue either their members' collective interests, an economic or social general interest, or both (Art. 2 LES). Here again, the notion of entities of the social economy in the Spanish Act is overarching and includes mutual entities that do not embrace the general interests of either an economic or a social nature. Article 2 of the LES requires that social economy entities be managed in accordance with the values laid down in Article 4 of the LES, including (i) the primacy of individual and social goals, (ii) the reinvestment of any surpluses, (iii) an internal solidarity-based model, and (iv) autonomous management independent of public authorities. In this way, the approach taken by the domestic Spanish act on social enterprises is rather stringent when compared to recent developments in the field of SE. First, because the act is transversal, it merely defines and seeks to promote entities of the social economy in full compliance with their respective applicable frameworks (Art. 1 and 5.3 LES). Second, and more significantly, the act provides a closed list of business forms that may qualify as social entrepreneurship entities (Art. 5.1 LES) alongside an enabling provision (Art. 5.2 LES).

The subjective scope of application in Article 5.1 LES covers cooperative societies, mutual societies, foundations, and associations that undertake economic activities, employee-owned public and private companies (*sociedades laborales*), work-integration enterprises, so-called special employment centers, fishermen associations (*cofradías de pescadores*), agricultural associations, and any other ad hoc entities, for instance, the Spanish Red Cross (Art. 5.1 LES). These are traditional entities in the social economy.⁶ Here, private and public limited liability companies

⁴Directorate General for Internal Policies (2017), pp. 43–44; Vargas Vasserot (2021), p. 136.

⁵Directorate General for Internal Policies (2017), p. 31.

⁶Sánchez Pachón (2009), p. 74; Fajardo García (2018), p. 111.

other than those that are employee-owned, even those that adopt social economic values, are excluded.⁷ Article 5.2 LES takes a broader approach by establishing that other private entities may qualify as entities of the social economy as long as they conduct their activities in compliance with the values laid down in Article 4 of the LES, and they are listed as entities of the social economy by the Spanish Ministry of Labour (Art. 5.2 LES). Thus, the *numerus clausus* approach in Article 5.1 LES is nuanced enough to establish an open-ended system.⁸ According to the Black Letter of Law, non-traditional business models, especially companies, may also acquire this status under Article 5.2 LES.⁹ Because these are private entities that do not per se belong to the social economy or comply with their values, they may only acquire this status as long as their applicable law leaves room for necessary amendments. Whether this may be the case requires a prior assessment by the Ministry of Labour, resulting in the inclusion of each suitable business form in the catalogue foreseen in Art. 6 LES.¹⁰ In the current legal framework, the same type of concern affects companies that become SEs. In the absence of specific legal intervention, party autonomy is likely to be seriously burdened by transaction costs when adapting private limited liability companies to both the social economy and SEs.

By allowing a wider range of entities to be listed as entities of the social economy in a broader sense, Article 5.2 LES conforms to the latest EU initiatives, even those published after the LES was passed,¹¹ as well as to prevailing scholarly opinion.¹² In this way, the Spanish LES did not establish any specific entity but rather leaned toward an enabling regime. A similar approach is likely to be adopted to regulate the SEs.¹³ However, the enabling system is usually regarded as being unsatisfactory on several grounds, and these caveats can be considered to assess SEs. First, to date and over a decade after the enactment of the LES, the Spanish Ministry of Labour has not established the catalogue set forth in Articles 5.2 and 6 LES, which hampers the advancement of alternative business forms as entities of the social economy.¹⁴ In addition, such a catalogue-based model is naturally restricted in scope because it does not address the obstacles that non-traditional SE business forms typically face in adopting SE values.¹⁵ These arise from their own applicable regime and can only be confronted on a case-by-case basis, which calls for specific amendments to the

⁷ Altzelai Uliondo (2020), p. 127.

⁸ Compare Alfonso Sánchez (2010), p. 11 and Alfonso Sánchez (2016), pp. 6–7/22 to Paz Canalejo (2012), pp. 88–89 and Arrieta Idiakez (2014), p. 38.

⁹ Fajardo García (2018), p. 109.

¹⁰ Similarly, Alfonso Sánchez (2016), p. 7/22; Fajardo García (2018), p. 112.

¹¹ See European Parliament resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

¹² Alfonso Sánchez (2010), p. 11; Altzelai Uliondo (2020), p. 132; Vargas Vasserot (2021), p. 125. See also SEGIB-PNUD-IDRC (2021), pp. 25–26.

¹³ Vargas Vasserot (2021), p. 139.

¹⁴ Vargas Vasserot (2021), p. 139.

¹⁵ Similarly, Vargas Vasserot (2021), p. 139.

law on each business form.¹⁶ In this vein, in force, company law may trim the adoption of social entrepreneurship values by companies, an issue the chapter further discusses vis-à-vis benefit corporations.

On a different note, the prevailing scholarly opinion favoured a broader general clause in Article 5.1 LES, which was finally rejected.¹⁷ We support the view that a disclosure system for non-traditional business forms such as SEs, which is similar to that foreseen in Article 6 LES, would enhance their visibility and is likely to foster policy discussions on the necessary regulatory amendments that may benefit each business form.¹⁸ A specific certification and transparency regime for non-traditional SE business forms seems particularly fitting. This may be adopted transversally within the LES as part of a future harmonised certification system for SEs.¹⁹ It shall also be pursued on a case-by-case basis, as the experience of benefit corporations in the comparative framework shows. In this connection, the supervision of compliance with social economic values and requirements is pending further regulation.²⁰ A single national register for social businesses, both entities of the social economy and SE forms, would face obstacles both at the conceptual and organisational levels and on the distribution of regulatory authority between the Spanish State and the *Comunidades Autónomas*.²¹

2.2 *Benefit Corporations*

Spain has not passed specific provisions on social enterprises, including benefit companies, and to date, the legislature does not envisage any regulatory initiative in this field. However, legal scholars, practitioners, and private policy proponents have fostered the debate around hybrid company forms that balance profit-making with the protection or enhancement of other not-for-profit interests. In Spain, entrepreneurs predominantly resort to private companies limited by shares (*sociedades de responsabilidad limitada*, or S.L.) or, to a much lesser extent, to public companies limited by shares (*sociedades anónimas*, or S.A.).²² Historical and market-specific factors explain why partnerships are not popular legal forms in the

¹⁶Vargas Vasserot (2021), p. 139.

¹⁷See as regards the LES, Monzón Campos et al. (2009), p. 144. See also Vargas Vasserot (2021), pp. 131 and 141 (Article 4 of the initial proposal of the LES).

¹⁸See Alfonso Sánchez (2010), pp. 14 et seq.

¹⁹See Thirion (2017), pp. 35–37.

²⁰Arrieta Idiákez (2014), p. 42; Alfonso Sánchez (2016), p. 6/22; Altzelai Uliondo (2020), p. 132. See further Paz Canalejo (2012), pp. 158–160.

²¹Sánchez Pachón (2009), p. 80.

²²Dirección General de Industria y de la Pequeña y Mediana Empresa (2019), p. 1; Registradores de España (2019), p. 15. See del Val Talens and Gimeno Ribes (2021), pp. 1–3.

Spanish business environment.²³ For this reason, this chapter mainly focuses on benefit companies, while leaving civil and commercial partnerships aside. Accordingly, from a policy perspective, the Spanish legislature would lean toward a specific-form approach by enabling benefit companies solely as a special form of private companies.²⁴ This was the case of the *sociedad limitada de interés general* (S.L.I.G.), a failed legislative proposal on a benefit corporation for Spain.²⁵ In this way, the policy option was similar to the German proposal for a *Gesellschaft mit beschränkter Haftung in Verantwortungseigentum*.²⁶ This methodological approach deviates from that adopted by other jurisdictions such as Italy and France, where overarching benefit models have been envisioned.²⁷

On the academic side, the discussion focuses on the applicable legal framework in which benefit—or, simply, not-for-profit—companies will appear. This usually results in scholarly debates around core company law concepts, namely, the cause of the company contract, the interest of the company, and the directors' duties toward it, as well as shareholder protection vis-à-vis majority and managerial abuse and third-party interests. Although to a lesser extent, this discussion also stems from the realm of social entrepreneurship. On the practitioner side, problems usually arise during the registration phase for companies with social interests. In Spain, articles of association are subjected to strict formal and material legality control by the Commercial Register (*Registro Mercantil*). For this reason, provisions in the articles of associations enabling hybrid purposes or giving directors leeway to consider other interests will be closely scrutinised, sometimes resulting in denied access to the register.

Today, policymaking is mainly fostered by private actors. *Upsocial*, a civil association based in Barcelona, put forward an initiative for a general interest private limited liability company (*sociedad limitada de interés general* or S.L.I.G.). In 2013, the project was presented as a legislative proposal by the *Grupo Parlamentario Catalán (Convergència i Unió)* but was rejected by the lower chamber of Parliament (*Congreso de los Diputados*).²⁸ For years, the proposal went almost unnoticed by company law scholars, and only sporadic references within the social economy

²³Gimeno Ribes (2022), pp. 1–10.

²⁴For this kind of approach, from the perspective of SEs, Altzelai Uliondo (2020), p. 132; Vargas Vasserot (2021), p. 125.

²⁵*Proposición de Ley de apoyo a las actividades de los emprendedores. Presentada por el Grupo Parlamentario Catalán (Convergència i Unió)* [122/000119], *BOCG, Congreso de los Diputados, 18 de octubre de 2013 (núm. 140-1)*, pp. 1–7 (hereinafter the S.L.I.G. proposal).

²⁶*Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung in Verantwortungseigentum (VE-GmbH)*. See Reiff (2020), pp. 1750 ff.

²⁷For Italy, Art. 1, commi 376 a 384 legge 28 dicembre 2015, n. 208; Corso (2016), p. 1000; Stella Richter (2017), pp. 7–8; Guida (2018), p. 2. For France, see *Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises* (Loi PACTE).

²⁸See Directorate General for Internal Policies (2017), p. 26.

literature were be found.²⁹ From a company law perspective, the legislative technique left room for improvement and included a large number of concepts that were familiar to social economy entities but foreign to private companies.

In recent years, the *B Lab Spain* foundation has established a benefit certification system. Since 2014, 74 entities have been certified as B-Corps after successfully adopting *B Lab Spain*'s guidelines, including the active pursuit of a stakeholder's interest (typically, workers, the environment, clients, or local communities).³⁰ Additionally, 2462 entities have signed up to have their so-called *b impact* assessed, which again includes an evaluation of their governance, workers, environmental and local communities, and client-related standards.³¹ Certification is granted only after introducing several amendments to the articles of association to include the interests of other stakeholders.³²

Against this background, to explore the formation of a benefit company under Spanish law, the following legal provisions are considered. Public and private companies are regulated under the *Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*. (LSC), which is a comprehensive company act. However, the Act does not address the contract by virtue of which a company is formed (*contrato de sociedad*), which is referred to more general provisions contained in the Spanish Commercial Code (Articles 19.1 LSC and 116.1 CdC, respectively).³³ Commercial law provisions refrain from defining contracts regulated under the civil law. Instead, they are confined to establishing requirements under which such contracts are deemed commercial in nature. As a result, the definition of a company contract must be sought in the Civil Code (Art. 1665 CC).³⁴ The provisions deal exclusively with partnerships, but these are the essential forms of business association upon which the entire system is built. Partnership law, namely, rules on purely contractual aspects, is also a default rule applicable to companies (Arts. 2 and 50 CdC). For the sake of simplicity, we refer to the contract giving rise to a company as a "company contract", notwithstanding the fact that the relevant provisions actually refer to civil and commercial partnerships.³⁵ The wording is not problematic in Spanish since the term *sociedad* also designates civil and commercial partnerships (*sociedades civiles* and *mercantiles*, respectively).

²⁹See, however, Embid Irujo (2020). See also Montero Simó (2017), p. 298; Díaz et al. (2020), pp. 24–25.

³⁰B Lab Spain (2019b), pp. 16–17.

³¹B Lab Spain (2019b), pp. 16–17.

³²B Lab Spain (2019a), <https://bcorporation.net/certification/legal-requirements>.

³³*Real Decreto de 22 de agosto de 1885 por el que se publica el Código de Comercio* (hereinafter CdC).

³⁴*Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil* (hereinafter CC).

³⁵On this approach, from an EU perspective, European Court of Justice, Decision of 10 March 1992, C-214/89 (Powell Duffryn). See also Mittwoch (2017), pp. 97–98.

The Spanish contract law system has historically been influenced by French law, which is also reflected in company law. As with other French-influenced jurisdictions, the cause is considered one of the three essential elements of a contract (Art. 1261.3 CC).³⁶ In the case of a company contract, the cause is regarded as the aim of pursuing profit to distribute it among shareholders, as foreseen by Arts. 1665 CC and 116.1 CdC. Civil and commercial partnerships are consistently defined as contracts in which the parties (members or partners) share the common goal of pursuing profit and distributing it among themselves. For years, legal scholars and courts have intensively discussed whether companies may be formed in pursuit of non-profitable goals in light of Articles 1665 CC and 116.1 CdC.

According to the general understanding, profit is a two-fold concept, and a distinction is usually drawn between objective and subjective profit. Many EU Member States are familiar with this duality, but the Spanish debate was strongly influenced by Italian academic discussion.³⁷ Objective profit refers to the net (positive) economic result of an activity's exploitation.³⁸ Authors have sometimes fostered a broader understanding of objective profit as mere creation of advantages for members or partners.³⁹ Subjective profit refers to the distribution of the latter among shareholders.⁴⁰ It is usually regarded as the key element upon which the distinction between for-profit and third-sector entities is built; the non-distribution constraint typically defines the scope of non-profit entities.⁴¹ Benefit companies have disrupted this paradigm. Their hybrid character goes beyond that of pre-existing forms such as cooperative societies.⁴² As can be noted, the emergence of benefit companies also poses new challenges in terms of fundamental freedoms in the internal market, since not-for-profit entities fall out of the scope of freedom of establishment (Art. 54 in relation to Art. 49 TFEU). As the line between profit and not-for-profit dilutes, consistent policy adaptation is required.⁴³

Within this framework, Spanish scholars and courts have dealt with the role of profit within the concept of *sociedad* (Arts. 1665 CC and 116.1 CdC). In line with other continental systems such as those of France and Italy, Spanish policymakers

³⁶See Article 1275 CC, equivalent to Art. 1131 of the French Civil Code, and Girón Tena (1976), pp. 37 ff. See further Zimmermann (2006), p. 553; Kötz (2017), p. 51.

³⁷Marasà (1984), p. 106.

³⁸Paz-Ares Rodríguez (1991), pp. 732–733 and n. 5. Rojo Fernández Río (2010), Article 19, p. 316. See also Lombardo (2013), p. 235 and n. 30.

³⁹Garrido de Palma (1972), p. 769; León Sanz (1990), p. 816. With nuances, Duque Domínguez (1968), p. 83.

⁴⁰Paz-Ares Rodríguez (1991), pp. 732–733 and n. 5.

⁴¹Hansmann (1980), p. 838; Von Hippel (2005a), p. 35. For Spain, Paz-Ares Rodríguez (2008), p. 146; Perdices Huetos (2008), p. 141.

⁴²Despite being subject to a non-distribution constraint, the inclusion of cooperative societies in the personal scope of the freedom of establishment (Arts. 49 and 54 of the Treaty on the Functioning of the European Union; hereinafter TFEU) is usually justified by their *hybrid* nature. See Lombardo (2013), p. 235.

⁴³Lombardo (2013), pp. 225–263. See also Mittwoch (2017), p. 97.

have historically mistrusted private associations pursuing non-profitable purposes. This explains why regulations on both civil and commercial partnerships define them as business associations that pursue economic goals. Today, constitutions recognise the fundamental freedom of association (Art. 22 of the Spanish Constitution, CE) and other related freedoms, such as the right to own property (Art. 33 CE), the right to create foundations (Art. 34 CE), and the freedom of enterprise (Art. 38 CE). Consequently, reluctance toward non-profitable organisations is no longer a policy reason to preserve the for-profit requirement.⁴⁴ Since the 1960s, scholarly efforts have pushed for a broader understanding of the general concept of *sociedad*, one in which profit is not an essential requirement but where any lawful common purpose is deemed sufficient.⁴⁵ These proposals are sustained by political, systematic, and comparative legal arguments and may be considered the currently prevailing scholarly opinion among private lawyers.⁴⁶ They are further supported by the fact that the legislature in aligned jurisdictions, such as France or Italy, has already accepted a more flexible approach. France added nuance to its strict for-profit requirement by introducing the need to consider environmental concerns and enabling any *société* to include a purpose statement. Italy introduced the *società benefit* in 2016.⁴⁷ In addition, the dominant scholarly opinion usually shares the view that any remaining doubt has been solved by means of Art. 2 LSC, a provision that is usually regarded as the final abandonment of the for-profit requirement for companies.⁴⁸ Art. 2 LSC establishes that private and public companies shall be deemed commercial in nature regardless of their objects (*objeto social*). The object refers to the activity undertaken by the company, as expressed by the articles of the association (Art. 23.b) LSC).⁴⁹ This differs from the for-profit cause of the company contract, usually referred to as *fin social*.

However, it may be argued that the provision does not fulfill such an ambitious function.⁵⁰ First, it ensures the applicability of commercial law provisions to companies, notwithstanding other considerations. In other words, companies qualify as merchants or businesspersons regardless of the type of activity they carry out. Second, it suggests that companies may pursue their for-profit purpose through

⁴⁴Girón Tena (1976), p. 32; Paz-Ares Rodríguez (1991), pp. 734–735 and n. 5. Critical, Vicent Chulià (1991), pp. 292–293.

⁴⁵Girón Tena (1976), pp. 32–40; Paz-Ares Rodríguez (1993a), Article 1665, pp. 1307 ff.

⁴⁶Girón Tena (1976), pp. 32–40; Paz-Ares Rodríguez (1993a), Article 1665, pp. 1307 ff. See also Pantaleón Prieto (1993), p. 5.

⁴⁷Note that the wording of Art. 1832 of the French Civil Code, equivalent to Art. 1665 CC, has not been modified, but the amendments to Articles 1833 and 1835 substantially alter the framework in which it is interpreted. For Italy, see *supra* n. 5.

⁴⁸Sánchez Calero (1995), pp. 133 ff; Girón Tena (1976), p. 37; Sáenz García de Albizu (1990), pp. 247–248; Fernández Ruiz (1991), p. 80; Paz-Ares Rodríguez (1991), p. 741; Paz-Ares Rodríguez (1993a), Article 1665, pp. 1309–1310.

⁴⁹European Court of Justice, Decision of 13 November 1990, C-106/89 (Marleasing).

⁵⁰Duque Domínguez (1968), p. 83; Vicent Chulià (1991), pp. 294–295; Vaquerizo Alonso (2010), Article 2, pp. 198–199. See also Paz-Ares Rodríguez (1993a), Article 1665, p. 1310.

any lawful activity (*cualquiera que sea su objeto*), which again does not exclude or abrogate profit, especially in a subjective sense.⁵¹ In turn, one could question whether an activity that cannot be feasibly expected to generate distributable profit can be chosen as part of a company's objects.⁵² Meanwhile, the courts have not entirely endorsed the extensive approach to the concept of a company and have tended to favour a black-letter interpretation of the law.⁵³ The administrative authority responsible for the Commercial Register, the *Dirección General de los Registros y del Notariado* (DGRN), now known as the *Dirección General de Seguridad Jurídica y Fe Pública* (DGSJFP), was also reluctant to accept the scholarly-fostered proposal. This usually prevents the registration of provisions in the articles of association that are directly or indirectly incompatible with the for-profit requirement.⁵⁴ In a recent decision on December 17, 2020, the DGSJFP shifted its traditional approach toward a more flexible view.⁵⁵ Its position is grounded in the distinction between objective and subjective profit. The DGSJFP granted registration for a company even though the articles of association foresaw that profit would not be distributed among shareholders, thus abrogating subjective profit. Here, the DGSJFP interpreted Article 2 LSC in relation to Article 116.1 CdC in the sense that only objective profit, and not subjective profit, must be deemed as part of the cause of the company. Granting the registration of subjective not-for-profit companies is a rather formalistic way of providing a practical solution to the increasing role of benefit or hybrid models.⁵⁶

Accordingly, from a doctrinal perspective, commercial partnerships and companies may pursue nonprofit purposes. On this basis, scholars have envisaged the formation of non-profit companies under the Spanish law. In these companies, profit is amended or even abrogated, either in an objective or subjective sense, or even completely.⁵⁷ Additionally, only sporadic references may be found about hybrid entities in the scholarly literature, partially profit-seeking in nature and partially aimed at fostering other stakeholder interests. However, the worldwide regulatory trend of benefit companies has not gone unnoticed. Authors have typically assessed them in connection with either the interests of the company or corporate social responsibility issues.⁵⁸

⁵¹ Similarly, Vicent Chulià (1991), p. 295.

⁵² See *infra* n. 68–71.

⁵³ STS (Sala de lo Civil, Sección 1ª) 29.11.2007 (n. 1229) [RJ 2008\32], IV. Pino Abad and Font Galán (2001), pp. 7 ff.

⁵⁴ RDGRN 02.02. 1966 [RJ 1966\1398]; RDGRN 11.04.2016 (núm. 5291) [RJ\2016\2990], IX.

⁵⁵ RDGSJFP de 17 de diciembre de 2020 [JUR\2021\5839]. See Fernández del Pozo (2021).

⁵⁶ See del Val Talens (2020), pp. 55–59 and p. 149.

⁵⁷ Paz-Ares Rodríguez (1993a), Article 1665, pp. 1307 ff; Paz-Ares Rodríguez (1993b), Article 1689, p. 1434; Ruiz Muñoz (1998), p. 295; Illescas Ortiz (1973), p. 26 and n. 30; Muñoz Martín (1994), p. 465. See also Sánchez Andrés (1994), p. 115.

Illescas Ortiz (1973), p. 26 and n. 30; Muñoz Martín (1994), p. 465.

⁵⁸ Hernando Cebriá (2016), pp. 22 ff.; Embid Irujo and del Val Talens (2016), p. 72; Esteban Velasco (2019), pp. 1061 ff; del Val Talens (2020), pp. 59–60.

3 Concept and Purpose of Benefit Corporations

Benefit companies are generally defined as hybrid companies.⁵⁹ Their hybrid character arises from the fact that they are partially for-profit and partially not-for-profit firms. The not-for-profit side builds on selecting one or more ideal or general interest purposes that the company purports to foster. Typically, one or more stakeholders are designated for a project. In the comparative framework, legal provisions on benefit company models sometimes include a general definition of public or general interests, followed by a non-exhaustive list of examples, including reducing a certain negative impact or the enhancement or protection of certain groups, entities, or communities, including artistic, charitable, cultural, economic, educational, literary, medical, religious, scientific, or technological purposes (Art. 1, *comma 378 legge 28 dicembre 2015, n. 208* and § 362(b) Delaware General Corporation Law). Most jurisdictions are familiar with this policy option, based on enumeration through the law of foundations, which typically foresees a similar list. In the case of Spain, this can be found in Art. 3.1 of *Ley 50/2002, de 26 de diciembre, de Fundaciones* (LF).⁶⁰

Under traditional for-profit models, not-for-profit or ideal purposes are generally alien to company law and must blend into the corporate entity. Under French-influenced systems, where the cause is essential to the contract, the hybrid character of benefit companies reflects on the cause: profit (Arts. 116.1 CdC, and 1665 CC) should be pursued together with other ideal, not-for-profit, or general interest goals.⁶¹ More precisely, in continental jurisdictions in which profit is still considered a core feature, benefit companies are typically considered to bring nuance to subjective profit but not necessarily to objective profit. By combining profit with a general interest goal, the company shall still be able to generate positive net income.⁶² If a broader notion of objective profit is preferred, the company will at least need to produce some kind of advantage or sufficient income to prevent it from being wound up and liquidated. This would have an impact on subjective profit and may prevent distribution among shareholders, which is an extremely controversial *de lege lata*.⁶³

The main difference from purely for-profit companies lies in the distribution of profits among shareholders. Benefit companies allocate earnings differently because the enhancement of a general or public benefit interest is balanced with the distribution of profits among shareholders. Benefit regulations enable the allocation of company resources in a manner that is forbidden or extremely uncertain under traditional for-profit models. The key policy change vis-à-vis for-profit forms lies in the possibility of assigning resources both to the distribution of profits and to the

⁵⁹Hernando Cebriá (2016), p. 23. See also, from an Italian perspective, Ventura (2016), p. 1161.

⁶⁰In this context, del Val Talens (2020), p. 59. Generally, Verdura Server (2008), pp. 111–114.

⁶¹See *comma 376 legge 28 dicembre 2015, n. 208*. On ideal purposes within the Spanish model see Illescas Ortiz (1973), p. 83.

⁶²Guida (2018), p. 2.

⁶³See *infra* Sect. 7.2.

enhancement of a social interest or public benefit goal.⁶⁴ In turn, social interest is pursued in a similar manner as in the non-profit sector, with the exception that the entity is not subjected to a non-distribution constraint.

In addition to modifying the cause of the contract, other features of benefit companies must be reconciled with structural company law concepts. Under the Italian model, public benefit or interest is part of the company's objective (*oggetto social*). As described above, this refers to the activity by which the company's purpose (cause or *fin social*) is implemented and achieved, and it is expressed in the articles of association (Art. 23.b) LSC).⁶⁵ Other jurisdictions include the general or public interest in the company by resourcing the so-called *raison d'être*.⁶⁶ This concept is alien to traditional company law, and may be introduced at the cost of legal certainty. For instance, the preamble of the *Loi PACTE* itself makes it clear that the *raison d'être* does not coincide with preexisting notions of company law, namely, the cause—*fin social*—or the object of the company—*objet social*. The latter consists of mandatory mentions of the company contract or the articles of association, as opposed to the *raison d'être*, which may be voluntarily included in the articles (Art. 1835 of the French Civil Code). This is followed by a provision that enabled directors to pursue them (Art. L-225-35, French Code of Commerce). A similar enabling provision for directors is also foreseen by systems that opt for an amendment of the company's objects, such as Italy (Art. 1, *comma 377 legge 28 dicembre 2015, n. 208*). The concept of purpose or *raison d'être*, as understood in the benefit literature, is also alien to the Spanish tradition.⁶⁷ In addition, the comparative framework suggests that benefit companies may give rise to many different business models depending on the extent to which the public benefit or interest is actually embedded into the company's activity. For this reason, assessing a hybrid model from a Spanish perspective would require the prior identification of such theoretical models.

The Spanish S.L.I.G. proposal seemingly envisaged a combined system, including both an amendment of the objects and a purpose provision. It foresaw that the articles of association mentioned one or several activities among the five alternatives (Art. 540.1 LSC-PLAAES).⁶⁸ These include (a) developing an economic activity to reduce or transform a specific social need, (b) providing goods or services to socially vulnerable collectives or individuals, (c) enhancing social opportunities for them,

⁶⁴Möslein and Mittwoch (2016), p. 426; Guida (2018), p. 3.

⁶⁵On their relationship see Lutter (1980), p. 90.

⁶⁶Art. 1835 of the French Civil Code. See Urbain Parleani (2019), pp. 575 ff.; Fleischer (2017), pp. 510–511; Fleischer (2018), pp. 703 ff. To prevent misunderstandings, we hereinafter refer to the purpose of the company in jurisdictions where this expression is used as a synonym for the cause of the contract (namely, Spain) merely as *cause* or *goal*. We refer to the concept of purpose as introduced by legislative reforms on benefit corporations and similar innovations simply as *raison d'être*.

⁶⁷See Embid Irujo (2019).

⁶⁸We hereinafter refer to amendments to the *Ley de Sociedades de Capital* as foreseen by the S.L.I.G. proposal as LSC-PLAAES.

(d) preserving and improving the environment, and (e) collaborating with other social economy entities. Only the first alternative included a list of possible scopes of activity (health, education, culture, housing, and environment), similar to the Italian benefit model or the law of foundations (Art. 3.1 LF). Article 540.1 LSC-PLAAES foresaw that the articles of association transcribe one or more of the aforementioned options. This technique entailed a questionable restriction on freedom of contract within the articles. Presumably, the transcription was not intended to prevent the articles from mentioning a specific stakeholder, individual, collective, or economic potentially profitable activity that the company would carry out. Article 540.2 LSC-PLAAES also mentioned a so-called *compromiso estatutario*, referring to the founders' commitment to creating a general interest impact on society. This compromise in the articles of the association may have been similar to an actual statement of purpose or *raison d'être*. However, the systematics of the provision made it unclear whether it actually referred to the company's object.

4 Benefit Corporation Models

Until this point, the analysis shows that what is described as a benefit company may translate into several business models. In other words, a wide phenomenon may result from deploying company forms in pursuit of hybrid purposes. Models may vary depending on the way in which public benefit is embedded in the structure of the company.⁶⁹ This is one of the reasons why enacting benefit companies is technically challenging and why the language tends to be inaccurate or generic. Accordingly, we narrowed down the potential outcomes into three theoretical benefit-corporation models. Our taxonomy relies on concepts arising from the non-profit sector literature and appears to be consistent with recent developments in the law of benefit companies.

First, since *de lege lata*, the purpose or *raison d'être* of a company, is a concept alien to the Spanish system, we understand that an adaptation in this regard would have a very little actual normative impact [Model 1]. The company's policy documents may refer to a broader goal or purpose to which the company is committed (typically, the environment or local communities affected by the activity). It is sometimes the case that this kind of formulation appears in board regulations (*reglamento del consejo de administración*) and is sometimes included in articles of association.⁷⁰ Such declarations do not typically affect the cause of the contracts. As long as the decision is within reason, it is assessed under the business judgment rule (Art. 226.1 LSC). Additionally, the scholarly understanding of the company's interests is sufficiently broadly interpreted as accommodating business decisions based on environmental or societal demands, even from strict shareholder-value-

⁶⁹Corso (2016), p. 1012.

⁷⁰Esteban Velasco (2014), p. 219.

oriented views.⁷¹ In larger undertakings, namely publicly listed companies, one additional reason why such provisions have a very little practical impact may correlate to the limited enforcement in continental public companies.⁷²

The second constellation designates benefit companies in which the protection or enhancement of the public interest is part of the company's day-to-day activities [Model 2]. In this scenario, the company actively takes necessary or convenient actions to foster their selected interests. This would require directors to organise and allocate human and material resources, namely financial resources. In this scenario, activities aimed at protecting or enhancing public interest are not merely ancillary but are indeed sufficiently intense and prolonged in time to be a part of the company's objects. The Spanish S.L.I.G. proposal took this approach by introducing specific amendments to the object provision in the articles of association (Art. 540 LSC-PLAAES).

This scenario can be implemented in two ways. In the first alternative, the enhancement of the general interest would require the company to use part of its resources to actively fund the social cause or stakeholders of their choice. This means that funds generated by profitable activities should be channeled to fund non-profitable purposes [Model 2.A]. This way of operating is familiar to non-profit law, which is generally referred to as a donative model (*modelo dotacional*).⁷³ As opposed to donating funds to a non-profit, financial resources would not be diverted to a third-sector entity but would be managed by the benefit company itself. The benefit company would allocate them directly in favour of the social interest of their choice and, by doing so, the company would be accomplishing its objectives. However, when assessing this model, it must be borne in mind that the benefit regulatory phenomenon aims to overcome a traditional donation-based system and some failures arising therefrom.⁷⁴ Under this model, articles of association would typically include a so-called plural object clause.⁷⁵ Additionally, an enabling provision for the distribution of profits may be needed.

The second alternative is one in which the only activity pursued by the benefit company effectively enhances or protects the social interest of its choice [2.B]. Under this model, the benefit company mimics social economy entities. Instead of channeling part of its earnings to foster social interest, the for-profit activity itself would fulfill this function. This could happen because the activity is undertaken in a specific manner to achieve this goal, or because the activity itself is suitable for it. The main concern of this model is the financial viability of the activity, which is usually sustained through profit reinvestment. The Spanish S.L.I.G. proposal seemed to be oriented toward this model (see Art. 540.1 and 541 under PLAAES), since no

⁷¹ See *infra* Sect. 7.1.

⁷² Enriques (2002), pp. 779–780; Latella (2009), pp. 307; Gelter (2012), pp. 856–870.

⁷³ Hansmann (1980), p. 840. For Spain, Valero Agundez (1969), p. 139; Embid Irujo (2019), pp. 81–82; Hernando Cebriá (2011), n. 3; del Val Talens (2020), pp. 52–54.

⁷⁴ Westaway (2014), pp. XVIII–XX.

⁷⁵ See *infra* n. 72–73.

distinction was drawn between different activities within the objects. This model-based division is not clear-cut, but an entity may rather combine different models or switch from one model to another.

5 Obstacles in the Set-Up of Benefit Corporations

In this section, we explore the extent to which in-force Spanish company law provides leeway for party autonomy to set up the different benefit-corporation models described above. Here, a distinction can be drawn between theoretical admissibility and effective registration.

5.1 *The Cause or Purpose of the Benefit Corporation*

As stated above, setting up beneficial companies under the Spanish law would require an adaptation of the cause of the company contract to render it hybrid or dual.⁷⁶ Wherever the legal system identifies the cause of a company's contract with the pursuit of profit, such an amendment is controversial. Spanish company law scholars regard this as admissible, but courts are reluctant.⁷⁷ However, under Spanish law, the cause of the company contract is not part of the articles of association and need not be expressed in any relevant company law document (contract or deed). In fact, only the objects of the company, as a means to achieve the company's purpose (cause), must be in writing.⁷⁸ As a result, such an abstract adaptation of the cause of the contract may not pose any practical problems during the set-up. Another way forward could be seen in the fact that courts, but also the DGSJFP, usually claim that for-profit purposes *shall prevail*.⁷⁹ This assertion could be interpreted in the sense that as long as profit is not seriously compromised or completely abrogated, a benefit or hybrid model may be compatible with our system. On a different note, Member States may only provide for the nullity of a company on the grounds that the objects are unlawful or contrary to public policy (Art. 11.b.ii) Directive (EU) 2017/1132 and Article 56.1.e) LSC).⁸⁰ Since conditions for a company's nullity must be narrowly interpreted, the prevailing scholarly opinion

⁷⁶Ventura (2016), p. 1166.

⁷⁷Paz-Ares Rodríguez (1993a), Article 1665, p. 1313. See also Fleischer (2001), p. 173.

⁷⁸Paz-Ares Rodríguez (1993a), Article 1665, p. 1324.

⁷⁹RDGRN 22.11.1991 [RJ 1991\8637], III.

⁸⁰Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) [hereinafter Directive (EU) 2017/1132].

shares the view that an unlawful cause, even a not-for-profit one, does not call for the nullity of the company.⁸¹

A for-profit cause does not prevent companies from making contributions or donations to charitable initiatives or other general objectives. Such payments are usually considered lawful, provided that they are merely auxiliary or marginal, in the sense that they do not replace or hinder the regular business activities of the company.⁸² Consequently, the allocated amount is reasonable.⁸³ Such requirements are intended to protect minority shareholders' rights, namely those of an economic nature (the right to receive distributed profits and the right to a share within liquidation).⁸⁴ Along this line, the articles of association may enable the company to allocate a small part of its annual profits to fund general interest initiatives.⁸⁵ The fact that such decisions and their corresponding provisions in the articles of association are admissible *de lege lata* enables entrepreneurs to adapt existing company forms to some of the features of benefit corporations without any prior legislative reform.

5.2 *Objects of the Benefit Corporation*

As analysed above, several jurisdictions require benefit companies to consistently adapt the provisions in the articles of association regarding their objects.⁸⁶ This regulatory technique blurs the difference between the objects and cause of the contract by gathering them in a single provision. *De lege lata*, the provision in the articles is only concerned with the former, namely, with the activity that the company carries to foster its purpose (Arts. 23.b) LSC y 117.1 RRM).⁸⁷ In this light, drafting the object provision in a benefit model may be problematic. The theoretical models described above may require that the relationship between for-profit and not-for-profit purposes be formulated differently. The same may apply to the various activities carried out to achieve each goal.⁸⁸ While Models 1 and 2.B may not raise any concerns in this regard, Model 2.A may require that the articles mention a non-profitable activity. In Spain, doubts typically arise on whether objects may only

⁸¹ León Sanz (1990), p. 818 and n. 29; Paz-Ares Rodríguez (1991), p. 741; Fernández Ruiz (1991), p. 80.

⁸² Esteban Velasco (2014), p. 307; del Val Talens (2020), p. 233.

⁸³ STS (Sala de lo Civil, Sección 1ª) 29.11.2007 (n. 1229) [RJ 2008\32], IV. RDGRN 02.02.1966 [RJ 1966\1398]; RDGRN 20.01.2015 (n. 1869) [JUR 2015\59988], II; RDGRN 11.04.2016 (n. 5291) [RJ2016\2990], IX. See del Val Talens (2019), pp. 41 ff.

⁸⁴ STS (Sala de lo Civil, Sección 1ª) 29.11.2007 (n. 1229) [RJ 2008\32], IV.

⁸⁵ RDGRN 22.11.1991 [RJ 1991\8637], III.

⁸⁶ Art. 1 *comma* 379 *legge* 28 dicembre 2015, n. 208.

⁸⁷ Corso (2016), p. 1008.

⁸⁸ Corso (2016), p. 1012.

consist of economic activities. Scholars usually interpret Article 2 of the LSC as enabling any lawful activity to be included in this provision (*cualquiera que sea su objeto*).⁸⁹ However, courts and registrars tend to reject the idea that the articles include activities that are presumed to be unfit to generate profit, such as making donations or gifts.⁹⁰ This approach on their part is incorrect because it entails an *ex ante* examination of the entire business model, for which commercial registrars and courts are ill-equipped. Additionally, donations are deemed economic in nature for purposes of the EU law, at least on the free movement of capital.⁹¹

Whenever economic activity is carried out solely (Model 2.B), or a donation-based model (Model 2.A), it should be mentioned within the objects of the company. This provision defines the scope of the directors' actions from an internal perspective *ex Art. 9.1 Directive (EU) 2017/1132 (Art. 234.1.I and II LSC)*. The Spanish S.L.I.G. proposal considered this, since a few alternatives foreseen by Art. 540 LSC-PLAAES designated either economic activity (Art. 540.1.a) and c) LSC-PLAAES) or the type of goods and services that would be distributed (Art. 540.1.b) LSC-PLAAES). Presumably, founders would have had to replace the generic reference to an economic activity or product or service with the actual economic activity the company undertook. Under Model 2.A, the object provision mentions both for-profit and not-for-profit activities. Whenever a company carries out more than one activity, a complex or plural object provision may be foreseen.⁹² Complex object provisions allow for an extension of the scope of activity at risk of undermining the principle under which the objects should be sufficiently delimited in the articles (Art. 23.b) LSC).⁹³ However, the DGSJFP has a rather formalistic view and considers a provision to be in compliance with this principle as long as it mentions activities among the ones listed in the *Clasificación Nacional de Actividades Económicas (CNAE)*.⁹⁴

On contributions to non-profit organisations or donations within the objects, two additional considerations can be made. First, in for-profit models, donations are not usually part of the objects, but rather auxiliary activities; for this reason, they typically need not be reflected in articles.⁹⁵ Second, because of reluctance toward such a provision, Model 2.A may confront more obstacles *de lege lata* than other

⁸⁹Girón Tena (1976), pp. 37 and 211; Pantaleón Prieto (1993), p. 44; León Sanz (2006), p. 814.

⁹⁰RDGRN 02.02.1966 [RJ 1966\1398].

⁹¹See Annex I, XI.B of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. Donations are usually controversial as to the material scope of application of free movement of capital. See Von Hippel (2005b), pp. 8–9; Hüttemann and Helios (2006), p. 2484; Barnard (2019), p. 525. See also del Val Talens (2020), p. 159.

⁹²Sáenz García de Albizu (1990), p. 84; Massaguer Fuentes (1993), p. 4; Illescas Ortiz (1995), pp. 110 ff. From an Italian perspective, Corso (2016), p. 1011.

⁹³On this principle, see Girón Tena (1976), p. 211; Broseta Pont (1976), p. 121; Rodríguez Artigas (1991), p. 143; Cabanas Trejo (2020), pp. 1–2.

⁹⁴RDGRN 09.10.2018 (n. 14864) [RJ 2018\4492]; Cabanas Trejo (2020), p. 4.

⁹⁵Pou Ampuero (2000), p. 308. See also Campo Sentís (1991), p. 298; Massaguer Fuentes (1993), p. 7.

alternatives. This should not raise excessive concern since a similar result may be achieved through a provision on the distribution of profits. In their turn, Lab B's amendment to the articles concerning the object advances a different approach, one that is similar to Art. 1833.II of the French Civil Code. In addition, whatever activity the company may carry out, a reference to the creation of a positive social impact, namely, on the environment, shall be included.

6 Finance

The financial aspects of benefit companies may vary from one model to another. Typically, regulations on the matter balance the distribution of profits among shareholders with the encouragement of the general interest reflected in the articles, which also appears consistent with the prevailing view in the fourth sector.⁹⁶ This is usually pursued through a legal provision that sets the percentage of distributable profit. Under the Spanish S.L.I.G. proposal, only 30% of profits (*beneficio*) could be distributed, while 70% would have to be reinvested or dedicated to reserves (Art. 541 LSC-PLAAES). An exception may be made if less than 30% of the profits were distributed in the two preceding years (Art. 541.II LSC-PLAAES). The proposal can be improved by clarifying the concepts of profit and reinvestment. First, such a provision should coordinate with Article 273.2 LSC, subordinating any distribution to prior covering of the legal reserves as well as reserves provided for in the articles of association, and forbidding distributions that reduce net equity (*patrimonio neto*) under share capital. Consequently, doubts arise as to whether the reinvestment quota would be calculated based on distributable profits. In this case, an express mention is advisable. The interaction of this 30/70 allocation system with other provisions set forth in the articles (additional reserves, founders' or shareholders' preferential rights, or directors' remuneration based on profits) may also have called for additional consideration.

In addition, the meaning of reinvestment is controversial since the proposal itself foresaw it in opposition to covering reserves. By opposing them, Article 541 LSC-PLAAES diverged from Article 57.5 of Ley 27/1999: not-for-profit cooperative societies may create a special reserve for non-distributable profits for reinvestment purposes, which are intended to help the cooperative establish itself in the market and improve its services. When opposed to covering reserves, reinvestment would then be interpreted as actively dedicated resources for the enhancement of the not-for-profit purpose. This means that a large percentage of profits can potentially be extracted from the company every financial year. If this were the case, further clarification would be required to specify how profits should be reinvested in a way that ensures the enhancement of the general interest or the protection of individuals and collectives selected in the articles of association. Provisions in the articles,

⁹⁶See Altzelai Uliondo (2020), pp. 119–122.

shareholder's instructions to directors' (Art. 161 LSC), or simply a decision of the General Meeting would be required.

In essence, different forms of *ex-ante* shareholder engagement could limit the risk of insider abuse in a model that provides a sort of *carte blanche* to allocate a large fraction of profits in activities and initiatives that may have only been vaguely described. Article 541 LSC-PLAAES would also need to coordinate with Art. 348 bis LSC, granting an exit right to shareholders in the event that profits are not sufficiently distributed.⁹⁷ Here, policy alternatives range from excluding the application of Art. 348 bis LSC in benefit regulations or narrowing its scope to profits that may be effectively distributed under benefit regulations (30%) to leaving the matter to the articles of association. Under Art. 348 bis LSC, this exit right can be abrogated by articles of association either after a unanimous shareholders vote or by granting an exit right to shareholders who voted against its exclusion.

Under the current regulations, scholars share the view that a fraction of annual profits may be allocated to social or general interest initiatives.⁹⁸ The DGSJFP agrees that articles of association can foresee a provision of the kind (for instance, establishing a percentage) subject to the same criteria applied to donations.⁹⁹ This means that only a small fraction of profits may be dedicated to not-for-profit purposes to preserve the for-profit goal and shareholders' economic rights. The DGSJFP arguably conceives of these provisions as simply enabling, but not necessarily binding, for the Ordinary General Meeting when deciding on how annual results should be distributed (Art. 273 LSC).¹⁰⁰ To our understanding, this may depend on the wording of the provision, which may simply be enabling or mandatory. What is still controversial is that the majority is required to amend the articles of association to introduce it, that is, whether a unanimous vote is required or whether a qualified majority would suffice.¹⁰¹

Furthermore, as long as the not-for-profit goal is formulated in broad terms, the provision is not bound to create a third party right to effectively perceive profit. Doubts may arise whenever the articles refer expressly to an organisation or to an individual (for instance, a foundation; see also Art. 540.2.b) LSC-PLAAES referring to "individuals"). *De lege lata*, the DGSJFP opposes the view that third-party rights may be created in this way.¹⁰² The abovementioned considerations may reflect differently on the various business models that a benefit company could adopt. Since Model 2.B includes not-for-profit activity as part of the objects, one could

⁹⁷ See Arias Varona (2018), pp. 283 ff.

⁹⁸ Albiñana García-Quintana (1954), p. 210; Sánchez Calero (1995), p. 105; Vicent Chulià (1991), p. 423; Massaguer Fuentes (1990), p. 21; García-Moreno Gonzalo (2002), p. 969; Muñoz Martín (2006), pp. 465–466.

⁹⁹ RDGRN 22.11.1991 [RJ 1991\8637], III.

¹⁰⁰ RDGRN 22.11.1991 [RJ 1991\8637], II.

¹⁰¹ STS (Sala de lo Civil, Sección 1ª) 29.11. 2007 (núm. 1229) [RJ 2008\32], IV. Muñoz Martín (1994), p. 320. See del Val Talens (2020), pp. 304–309.

¹⁰² RDGRN 22.11.1991 [RJ 1991\8637], II.

argue that profits may be dedicated to it in the same way as for-profit activity. Model 2. On the contrary, A typically relies on this type of *ex ante* solution.

7 Governance

As far as governance is concerned, regulations on benefit companies typically assess directors' duties and shareholder protection mechanisms.

7.1 Directors' Duties

Benefit regulations usually include a legal provision that enables directors to pursue general interests or not-for-profit purposes. This typically includes a reference to the interest of the company that opts for a stakeholder approach and sometimes even departs from the maximisation of shareholder value (for Italy, Art. 1, *comma* 377 *legge* 28 *dicembre* 2015, *n.* 208; for the Spanish S.L.I.G., Art. 543 LSC-PLAAES).¹⁰³ Under in-force Spanish company law, shareholder value is deemed compatible with the directors' consideration of other stakeholders' interests that, if ignored or not properly accounted for, may generate reputational damage or other sort of negative impact on the company.¹⁰⁴ The latter may also be formulated positively; as long as stakeholder concerns are not detrimental to value creation, the decision is protected by the business judgment rule.¹⁰⁵ Assuming the decision is not immediately profit-maximising or requires long-term engagement, it can still be deemed compatible with the company's interest on the grounds of a long-term maximisation value approach.¹⁰⁶

Disregarding environmental and community concerns may push the decision away from the scope of the business judgment rule (Art. 226.1 LSC). This may happen because the procedural prongs of the business judgment rule may not be fulfilled if the decision fails to adequately assess environmental or societal impacts.¹⁰⁷ Under Art. 226.1 LSC, these are formulated as adequate decision-making procedures and suitable information.¹⁰⁸ This approach is similar to what

¹⁰³ Ventura (2016), p. 85.

¹⁰⁴ Sánchez-Calero Guilarte (2006), pp. 50–51; Esteban Velasco (2014), pp. 300–302.

¹⁰⁵ Alfaro Águila-Real (2015), p. 359; Alcalá Díaz (2018), p. 53.

¹⁰⁶ Esteban Velasco (2014), pp. 300–302; Megías López (2017), pp. 8–10; Alcalá Díaz (2018), pp. 68–71; Esteban Velasco (2019), p. 1010; See, recently, Hernando Cebriá (2020), pp. 39 ff.

¹⁰⁷ Embid Irujo (2018), pp. 208–209.

¹⁰⁸ See Guerrero Trevijano (2014), pp. 275–279; Embid Irujo (2015), pp. 121–123; Roncero Sánchez (2016), pp. 393 ff.

has been described as a *benefit–judgment rule*.¹⁰⁹ Provided that a wider range of potential decisions are available to reconcile profit and purpose, and the directors are required to balance the different interests at stake, scholars have suggested that the focus should be placed on the procedural aspects of the decision, rather than on the merits thereof.¹¹⁰ This approach is sometimes criticised because it provides excessive leeway for directors.¹¹¹ However, one could question whether a decision that needs to balance several interests (here, the shareholders’ and the stakeholders’ interests)—rather than only one—would actually allow directors to choose among a larger number of potential outcomes. Arguably, in some cases, the need to consider stakeholder interests would narrow their options. Legislative amendments to provide express authorisation for directors to consider stakeholder interests have sometimes been disregarded because they generate balancing costs for directors.¹¹² A similar assessment may be made on the multi-stakeholder provision fostered by B Lab, in which the interests of employees, clients, suppliers, and other parties, such as local communities, the environment, and both long- and short-term interests should be envisioned. However, scholars generally consider such provisions to be voluntary.¹¹³

7.2 Shareholder Protection

Shareholder protection in benefit companies aims to ensure that the company’s essential features are not altered without shareholder consent or other adequate balancing mechanisms. However, the kind of concerns that arise when turning traditional for-profit company models into benefit corporations also reflect on the proper way to protect shareholders. If the cause of a company contract is altered, a unanimous vote is required.¹¹⁴ This result is justified from the perspective of both company law and contract law. Under contract law provisions, an amendment to the cause of the contract requires unanimous consent (Art. 1256 CC).¹¹⁵ The result could also be achieved through company law provisions by conceding that the alteration of the for-profit cause directly affects an individual shareholder right (Art. 292 LSC): the right to participate in the distribution of profits (Art.

¹⁰⁹ Embid Irujo (2018), pp. 206–207. See also Stella Richter (2017), p. 7.

¹¹⁰ Corso (2016), p. 1020.

¹¹¹ Hernando Cebriá (2016), p. 31. From an Italian perspective, Stella Richter (2017), p. 7.

¹¹² Embid Irujo and del Val Talens (2016), p. 68; Peinado Gracia (2019), n. 35. See, however, Gómez Segade (2012), pp. 113–115; Esteban Velasco (2019), p. 1016.

¹¹³ Gómez Segade (2012), p. 115; Esteban Velasco (1990), p. 406; Esteban Velasco (2014), p. 311.

¹¹⁴ Girón Tena (1976), pp. 33 ff.; Esteban Velasco (1990), p. 406; Paz-Ares Rodríguez (1993a), Article 1665, p. 1323; Alcalá Díaz (2019), p. 5.

¹¹⁵ Girón Tena (1976), pp. 33 ff.; Paz-Ares Rodríguez (1993a), Article 1665, p. 1323.

93 LSC).¹¹⁶ The second solution is slightly more controversial because it leads to an ongoing discussion on whether shareholders may forego this right *ex ante*.¹¹⁷ Nevertheless, it could be argued that such an amendment will not abrogate or exclude the right to participate in the distribution of profits. Instead, it would only lead to a reduction in potentially distributable profits, directly affecting the right, but not requiring shareholders to waive it. This requirement is also considered applicable when the articles of association are amended to include a stakeholder interest provision.¹¹⁸ If only the objects of the company are concerned, a substantial amendment of the articles of association gives rise to an exit right (Art. 346.1.a) LSC).¹¹⁹ Extending the scope of the objects by including a not-for-profit activity (Model 2.A), provided that this option is admissible, qualifies as a substantial amendment to the provision. Consequently, shareholders who opposed it enjoyed a sell-out right or appraisal.

Benefit regulations usually foresee an exit right, which is triggered by the conversion of a for-profit company into a benefit one and vice versa (§ 363(b) 1 DGCL; Art. 544 LSC-PLAAES).¹²⁰ As has been noted, an exit right may be an adequate protective mechanism against amendments to the objects, but insufficient if the company's structure is altered in a more significant way. If a hybrid purpose is instated, even if only an amendment of the articles is formally proposed, a material change in the cause of the company may effectively take place, and consistently, every shareholder's consent would be required.¹²¹ Sporadically, the authors considered that an exit right may suffice.¹²²

8 Registration

The obstacles that entrepreneurs may face in the process of registering a benefit corporation in Spain have been assessed throughout the chapter. As described, these are usually derived from strict registrar control, which in turn is supported by DGSJFP's conception of profit as an essential element of Spanish company law. Scholarly consensus on the need to overcome for-profit requirements does not necessarily result in the successful registration of hybrid companies. Controversial

¹¹⁶ *In extenso*, Martínez Flórez (2010), pp. 240–241. See also Muñoz Martín (1994), p. 294; Ruiz Muñoz (1998), p. 295; Muñoz Martín (2006), p. 466; RDGRN 30.07.2015 (n. 10468) [2015 V4248], II.

¹¹⁷ Sequeira Martín (2018), p. 857.

¹¹⁸ Esteban Velasco (2014), p. 311; Esteban Velasco (2019), p. 1016.

¹¹⁹ Rodríguez Artigas (1994), p. 171; Martínez Sanz (1997), p. 47; Bonardell Lenzano and Cabanas Trejo (1998), p. 45.

¹²⁰ Stella Richter (2017), pp. 8–9.

¹²¹ Esteban Velasco (2019), p. (1016).

¹²² Illescas Ortiz (1973), p. 26 and n. 30. Against this view, Muñoz Martín (1994), p. 309.

issues at a registration state would typically include mentioning not-for-profit activities as part of the objects and other provisions in the articles of association that are deemed incompatible with profit-making, such as provisions allocating a large fraction of earnings to non-profit or general interest initiatives.

9 Specific Tax Treatment

As Spain has not adopted specific regulations on benefit companies or similar hybrid models, no specific tax treatment exists. Donations and other contributions to not-for-profit initiatives by for-profit companies are tax-deductible under company tax regulations.¹²³ Both public and private companies can benefit from this tax incentive. However, undertakings operating as S.A. and S.L. are excluded from the special tax regime foreseen for not-for-profit entities. Only not-for-profit entities and other organisations are listed in Article 16.a) LIFM in relation to Art. 2 LIFM may enjoy it. Extending it to benefit corporations formed as public or private companies would require prior legislative reforms. This claim is supported by benefit corporation advocates, who have traditionally demanded tax authorities and policymakers to include for-profit companies operating in a sustainable, stakeholder-friendly manner, in the same tax regime as non-profit organisations. In turn, the S.L.I.G. proposal was largely concerned with tax benefits, not only for the benefit company itself, but also for so-called social enterprise proximity investors (Art. 4 PLAAIS). However, these provisions were designed under a company tax regime that is no longer in force.¹²⁴

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¹²³ See Articles 17 ff. *Ley 49/2002, de 23 de diciembre, de régimen fiscal de las entidades sin fines lucrativos y de los incentivos fiscales al mecenazgo* (hereinafter LIFM).

¹²⁴ Montero Simó (2017), p. 307.

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Social Enterprises and Benefit Corporations in Switzerland



Henry Peter and Vincent Pfammatter

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1 Introduction

In today's world, it appears obvious that corporations may not continue to operate with the maximization of shareholder's profits as their sole objective. As a sign of the times, the influential Business Roundtable,¹ an association of US leading companies working to promote the US economy, has recently issued a statement² according to which they were now committed to considering the interests of *all* stakeholders when conducting their business (customers, employees, suppliers, communities, and shareholders). This statement was signed by almost 200 CEOs, which pledged to lead their companies in consideration of these principles,³ stating, in sum, that they were shifting from a shareholder-centered to a multi-stakeholder approach of business.

In many ways, this corresponds to what social entrepreneurs and B corp advocates had been promoting for years, if not decades. Although criticisms have been raised as to the real intentions of the CEO's Business Roundtable Statement,⁴ it is nevertheless a significant step forward, as *shareholder primacy* has been its official position since 1997.⁵ How to achieve such results is now the question.

Without any doubt, B corps, benefit corporations and other types of social enterprises are part of the solution, and the objective of this contribution is to analyze how these structures and labels fit today in Switzerland, and what opportunities and likely evolution the Swiss legal system offers in this regard.

As a matter of fact, there is not a single definition of *benefit corporations*, but it is commonly admitted that they are companies that have a multi-stakeholder approach at heart and consider not only economic parameters, but also social and environmental ones.

Across jurisdictions, and depending on their specificities, they are referred to as blended enterprises,⁶ social enterprises,⁷ for-benefit enterprises,⁸ hybrid entities,⁹ dual- or multipurpose entities, flexible- or social purpose corporations, etc. In the present contribution, we will use the term "*benefit corporation*" as the overarching term.

¹<https://www.businessroundtable.org> (18/01/22).

²<https://opportunity.businessroundtable.org/ourcommitment> (18/01/22).

³See also McGregor (2019).

⁴B corp leaders have publicly called the leaders of the Business Roundtable to get to work and "to put their words into action," by publishing a full-page print in The New York Times of 25 August 2019, see article here <https://bthechange.com/dear-business-roundtable-ceos-lets-get-to-work-25f06457738c> (18/01/22); Rinne (2019).

⁵Winston (2019).

⁶Brakman Reiser (2010), pp. 105 et seq.

⁷Ventura (2019), p. 170.

⁸Sabeti (2011).

⁹Pfammatter (2019), pp. 175 et seq.

Certain countries have introduced specific legal forms to meet the needs of benefit corporations and encourage their development. This is the case of the United States of America, where a number of states have enacted new legal forms such as Low-Profit Limited Liability Company (L3C), Social Purpose Corporation (SPC) or Public Benefit Corporation.¹⁰ It is also the case of Italy, which introduced the *società benefit* (SB) in 2016,¹¹ Columbia that enacted in 2018 the *Sociedades de Beneficio e Interés Colectivo* (BIC),¹² or France, where in 2019 the hybrid model of “*entreprise à mission*” has been introduced.¹³

Each of these models show similarities given that they blend the intention of making profits with a non-profit ideology. But they also differ, be it in the predominance of one purpose over the other (is it primarily a profit-making entity, or does the profit serve the non-profit purpose?)¹⁴ or in the legal form they adopt.

At this juncture, a semantic element needs to be clarified. Profit-making purposes are often described with synonyms such as “for-profit,” “economic” or “commercial,” and non-profit-making purposes with words such as “social,” “ideal,” “charitable,” or “non-profit.” For the sake of coherence and simplification, in the present contribution, we will use “*economic purpose*” to encompass all profit-making objectives, and “*ideal purpose*” when describing non-profit-making objectives. These concepts—and definitions—are to be distinguished from the “public utility purpose” which, in Switzerland, is defined and used in tax laws. It must also be distinguished from the “commercial activity,” which can be a mean to achieve a purpose, and not a purpose in itself.

Unlike other jurisdictions, Switzerland’s legislator has decided—so far—not to provide for a dedicated legal structure for benefit corporations. And this stance is unlikely to evolve soon, as the Federal Council, Switzerland federal executive body, stated in 2018 that it did not intend to encourage the creation of a new legal structure for benefit corporations, although it supported private initiatives in this sector, such as the B corp movement.¹⁵

In this contribution, we will therefore first focus on the B corp movement in Switzerland, and complete our analysis with a case study. We will then analyze the specificities of the “social enterprise” model, which, in Switzerland are dual-purpose companies sponsored by the state. Given the absence of any specific legal form for benefit corporations, we will then review whether existing legal forms in Switzerland

¹⁰Ventura (2019), p. 171.

¹¹Introduced with the 2016 “Stability Law,” Law No. 208 of December 28, 2015 (G.U. 30.12.2015).

¹²*Sociedades de Beneficio e Interés Colectivo* (BIC) were introduced in Columbia by a new law in July 2018, Ley n° 1901, 18 June 2018.

¹³Law No. 2019-486 of May 22, 2019. On this, see Ventura (2019), pp. 172–173.

¹⁴On this subject, see Brakman Reiser (2010), pp. 105 et seq.

¹⁵See below, section *Legislative initiatives*. Interpellation 13.3689 of Mr. Eric Nussbaumer, member of the Swiss parliament (national council), and related statement of the Federal Council of September 12, 2013. Interpellation 18.3455 of Mr. Fabian Molina, member of the Swiss parliament (national council), and related statement of the Federal Council of 22 August 2018.

may be adopted to satisfy multiple purposes. To this end, we will review the legal contours of corporations (LLC or LTD), cooperatives, and charities, namely, associations and foundations. Before concluding, we will address certain tax-related aspects, as well as past and current legislative initiatives intended to make Swiss law evolve towards a legal structure specific to benefit corporations.

2 The B Corp Movement in Switzerland

Given that Switzerland does not have a specific legal form for benefit corporations, we will first focus on the B corp movement, and how it developed in Switzerland. In this section, we will also analyze the specificities of the “social enterprise” model, which resemble hybrid entities, with the specificity however of being sponsored by the state.

2.1 Generalities¹⁶

The absence, in Switzerland, of a dedicated legal status enabling to address the needs and goals of benefit corporations and the willingness to dispose of internationally comparable criteria has led to initiatives from the private sector, particularly to the birth of assessment standards and “*certification systems aimed at measuring a company’s social and environmental impact.*”¹⁷ The most prominent and well-known of these third-party accountability standards is the B corporation certification of the B Lab organization.¹⁸

B Lab defines itself as a nonprofit that serves a global movement of people using business as a force for good. In B Lab’s view, prosperity and sustainability are indeed not incompatible,¹⁹ and in fact, if one—as it should—adopts a long-term perspective, they complement each other. Launched in 2006 by the American non-profit organization B Lab, the label now exists in over 64 countries around the world, including Switzerland, and more than 3000 companies, spread over 150 industry types, bear the label.²⁰

¹⁶The following section is based on an article, which has been published in ExpertFocus 2019/3, p. 176, by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland.”

¹⁷Ventura (2019), p. 170. In Switzerland, the social economy is also being encouraged through other means, notably the Chambers of social and solidary economies (*Chambres de l’économie sociale et solidaire*), which exist in Geneva, Vaud, and Jura notably.

¹⁸<https://www.bcorporation.net/en-us/movement/about-b-lab> (18/01/22).

¹⁹Richterich (2019).

²⁰Richterich (2019).

The certification is the result of a careful assessment of the company that may be granted by B Lab. Such assessment measures the relevant entity's "*entire social and environmental performance*" and holistically²¹ evaluates how the company's operations and business model impact workers, community, environment, and customers.²² In other words, the B Lab label stands for companies which have, globally, a positive impact on society rather than a focus on the maximization of shareholders' profits. Companies which, in other words, commit to a "triple bottom line approach" to business.²³

The B corp assessment process includes several steps. The starting point is a self-evaluation performed by the company itself, by means of the completion of a thorough form containing 280 questions.²⁴ Various parameters are scrutinized, ranging from the respect of human rights, gender and salary equality and energy management. The result of this self-analysis is a score, which may reach a maximum of 200 points, with a limit set at 80 points to pass the cut.²⁵ A noteworthy requirement in that context is transparency that is required from the company,²⁶ the latter having *inter alia* to disclose (legal) issues it may have had in the past. The second step is that the company must embody its commitments in its articles of incorporation and other corporate documentation, thus making such commitments mandatory for all its stakeholders, including its directors and shareholders.²⁷

The B corp certification is not a one-time effort, but rather an ongoing process and commitment. A first assessment is followed by a continuous monitoring and periodic re-assessment which incentivizes permanent initiatives, aiming at improving the score. In any event, the label should not be seen as an objective in its own, but rather as a mean to measure, compare and improve.²⁸ There are many examples worldwide of commercially successful B corporations, such as Patagonia,²⁹ Ben & Jerry's³⁰ (a group subsidiary of Unilever³¹), Kickstarter,³² or Nature & Découvertes.³³

²¹ Richterich (2019).

²² <https://www.bcorporation.net/en-us/certification> (18/01/22).

²³ Concept developed by John Elkington and other Scholars. Elkington (1994), pp. 90–100. For a summary of this concept, see for instance: Slaper and Hall (2011); Pfammatter and Wynne (2017), p. 43.

²⁴ Richterich (2019).

²⁵ Richterich (2019).

²⁶ B-Corp Certification - Disclosure Questionnaire Documentation.

²⁷ Richterich (2019).

²⁸ Richterich (2019).

²⁹ <https://bcorporation.net/directory/patagonia-inc> (18/01/22).

³⁰ <https://bcorporation.net/directory/ben-and-jerrys> (18/01/22).

³¹ Richterich (2019).

³² <https://bcorporation.net/directory/kickstarter-pbc> (18/01/22).

³³ <https://bcorporation.eu/directory/nature-et-decouvertes> (18/01/22).

It is difficult to find disadvantages to such label, for those who adopt it. One difficulty faced by companies who have adhered to the B corp certification system is that they must live up to the expectations they create. As such, they are more exposed to criticism in case a problem occurs. Another *prima facie* downside is that the certification comes with a cost; however, this should not be seen as a deterrent considering the many upsides of the label.

2.2 *B Corps in Switzerland (See Table 1)*³⁴

In Switzerland, the B corp movement is quite recent. The first B corp certification was issued in 2014, the only one that year.

As of today, there are close to sixty entities certified as B corps, across all sectors of the industry (see Table: B corps in Switzerland hereafter). Although, it is difficult to draw trends from such a rather limited number of entities, one can note the following:

- *Legal structure*: about two-thirds of the B corps are LTDs, and the remaining third is split between LLCs and cooperatives;³⁵
- *Geographical distribution*: interestingly, most B corps are located in the French-speaking part of Switzerland, while three are in Ticino (Switzerland’s Italian-speaking canton) and only six in the German-speaking part, although the latter by far represents the largest part of the country. This might be because B Lab Switzerland,³⁶ the Swiss branch of B corp, is located in Geneva, but perhaps also to a different sensitivity to these issues in the Romandie region, including the fact that Geneva is growingly developing as an international sustainable finance hub;
- *Activity sector*: while B corp in Switzerland belongs to a wide variety of industries and activities, most of them are active in the services’ industry. This is in line with the importance of the type of industry mainly represented in Switzerland.

From a legal and corporate perspective, B corps have to find common ground between the existing legal framework and the requirements imposed by the B corp label. In practice, this means that companies must amend their articles of association to reflect the following principles:

³⁴The following section is based on an article that was published in ExpertFocus 2019/3, p. 176, by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

³⁵The website <https://bcorporation.net/certification/legal-requirements> (18/01/22) proposes to choose between an LLC, and LTD or a Cooperative if a Swiss company intends to become a B corp. It does not, however, exclude other legal forms.

³⁶<https://www.blab-switzerland.ch> (18/01/22).

Table 1 B corps in Switzerland^a

#	Name	Legal structure	Sector	Business	Date of certification
1.	Enki Capital	Ltd.	Service	Private equity	2022
2.	Légumes Perchés	LLC	Service	Agriculture/growers	2022
3.	Foound	LLC	Service	Coworking and more	2021
4.	Lukevent	Ltd.	Service	Travel industry	2021
5.	Sigma legal	Partnership	Service	Law	2021
6.	conexkt	LLC	Service	Innovation consulting	2021
7.	SCB Group	Ltd./Group	Service	Renewable energy	2021
8.	Naef Holding	Ltd.	Service	Real estate	2021
9.	Banque Bonhôte	Ltd.	Service	Banking	2021
10.	Redsen Group	Ltd./Group	Service	Digital consulting	2021
11.	Reform	LLC	Service	Design	2021
12.	La Maison Creative Direction	Ltd.	Service	Communication and luxury retail performance	2021
13.	KAMPOS	Ltd.	Manufacturing	Luxury swimwear and ready-to-wear apparel	2021
14.	AdvantiKA	LLC	Service	Business transformation consulting	2021
15.	Eclotions	Sole proprietorship	Service	Marketing and communication	2021
16.	SmartHelio	LLC	Service	Energy	2021
17.	Symbiotics	Ltd.	Service	Impact investment solutions	2021
18.	Vestergaard	LLC/Group	Wholesale/Retail	Public health innovative technology	2021
19.	Weleda Group	Ltd./Group	Manufacturing	Organic natural cosmetics, anthroposophic therapy medicines	2021
20.	Vivent	Ltd.	Wholesale/Retail	Bio-signals and electroceuticals technology	2021
21.	SEP Jordan	Ltd.	Wholesale/Retail	Fashion and home accessories	2020
22.	Enoki	LLC	Service	Sustainable urban planning	2020
23.	Domicile & Co.	Ltd.	Service	Real estate	2020
24.	OA Legal	Ltd.	Service	Law	2020
25.	CleanGreens Solutions	Ltd.	Manufacturing	Clean aeroponics systems	2020
26.	GAIA Insights	LLC	Service	Leadership development solutions	2020
27.	Watalux	Ltd.	Wholesale/Retail	Water disinfection and treatment	2020

(continued)

Table 1 (continued)

#	Name	Legal structure	Sector	Business	Date of certification
28.	The Rainforest Company	Ltd.	Wholesale/ Retail	Açaí products	2020
29.	Evian Volvic Suisse	Ltd.	Wholesale/ Retail	Water and aqua-drinks	2020
30.	The Positive Project	LLC	Service	Financial and sustainability management support services	2020
31.	Ethos Services	Ltd.	Service	Sustainable investment solutions	2020
32.	Sofies International	Ltd.	Service	Land resource development & waste management	2020
33.	Impact Finance	Ltd.	Service	Investment advisory	2020
34.	L'écoline	Ltd.	Service	School	2019
35.	Mobilidée	LLC	Service	Mobility management	2019
36.	B+G and Partners	Ltd.	Service	Design	2019
37.	7 Peaks Brasserie	LLC	Manufacturing	Craft beer	2019
38.	Twist Communication	Ltd.	Service	Communication, etc.	2019
39.	Serbeco	Ltd./Group	Manufacturing	Waste management, etc.	2019
40.	ecoRobotix	Ltd.	Manufacturing	Autonomous solar-powered weeding robot	2019
41.	Lombard Odier	Ltd./Group	Service	Wealth and asset management	2019
42.	Raiffeisen GE-Rhône	Cooperative	Service	Banking	2019
43.	ARU	Ltd.	Service	Human resources	2019
44.	Impact Hub Bern	Cooperative	Service	Coworking space	2018
45.	Alaya	Ltd.	Service	Communication, volunteering, etc.	2018
46.	Relevant	Ltd.	Service	IT consulting, IT security, digital marketing	2018
47.	Coninco	Ltd.	Service	Sustainable finance & investment solutions	2018
48.	MagicTomato	Ltd.	Wholesale/ Retail	Local online groceries	2017
49.	Baabuk	LLC	Wholesale/ Retail	100% natural wool footwear	2017
50.	One Creation	Cooperative	Service	Sustainable investment cooperative	2017

(continued)

Table 1 (continued)

#	Name	Legal structure	Sector	Business	Date of certification
51.	Conser Invest	Ltd.	Service	Sustainable investment advisory and digital tools	2016
52.	Accès Personnel	Ltd.	Service	Delegation of temporary and fixed staff	2016
53.	Opaline	Ltd.	Manufacturing	Fruit juices	2015
54.	Globalance Bank	Ltd.	Service	Wealth management, private bank	2015
55.	Loyco	Ltd.	Service	Administrative services	2015
56.	Abhati	LLC	Wholesale/ Retail	Holistic skincare & lifestyle brand	2015

^a According to information published on www.bcorporation.net and <https://fr.blab-switzerland.ch> (06/02/2022)

- (i) pursue the company's (and therefore its shareholders') interest, but also have a material positive impact on society and the environment at large,
- (ii) consider a range of stakeholder's interests (including shareholders, employees, suppliers, society, and the environment), and, therefore,
- (iii) consider that shareholder value is not prevailing—and certainly not prevailing in a short-term perspective—and is only one factor amongst others, which board members need to consider when running the business.

On tax incentives, it is important to bear in mind that B corp entities generally do not benefit from tax exemptions by virtue of their multi-stakeholder approach. As a matter of principle, they remain for-profit entities and are taxed as such.³⁷

2.3 *A Recent Leading Example in Switzerland: Lombard Odier Becoming a B Corp*³⁸

Founded in 1796, Lombard Odier is one of Switzerland oldest private banks. It holds more than USD 300 billion of client's assets.³⁹ “*Lombard Odier provides wealth and asset management services, private banking services, and technology services for*

³⁷ See below, section *Tax aspects*.

³⁸ See B corp directory website <https://bcorporation.eu/directory/lombard-odier> (18/01/22) and press release of the bank: <https://www.lombardodier.com/fr/contents/corporate-news/media-releases/2019/march/lombard-odier-group-awarded-b-co.html> (18/01/22).

³⁹ <https://www.lombardodier.com/home/about-us/la-maison.html> (18/01/22).

banking. The company employs more than 2,400 individuals throughout its global operations spanning Europe, Asia, and the Americas.”⁴⁰

As a privately-owned bank, Lombard Odier is free from market pressure and external public shareholders pressure for increasing financial results.⁴¹ Lombard Odier describes the obtention of the label as a major step forward. The bank has long looked for an external certification to get a perspective as to where it stands and identify areas of potential improvements.⁴² From a governance perspective, the B corp label has requested amending the purpose clause of the group’s holding entity, as well as amendments of internal regulations.⁴³

It is noteworthy that, although the B corp label exists since more than ten years, Lombard Odier is, worldwide, one of the first financial institutions of this importance to have accessed the label.⁴⁴

3 The Swiss Social Enterprise Model (State Sponsored Entities)

Swiss authorities sponsor certain companies that aim at reintegrating workers in the professional and social life. They are generally referred to as Social and Professional Integration Enterprises (SPIEs).⁴⁵ It is estimated that there are currently about 1200 SPIEs in Switzerland, which achieve together a global yearly turnover of CHF 630 million, mainly in the industry, food and commerce fields.⁴⁶

SPIEs are private companies exposed to entrepreneurial risks⁴⁷ and pursuing a dual mission (or hybrid mission): making profits to be partially self-financed and accomplishing a social mission. They are hybrid entities in the sense that they do pursue simultaneously an ideal and an economic purpose.⁴⁸ From a legal structure

⁴⁰B-Corp Certification - Disclosure Report of Lombard Odier, available at <https://bcorporation.net/directory/lombard-odier> (18/01/22).

⁴¹<https://bcorporation.eu/directory/lombard-odier> (18/01/22).

⁴²Richterich (2019).

⁴³Lombard Odier has kindly provided this information. Mr. Patrick Odier, Chairman of the Board and Mr. Bertrand Gacon, Head of Corporate Sustainability, are herewith thanked by the authors for their time and the explanation they have provided.

⁴⁴A few other financial institutions have accessed the label in Switzerland, namely, Globalance Bank and Bank Raiffeisen Région Genève Rhône, or investment advisors such as Conser Invest and Coninco.

⁴⁵In French “*Entreprises d’Intégration Sociale et Professionnelle (EISP)*.”

⁴⁶Ferrari et al. (2016), pp. 10–11.

⁴⁷*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d’intégration sociale et professionnelle (EISP); Guide à l’intention des organes d’exécution de l’aide sociale, de l’assurance-chômage et de l’assurance-invalidité*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3.

⁴⁸*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d’intégration sociale et professionnelle (EISP); Guide à l’intention des organes d’exécution de*

point of view, it is interesting to note that such social enterprises can adopt various legal forms, from foundations or associations, to LTD and LLCs.⁴⁹

Compared to Europe, the SPIE model is relatively new in Switzerland.⁵⁰ In Switzerland, they are not subject to minimum requirements concerning the number of distressed employees they are hiring, or the level of self-financing that they must achieve.⁵¹ To date, they act in a fairly unregulated market, which raises certain concerns, particularly from an unfair competition perspective. However, several conditions and restrictions are imposed by the Swiss social insurance which sponsors them, particularly, the use of profits is limited and non-compete restrictions are imposed to limit unfair competition effects.⁵²

The common denominator of all SPIEs is that (i) they do pursue a hybrid purpose as aforesaid, (ii) they hire socially impaired individuals as well as ordinary employees⁵³ and (iii) they are partially sponsored or supported by the state.⁵⁴ This latter point is key in distinguishing such enterprises from other type of benefit corporations which are considered in the present contribution. For this reason, the specific model will not be further explored and developed here.

4 Existing Legal Structures

Given the absence of a specific legal form for benefit corporations, the following section will review whether and which Swiss existing legal forms may be used to pursue hybrid purposes. To this end, corporations (LLC or LTD), cooperatives, and charities, namely, associations and foundations, will be assessed in turn.

l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3. See also the cited reference, namely, the International Comparative Social Enterprise Models, ICSEM.

⁴⁹For examples of each of these entities, refer to the *Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3.

⁵⁰Ferrari et al. (2016), p. 12.

⁵¹*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3. See also the cited reference, namely, the definition of the Social Firms Europe (CEFEC), according to which a social enterprise should cover at least 50% of its spending by profits coming from its commercial activity.

⁵²*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 4; Ferrari et al. (2016), p. 11.

⁵³Ferrari et al. (2016), p. 12.

⁵⁴In principle by the social assistance, the unemployment insurance or the disability insurance.

4.1 Ordinary Corporations (LTDs and LLCs)⁵⁵

The two main forms of corporate vehicles in Switzerland are the limited by shares company (“LTD”)⁵⁶ and the limited liability company (“LLC”)⁵⁷ (together referred to as “Corporations”). Both are entities held by shareholders and have their own legal personality, the result being that they are solely responsible for their (own) debts. The core structure and purpose(s) of these entities are set in their articles of association, which can be supplemented by organizational and governance rules. The purpose of Corporations must in principle be of an economic nature (i.e., a for-profit purpose).⁵⁸ A Corporation must therefore, as a rule, pursue the objective of making profits for the benefit of its shareholders.⁵⁹

Traditionally, corporate law has required that directors place profits and shareholder value (maximization of financial returns for shareholders) above all other objectives. This is generally referred to as the *shareholder primacy principle*.⁶⁰ Swiss corporate law therefore contained (and still does) mechanisms and provisions aiming at forcing directors to adopt an approach which primarily benefits the shareholders and leaves the ultimate control with them.⁶¹ Particularly, directors could not decide unilaterally to retain or use profits for other purposes than distributing them to the shareholders.⁶²

This rather inflexible view of corporate law does not accommodate well with the multi-purpose approach of benefit corporations. However, the shareholder primacy principle is increasingly counter-balanced by a few other forces. Corporate social responsibility,⁶³ economic, social, and moral requirements,⁶⁴ ESG expectations, increasing awareness towards environmental priorities,⁶⁵ all result in changing the “*rules of the game*.”⁶⁶ Principles and limits are not solely imposed by state laws and regulations anymore,⁶⁷ but corporations are forced, by virtue of a bundle of para-

⁵⁵The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁵⁶Article 620 et seq. of the Swiss Code of Obligations (“SCO”), RS 220.

⁵⁷Article 772 et seq. SCO.

⁵⁸Article 620 para. 3 SCO, *a contrario*, for LTDs and Article 772 SCO for LLCs.

⁵⁹Forstmoser and Meier-Hayoz (2015), p. 490.

⁶⁰See, for instance, Friedman (1970).

⁶¹Jacquemet and Peter (2015), p. 173.

⁶²Jacquemet and Peter (2015), p. 172.

⁶³Peter (2016), pp. 469 et seq. See also publication of *economiesuisse*, Corporate Social Responsibility from a Business Perspective, July 2015.

⁶⁴Jacquemet and Peter (2015), p. 173, and the cited references.

⁶⁵By way of an example, see the 17 UN Sustainable Development Goals of the World’s Agenda for 2030.

⁶⁶Jacquemet and Peter (2015), p. 173, and the cited references. Mayer et al. (2020).

⁶⁷Jacquemet and Peter (2015), p. 173, and the cited references.

normative obligations⁶⁸ to consider other purposes than purely economic ones.⁶⁹ As recently stated by the Business Roundtable, and acknowledged by the Washington Post, “Corporations are [. . .] facing increasing pressure - whether from customers, employees or public groups - to take stands on issues that affect society at large.”⁷⁰

In Swiss corporate law, one may consider that a legal basis has always existed for for-profit entities to include ideal objectives. Indeed, under Article 717 para. 1 of the Swiss Code of Obligations (“SCO”), board members and corporate directors must exercise their duties by taking into consideration not only the interest of the shareholders, but also the interest of the company itself. In other words, one must consider that a company has a distinct and autonomous interest, which differs from the sole pursuit of profit making for its shareholders. According to leading legal scholars, this could be the legal basis of the *stakeholder value theory* in Switzerland,⁷¹ in the sense that it would legitimate decisions made in the interest of stakeholders other than shareholders (e.g., of employees, the community, etc.), for as long as such decisions would also serve the company’s interest in the long term.⁷²

From this perspective, Swiss corporations might not need a new legal structure to allow pursuing ideal purposes, besides a (more or less) primary economic purpose. The current legal system might in other words already concede enough flexibility in this respect. One question, however, remains: is it sufficient? Does Swiss law allow to go one step further and consider, or even require, that the interests of all stakeholders be considered at the same level (and profit-making for shareholders not being above any other)? The latter conception is being designated by scholars as the “*stakeholder-mandatory*” conception, as opposed to the “*stakeholder-optional*” conception.⁷³

4.2 Corporations with Non-Profit Purposes (Article 620 al. 3 SCO)⁷⁴

Another existing option, which is rarely used,⁷⁵ is to set up a non-profit corporation or, better said, a corporation with a non-economic purpose.⁷⁶ Under Article

⁶⁸Neri-Castracane and Peter (2018), § 6.

⁶⁹Neri-Castracane and Peter (2018), § 6.

⁷⁰McGregor (2019). See also the Statement issued by the Business Roundtable in 2019, available at <https://opportunity.businessroundtable.org/ourcommitment> (18/01/22).

⁷¹Jacquemet and Peter (2015), p. 173, and the cited references.

⁷²Neri-Castracane (2016), p. 224.

⁷³See notably McDonnell (2019).

⁷⁴The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁷⁵Baudenbacher (2016), Article 620, n° 2.

⁷⁶Baumann and Markowitsch (2016), pp. 136 et seq.

620 para. 3 SCO, a company limited by shares may in fact also be established with a non-economic purpose,⁷⁷ meaning with an “ideal” or non-profit purpose.⁷⁸ Such a purpose can for instance lean towards culture, philosophy, public-utility, religion, politics, or leisure. The existence of corporations with non-economic purposes is widely recognized by legal scholars,⁷⁹ as well as by the Swiss Supreme Court case law.⁸⁰ Recently, the Swiss Federal Council has also reiterated that the current state of Swiss law authorizes the creation of corporations with non-economic purposes.⁸¹

Although the possibility of setting-up a corporation with a non-economic purpose exists, it is largely unknown or, in any event, used.⁸² The reasons thereof might be the following: viewed as an alternative to a charity (foundation or association), a corporation with a non-economic purpose is likely to face difficulties with fundraising and public subsidies.⁸³ It might also be less able to benefit from tax exemptions. In addition, Swiss law requirements are often stricter for corporations than they are with respect to associations and foundations, particularly when it comes to equity requirements, fiduciary duties of the management, mandatory statutory rules, and accounting requirements.⁸⁴ These may be some of the reasons why, up to now, social entrepreneurs willing to pursue non-economic purposes have favored foundations or associations over corporations.

4.3 Cooperatives⁸⁵

Cooperatives⁸⁶ are corporate entities composed of an unlimited number of individuals or commercial companies (but at least 7), who join forces for the primary

⁷⁷ Lombardini (2017), Article 620, n° 42-43; Baudenbacher (2016), Article 620, n° 2.

⁷⁸ The situation is identical for LLCs. Since the reform of Swiss comparative law in 2007, the previously existing condition of Article 772 para. 3 old SCO (which provided that LLCs could only be established for an economic purpose) has been removed, with the intention to confirm that LLCs could pursue either economic or non-economic purposes. The Report of the Federal Council on the amendment expressly specifies that LLCs should, besides economic purposes, be authorized to pursue ideal purposes of public utility.

⁷⁹ Forstmoser and Meier-Hayoz (2015), p. 490; Montavon et al. (2017), p. 236.

⁸⁰ Swiss Federal Court decision, 25 February 2016, B_3502/2014, para. 4.1.

⁸¹ Interpellations 18.3455 and 13.3689, op.cit.

⁸² For a few examples of corporation with non-economic purposes, see Bui (2013), which cites Sotweb Sàrl, Friends of Humanity SA, CauseDirect SA and Assurethic Sàrl.

⁸³ This view is shared by Baumann and Markowitsch (2016), pp. 136 et seq.

⁸⁴ Jakob et al. (2009), p. 16.

⁸⁵ The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁸⁶ Articles 828 to 926 SCO.

purpose of promoting or safeguarding their own interests.⁸⁷ They may pursue a commercial activity to this end.⁸⁸

As opposed to corporations, the purpose of cooperatives is based on a member-centered concept (similar to an association), rather than on making profits at the entity level and distributing it to its shareholders. In other words, while corporations can be seen primarily as a capital divided into shares, cooperatives have an “*ad personam*” character and are based on the concept of pooling economic forces in the direct interest of its members.⁸⁹

Under Article 828 para. 1 SCO, cooperatives pursue primarily economic purposes, or more precisely the economic interests of their members. However, they may also pursue other purposes, in addition to such economic purposes, for as long as they also serve the interests of their members.⁹⁰ Cooperatives can thus also favor other stakeholders’ interests (i.e., the interests of non-members).⁹¹

Well-known examples of cooperatives in Switzerland are the two largest retail food-store business, Coop and Migros. In both instances, their articles of association contemplate that the cooperative must foster the interests of its members but also of all consumers and other stakeholders.

Notwithstanding the fact that cooperatives are not supposed to make themselves any profit but to directly favor their members,⁹² a limited distribution of dividends is allowed under the strict conditions of Article 859 para. 2 and 3 SCO. This compulsory provision means that any return on the capital invested resembles more an interest than a dividend payment. Another significant difference with corporations is the principle known as “one man, one vote.” Under Article 885 SCO, each member of a cooperative is entitled to one and only one vote, irrespective of the number of “shares” that he/she owns. This rule echoes the principle of equality of all members contemplated under Article 854 SCO and is part of the social philosophy of the cooperative.⁹³ As a consequence, no member may take control of the cooperative, nor, for that matter, assign such control.

⁸⁷ Pfammatter and Wynne (2017), p. 53.

⁸⁸ Jakob et al. (2009), p. 14.

⁸⁹ Forstmoser and Meier-Hayoz (2015), p. 744.

⁹⁰ Forstmoser and Meier-Hayoz (2015), p. 747. The ordinance on the Register of commerce seems to push it even further since it contemplates that cooperatives with pure public utility purposes may also validly be registered (Article 86 let. b para. 2 Swiss Ordinance on Register of Commerce, “ORC”).

⁹¹ Forstmoser and Meier-Hayoz (2015), p. 749 and cited references.

⁹² Reymond (1996), pp. 162 et seq. For such a distribution to take place, the following conditions must be met: (i) the cooperative must have made profits, (ii) the articles of associations of the cooperative must contemplate the possibility of a distribution of dividends, (iii) the distribution must be made in proportion to the share of capital, and (iv) the percentage of the distribution may not exceed the usual rate of interest for long term loans without special security (which means that the shareholder of a cooperative may not be remunerated more than an ordinary lender); Balkanyi and Neuhaus (2016), Article 859, n° 6.

⁹³ Chabloz (2017), Article 885, n° 2 et seq.

The cooperative can be an appropriate legal vehicle when it comes to pursuing economic and ideal purposes at the same time, particularly given that (i) it may pursue various purposes and favor various categories of stakeholders, and (ii) it is not centered on profit-making but nevertheless allows distribution of (limited) dividends. It has been—and still is—used by very large, successful, and sustainable businesses, which may be considered as visionary. In fact, it is a model of “social entrepreneurship” that existed even before the concept became an economic theory. However, this vehicle is rarely considered nowadays (in fact, the number of cooperatives in Switzerland is lower today than it was 50 years ago), particularly in the non-profit sector.⁹⁴ Whether this is justified is not quite clear, although an explanation could be that the mandatory “one man one vote” principle might discourage social entrepreneurs to choose this type of entity, particularly because this entails that they would not be able to maintain full control over the entity, which might be difficult to reconcile with non-profit purposes one wishes to achieve.

4.4 *Associations and Foundations (Charities)*⁹⁵

Under the term “charities” are encompassed associations and foundations⁹⁶ which are the two main legal forms of charitable ventures in Switzerland.

The fact that associations and foundations are not corporations makes them, per se, improper to qualify as benefit *corporations*. Nevertheless, the perspective that they offer in terms of hybridity is worth being analyzed in the present contribution. To that effect, the following section will particularly consider whether, in Switzerland, charities may pursue an economic purpose alongside an ideal purpose, and thus have dual—or multi—purposes.

At the outset of this section, a few clarifications are necessary:

- (i) **Economic purpose vs commercial activity:**⁹⁷ A distinction must be made between an “economic purpose” and a “commercial activity.” The purpose, which may be either economic (for-profit) or ideal (not-for-profit), or both at the same time, is the objective (i.e., the aim) of the entity. The commercial activity, in turn, is the mean to achieve such a purpose.
- (ii) **No shareholders:** charities do not have shareholders because they do not issue shares and have no “owners.”⁹⁸ An association has members, but no shareholders. A foundation has neither members, nor shareholders; it only has

⁹⁴ Jakob et al. (2009), p. 14.

⁹⁵ The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁹⁶ Articles 80 SCC et seq.; Articles 60 SCC et seq.

⁹⁷ For a more detailed analysis of the question, see Merkt and Peter (2019), pp. 209 et seq., and the cited references.

⁹⁸ Wynne (2016).

beneficiaries. Given that both types of entities have no shareholders, they may not distribute them any profit,⁹⁹ which makes them unsuitable for investments.

- (iii) **Tax exemption:** tax exemptions are essential for charities but because of the tax rules currently applicable in Switzerland, they are subject to strict requirements, amongst which that they may only exercise limited commercial activities. The present section deals with civil law constraints, while related tax aspects will be analyzed further below (section *Tax aspects*).

4.5 Foundations

Foundations are widely considered to be the most suitable legal vehicle for a charity. As such, foundations generally do not have economic purposes, nor commercial activities. But in fact, they could. Indeed, legal scholars are of the opinion that the principle of freedom of foundations and the lack of a provision prohibiting it allows foundations to pursue an economic purpose.¹⁰⁰ From the perspective of a foundation's **purpose**, there is no legal impediment or restriction to the type of objective that a foundation may pursue, save illegal purposes or purposes that are impossible to achieve.¹⁰¹

Although this question has been long disputed amongst legal scholars,¹⁰² the Swiss Supreme Court has now confirmed that nothing in the Swiss civil legal framework restricts foundations from having an economic purpose,¹⁰³ as long as such purpose is not contrary to law.¹⁰⁴

On a possible commercial **activity**, there are various ways for a foundation to engage in it, which range from owning all or part of a for-profit entity (a so-called *holding foundation*¹⁰⁵), to conducting a commercial activity on its own.¹⁰⁶ De facto limitations to such activities are however set by tax law,¹⁰⁷ as it will be discussed further below (section *Tax aspects*).

In practice, however, some specificities of foundations often outweigh their potential advantages, which is why this type of entity is rarely used to pursue an

⁹⁹Merkt and Peter (2019), p. 209.

¹⁰⁰Grüniger (2014), Article 80 SCC, n° 17-22. Of the same view are Merkt and Peter (2019), p. 210.

¹⁰¹Merkt and Peter (2019), p. 210, who cite the appropriate legal references, namely, Art. 52 para. 3 SCC and Art. 19 and 20 SCO.

¹⁰²Merkt and Peter (2019), p. 210 and the cited references; Vez (2010), Article 80, n° 15.

¹⁰³As recognized by the Swiss Supreme Court in Swiss Federal Court decision, 75 II 81 (Holding-Foundation) and Swiss Federal Court decision, 120 II 137, para. 3 d; See also Swiss Federal Court decision, 127 III 337, para 2a; Merkt and Peter (2019), p. 210.

¹⁰⁴Swiss Federal Court decision, 110 Ib 17, para. 3d.

¹⁰⁵Delphine Bottge (2022).

¹⁰⁶Merkt and Peter (2019), p. 210; Bottge (2019), pp. 180 et seq; Riemer (1980), pp. 489 et seq.

¹⁰⁷Merkt and Peter (2019), p. 210.

economic purpose.¹⁰⁸ The specific disadvantages of foundations are mainly that a foundation is an inflexible structure (for instance, its purpose may, in principle, not be amended) and it does therefore have a difficult time to adapt to—and evolve in—a changing environment. In addition, foundations are subject to the supervision of a state authority, which sometimes renders their operations more burdensome.

4.6 Associations

Under Article 60 para. 1 SCC and Article 91 ORC, an association may in principle *not* pursue an economic purpose.¹⁰⁹ It must pursue an ideal purpose (non-profit),¹¹⁰ examples¹¹¹ of which are provided by Article 60 para. 1 SCC, namely, purposes related to politics, religion, science, art, charity, or recreational activities.

In other words, an association may in principle not pursue or run a commercial activity which generates profits and distribute it to its members.¹¹² This would indeed mean that it has an economic purpose. If an entity wants to generate a profit and distribute it to its members, it must opt for another type of legal form of the Code of Obligations (i.e., a corporation).¹¹³

There are, however, situations in which associations may be involved in commercial activities, or even have an economic purpose, under certain restrictions:

- (i) First, an association may run a commercial activity of its own, provided it is for the benefit of third parties (i.e., to the exclusion of its members).¹¹⁴ In such a case, the association is generally considered as pursuing an ideal purpose.

¹⁰⁸ Swiss Federal Court decision, 127 III 337.

¹⁰⁹ Forstmoser and Meier-Hayoz (2015), p. 133.

¹¹⁰ Swiss Federal Court decision, 127 III 337, para.2b; See Article 60 para. 1 SCC which reads, in the translation available at <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html> (18/01/22): “Associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.” See also Merkt and Peter (2019), p. 209.

¹¹¹ Article 60 para. 1 SCC provides for examples, not for a comprehensive list; Heini and Scherrer (2014), Article 60, p. 481 n° 4.

¹¹² Hari and Jeanneret (2010), Article 60, n° 7; Chappuis and Perrin (2008), pp. 3, 4 and 5; Heini and Scherrer (2014), Article 60, p. 482 n° 5.

¹¹³ Chappuis and Perrin (2008), p. 3.

¹¹⁴ Hari and Jeanneret (2010), Article 60, n° 8.

- (ii) Second, pursuant to the case law of the Swiss Federal Court, an association may have an economic purpose, as long as it does *not* engage in a commercial activity itself.¹¹⁵ This is for instance the case of professional associations,¹¹⁶ syndicates, employer's associations or even cartels.¹¹⁷ Such associations represent or defend the economic interests of their members, but they do not make nor distribute profits to their members.¹¹⁸ If an association wishes to have an economic purpose and, at the same time, a commercial activity, applicable laws on ordinary Corporations will apply and the entity will have to be restructured as a Corporation (Article 59 para. 2 of the SCC).¹¹⁹

Having a hybrid purpose within an association is not excluded by law, nor by case law,¹²⁰ even though it is criticized by some legal scholars.¹²¹ In any event, whenever an association has a hybrid purpose, it cannot have a commercial activity simultaneously, which makes it improper for qualifying as a proper hybrid structure or benefit corporation.

5 Tax Aspects

This section will first summarize the general principles of tax exemption in Switzerland. These principles will then be applied to legal entities structured as corporations with multiple purposes. The question of potential tax relief for B corps will then be briefly addressed and, in an *excursus*, the issue of tax exempted entities having a commercial activity will be discussed.

¹¹⁵Swiss Federal Court decision 90 II 333, section 7, p. 345, which states (in French) that: “[...] une association n’a un but économique – qui l’empêche d’acquérir la personnalité morale – que si elle exerce elle-même une industrie en la forme commerciale. En revanche, les groupements qui se proposent des objectifs économiques généraux, sans exercer eux-mêmes une telle activité, demeureront constitués en association.” About this, see also Forstmoser and Meier-Hayoz (2015), pp. 134 et seq.

¹¹⁶Hari and Jeanneret (2010), Article 60, n° 8; Chappuis and Perrin (2008), p. 3, who cite relevant case law, particularly Swiss Federal Court decision 131 III 97, para. 3.1. See also Swiss Federal Court decision 90 II 333, section 7, p. 345.

¹¹⁷Chappuis and Perrin (2008), p. 4; Forstmoser and Meier-Hayoz (2015), p. 801.

¹¹⁸Chappuis and Perrin (2008), p. 4.

¹¹⁹Hari and Jeanneret (2010), Article 60, n° 14.

¹²⁰See Swiss Federal Court decision 90 II 333, section 3, p. 338.

¹²¹Heini and Scherrer (2014), Article 60, p. 483 n° 11.

5.1 Principles of Tax Exemption

As foreseen in Article 56 (g) of the Swiss Federal Law on Direct Taxes (LIFD),¹²² to enjoy tax exemption a Swiss legal entity must pursue a **public utility purpose**, which typically includes charitable, humanitarian, health, ecology, education, science and culture related activities.¹²³ The notion of public utility tends to be interpreted restrictively by the tax administration and courts.¹²⁴

Case law and directives issued by the tax authorities (particularly the often-criticized Circular n° 12)¹²⁵ in fact set the following mandatory conditions for obtaining tax exemptions:¹²⁶

- **Exclusivity:** all funds must be used in furtherance of the public utility purpose of the entity;
- **Irrevocability:** all funds must be irrevocably attributed to the purpose of the entity, and may never be returned to the founder or the donor;
- **Effective activity:** the entity must pursue an effective activity in line with its purpose, and may not limit itself to holding assets;
- **Large circle of beneficiaries:** the scope of the beneficiaries may not be limited to a small circle, but it must be large, if not limitless. Particularly, beneficiaries may not only be a close group of individuals;
- **Lack of self-interest (altruism):** board members of a tax exempted entity must act on a *pro-bono* basis and may therefore not be remunerated.

As provided by Article 56 (g) LIFD, irrespective of its legal form, any entity which fulfills the aforesaid requirements can, as a matter of principle, benefit from tax exemption.¹²⁷ Thus, although tax exemption is primarily meant to apply to associations or foundations, if they fulfill all requirements, LLCs and LTDs, or even partnerships limited by shares could benefit therefrom, as discussed hereafter.¹²⁸

¹²²RS 642.11 (LIFD). See also Article 23 para. 1 let. f of the federal law on harmonization of the direct taxes of the cantons and communes, of 14 December 1990 (LHID), RS 642.14.

¹²³Pfister (with Lurà) (2017), p. 239; Pfammatter and Wynne (2017), p. 13.

¹²⁴Pfister (with Lurà) (2017), p. 239 and the cited references; Swiss Federal Court decision, 114 Ib 277, para 2b and 113 Ib 7, para. C 2.b.

¹²⁵Federal Tax Administration, Circular No. 12, *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 culturels (art. 56, let. h LIFD); déductibilité des versements bénévoles (art. 33, 1er al, let. i et art. 59, let. c LIFD)*.

¹²⁶Lideikyte Huber (2019), p. 215; Maillard and Urech (2017), Article 56, pp. 1028 et seq.; Pfister (with Lurà) (2017), p. 239; Pfammatter and Wynne (2017), pp. 13–14.

¹²⁷Pfammatter and Wynne (2017), p. 13.

¹²⁸Maillard and Urech (2017), Article 56, p. 1028; Pfammatter and Wynne (2017), p. 13.

(1) *Tax exemption for corporations with multiple purposes?*

As seen above, associations are improper legal vehicles for hybridity. Foundations may present a certain interest, but since they do not have a share capital, they are unsuitable for investment purposes. These two types of legal entities will therefore not be analyzed here from a tax perspective. Turning therefore to Corporations with a share capital (particularly LTDs, LLCs), the main issue on a possible tax exemption lies, precisely, in the fact that they have a capital divided in shares.

When purchasing or subscribing shares, shareholders of Corporations, in substance, become co-owners of the entity. Such shares can be traded and sold to third parties, and shareholders thus may leave the entity and are free to receive an appropriate compensation (price) for their investment.¹²⁹ This violates the principle of *irrevocability* (see above, *Principles of tax exemption*), in the sense that it can be considered that funds provided to the entity are in that case returned to the investor later on in time.

A second issue lies in the distribution of dividends, a form of retribution that is not authorized if an entity intends to remain tax exempted. Indeed, according to the principle of *exclusivity* (see above, *Principles of tax exemption*), all profits must be used in furtherance of the public-utility purpose of the entity if it wants to be tax exempted.¹³⁰ They may therefore not be distributed to shareholders, which conflicts with the concept of investment, pursuant to which a financial return is expected by those who put equity at the company's disposal.

Some scholars argue that to circumvent these hurdles, the articles of incorporation could limit the transfers of shares,¹³¹ and prohibit distribution of dividends.¹³² However, save for exceptional cases, such measures seem to have been insufficient to convince Swiss tax authorities to grant tax exemptions to Corporations, even if they pursue purposes of public utility.¹³³

The Swiss tax authorities' reasoning is debatable, and probably unfortunate. The legislator did in fact expressly not limit tax exemptions to foundations or associations.¹³⁴ Indeed, article 56 LIFD refers to "legal entities," without any restriction as to their type. Besides, even the Circular n° 12 of the Federal Tax administration

¹²⁹Baumann and Markowitsch (2016), p. 166.

¹³⁰Interpellation 13.3689 of national council Mr. Eric Nussbaumer, and related statement of the Federal Council of September 12, 2013.

¹³¹See, for instance, Article 822 para. 2 SCO for LLCs.

¹³²Maillard and Urech (2017), Article 56, p. 1028.

¹³³However, the Swiss executive authorities do not seem to be in favor of adopting a different approach. See Interpellation 13.3689 of national council Mr. Eric Nussbaumer, and related statement of the Federal Council of 12 September 2013. For further developments about this, see below section *Legislative initiatives*, related to past and current legislative initiatives; Pfammatter and Wynne (2017), p. 14; Pfammatter (2019), p. 177.

¹³⁴Maillard and Urech (2017), Article 56, p. 1028.

admits that Corporations may benefit from tax exemptions under certain conditions.¹³⁵

With little creativity tax authorities could set a framework of conditions thanks to which tax exemptions could apply to Corporations having a share capital. Some of these, as seen above, could be to limit the transfers of shares,¹³⁶ to prohibit the distribution of dividends¹³⁷ and of all types of financial benefits in favor of shareholders.¹³⁸

(2) *B corp status: No tax exemptions for B corporations*

For the reasons stated above, a B-Corp status (as well as any other similar label), does not as such trigger any tax relieves. They remain considered as for-profit entities and are taxed as such.

(3) *Excursus: Tax exemptions in favor of entities with a public-utility purposes and a commercial activity*

It appears appropriate to consider the option of pursuing an ideal purpose and having at the same time a commercial activity to generate revenues to achieve this purpose, although, strictly speaking, such a setup does not give rise to a hybrid or benefit corporation.

From a civil law perspective, nothing prevents a foundation, an association, or a corporation from having simultaneously an ideal purpose and a commercial activity. Restrictions thereto are however imposed by tax requirements, which strongly limit the possibility for tax exempted entities to have a commercial activity.¹³⁹

The rationale behind this restriction is that competitive neutrality would be impacted, in the sense that a tax exemption granted by the state would amount to a competitive advantage or even a form of subvention, whereas the entity's competitors which do not enjoy any tax exemption are therefore comparatively disadvantaged. This would result in creating an unfair competition or even a distortion of competition.¹⁴⁰

This position so far adopted by the Swiss tax authorities as well as by the Swiss Supreme Court deserves to be reconsidered for the following reasons. First, having some level of commercial activity to generate revenues has become a necessity for most non-profit entities if they want to be able to achieve their missions without relying exclusively on donations. Second, the fact that non-profit entities pursue a

¹³⁵Federal Tax Administration, Circular No. 12, *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 culturels (art. 56, let. h LIFD); déductibilité des versements bénévoles (art. 33, 1er al, let. i et art. 59, let. c LIFD)*, p. 2.

¹³⁶See for instance Article 822 para. 2 SCO for LLCs.

¹³⁷Maillard and Urech (2017), Article 56, p. 1028.

¹³⁸Pfammatter and Wynne (2017), p. 43.

¹³⁹Merkt and Peter (2019), p. 210.

¹⁴⁰Merkt and Peter (2019), p. 210; Lideikyte Huber (2019), p. 216 and the cited references; Swiss Supreme Court decision 121 I 279, para. 4a.

public-utility purpose means that there is no real competitive relationship between them and for-profit entities. Third, a limitation of the commercial activity could be imposed—as suggested by the Swiss Supreme court—which would also prevent a distortion of competitive neutrality.¹⁴¹

Finally, an alternative remains to seek to obtain a partial tax exemption, which allows to have, under the same roof, a commercial activity that is taxed, and a non-profit activity that is tax-exempted. Although this solution exists, it is rarely implemented in practice.¹⁴²

6 Legislative Initiatives

Past and current legislative initiatives aiming at promoting the adoption of benefit corporation status in Switzerland are struggling with the same recurring question: is a new legal structure really needed to meet the expectations of social enterprises and benefit corporations, or can the existing legal system satisfy these needs, if needed by stretching the scope of existing legal structures? This question seems not only to be a Swiss issue, but rather a hot topic around the world.¹⁴³

In Switzerland, there have been two noteworthy, but unsuccessful, attempts by politicians to get the Federal Council, Switzerland federal executive body, to move towards creating a new legal form for benefit corporations, or at least encouraging this movement.¹⁴⁴

¹⁴¹These suggestions have been developed by Merkt and Peter (2019), pp. 209 et seq.

¹⁴²Lideikyte Huber (2019), p. 217; Pfammatter and Wynne (2017), p. 14.

¹⁴³Ventura (2019), p. 170.

¹⁴⁴Interpellation 13.3689 of Mr. Eric Nussbaumer, member of the Swiss parliament (national council), and related statement of the Federal Council of 12 September 2013; Interpellation 18.3455 of Mr. Fabian Molina, member of the Swiss parliament (national council), and related statement of the Federal Council of 22 August 2018. For the sake of completeness, it must be mentioned that an initiative n° 14.470 from State Counsellor Werner Luginbühl is currently under discussion in the context of the Swiss parliament and aims a reinforcing the attractiveness of Switzerland for foundations. This initiative has legal and tax components which might change the legal panorama for foundations in the future, although it will not have a significant impact for hybrid entities.

6.1 *Interpellation 13.3689 of National Council Mr. Eric NUSSBAUMER (2013)*

The first of these two attempts was made in 2013 by socialist national council member Eric NUSSBAUMER.¹⁴⁵ In his submission to the Federal Council, Mr. NUSSBAUMER highlighted the fact that in recent years, numerous business had been created with a view not only to maximize profits, but also to foster public utility (e.g., business focused on soil decontamination, or addressing social challenges). Acknowledging that other countries were making efforts to structure and support such “benefit” corporations, Mr. Nussbaumer questioned the Federal Council on several related issues, and got the following answers:¹⁴⁶

- First, the Federal Council confirmed that the Swiss Confederation did not possess official statistics about public utility corporations.¹⁴⁷
- Second, the Federal Council recalled that a commercial entity may pursue purposes other than the pure maximization of its profits (i.e., it could pursue purposes that are ideal and/or of public utility¹⁴⁸) and that the possibility of creating an association or a foundation having public utility purposes already existed in Switzerland. Based on this, the Federal Council considered that there was no need to amend the existing legal framework.¹⁴⁹ It also refused to analyze in depth whether the US benefit corporation model¹⁵⁰ could be transposed in the Swiss legal system.
- Third, on tax advantages, the Federal Council considered that public utility corporations could *not* benefit from tax advantages, unless a few Swiss laws were amended, which it did not intend to do.¹⁵¹
- Fourth and finally, the Federal Council noted that Switzerland did not have a dedicated program to support social entrepreneurship and benefit corporations,

¹⁴⁵The following section is based on the Interpellation 13.3689 of national council member Mr. Eric Nussbaumer, and the related statement issued in relation thereto by the Federal Council on 12 September 2013.

¹⁴⁶The present publication presents a not exhaustive selection of the most relevant section of the exchange between national council member Nussbaumer and the Federal Council.

¹⁴⁷In French: *entreprises d'utilité publique*.

¹⁴⁸See above section *Existing legal structure*.

¹⁴⁹In French “[...] le Conseil fédéral estime qu’il n’y a pas lieu de modifier le cadre réglementaire des sociétés.”

¹⁵⁰In the text of the Interpellation, referenced to <http://benefitcorp-net/>.

¹⁵¹The Federal Council estimated that the Swiss Code of Obligations (RS 220), the Federal Law on Direct Federal Taxes (RS 642.11) and the Federal Law on Harmonization of Direct Taxes of Cantons and Municipalities (RS 642.14) would have to be amended to render possible the exemption of corporations pursuing public utility purposes. About this, see also section *Tax aspects* hereabove.

but that it did encourage the movement through the support of private initiatives.¹⁵²

6.2 *Interpellation 18.3455 of National Council Mr. Fabian MOLINA (2018)*

The second attempt was made five years later, in 2018, by socialist national council member Fabian MOLINA.¹⁵³ In his statement to the Federal Council, Mr. MOLINA emphasized that social entrepreneurship was gaining importance in Switzerland, as it was around the world. He thus questioned the Federal Council on several related issues, and received the following answers:¹⁵⁴

- First, on the legal framework, the Federal Council restated its position, as expressed five years earlier, that the existing legal framework was sufficient to allow social enterprises to exist in Switzerland.
- In addition, it made the argument that the priority of the Federal Council was to focus on Corporate Social Responsibility (CSR). In its view, business that did properly consider CSR in all their activities were contributing to the 17 Sustainable Development Goals of the United Nations and, even if CSR was different from social entrepreneurship, both had the same objectives and were thus comparable. By stating so, it appears that the Federal Council took an undesired shortcut. Can it really be stated that social entrepreneurship does not need to be supported given that it is nothing else than some sort of duplication of CSR? Second, the Federal Council reiterated that, in addition to not being willing to create a new legal structure for benefit corporations, it also did not intend to provide for an official definition of social entrepreneurship. The Federal Council stated that it supported private initiatives in that sector, such as the B corp movement, but that it did not intend to interfere with such private initiatives.

¹⁵² See, particularly, the Social Entrepreneurship Initiative and Foundation (seif), <https://seif.org/en/>, which is supported directly by the Swiss Confederation through Innosuisse, the Swiss Innovation Agency, as well as the private organisation *Fachverband unternehmerisch geführter Sozialfirmen* (FUGS), <https://www.sozialfirmen.ch/> (18/01/22), which is also cited in the statement of the Federal Council of 12 September 2013 in response to the Interpellation 13.3689 of national council member Mr. Eric Nussbaumer.

¹⁵³ The following section is based on the Interpellation 18.3455 of socialist national council member Mr. Fabian Molina, and the related statement issued by the Federal Council on 22 August 2018.

¹⁵⁴ The present publication presents a not exhaustive selection of the most relevant section of the exchange between national council member Molina and the Federal Council.

- Third, the Federal Council confirmed that it still had not made a detailed analysis on the sector of social entrepreneurship, but that it was closely following the evolution of CSR.¹⁵⁵ The Federal Council mentioned that private initiatives were performing such analysis. By way of an example, it cited the survey conducted by the Thomson Reuters Foundation in 2016 in 45 of the world's biggest economies to find out which countries were creating the best environment for social entrepreneurs.¹⁵⁶ It resulted from that survey that Switzerland was ranked 11th out of 45,¹⁵⁷ which the Federal Council seemed to consider as a satisfactory ranking.

7 Conclusions and Proposals for the Future

As a matter of fact, Swiss corporate law has not been thought for benefit corporations, and there is currently no specifically dedicated legal vehicle to this end.¹⁵⁸

However, Swiss corporate law is flexible enough to allow considering other interests alongside shareholders' benefits. Also, corporations may express in their articles of incorporation their intention to pursue multiple purposes, some of which may be of a non-economic nature.¹⁵⁹ Furthermore, labels, such as B corp, allow Swiss corporation to bound themselves to triple-bottom line principles.¹⁶⁰ In view thereof, the Swiss legislator does not currently seem to be willing to develop the legal framework towards the creation of a benefit corporation status.

Against this background, unlike other countries in which existing laws would prohibit a multi-stakeholder approach, one must acknowledge that Swiss law offers the requested flexibility, at least to a certain extent.

Despite this, a specific legal status for benefit corporations could still be advisable, for the following reasons:

- First, a new statutory regulation on benefit corporations would simplify and clarify this status, and send a strong signal to society that such structures are encouraged in Switzerland.
- Second, the tax treatment of such structures should—and would—be clarified, which appears urgent since unjustified tax requirements for obtaining tax exemption should be eliminated for the Swiss tax environment to become more “public utility friendly.”

¹⁵⁵ And published a large study in May 2018 on the Relevance and Significance of the “OECD Guidelines for Multinational Enterprises” in Switzerland, available at www.seco.admin.ch (18/01/22).

¹⁵⁶ Thomson Reuters Foundation, the best countries to be a Social Entrepreneur 2016.

¹⁵⁷ Thomson Reuters Foundation, the best countries to be a Social Entrepreneur 2016.

¹⁵⁸ Pfammatter (2019), p. 177.

¹⁵⁹ Pfammatter (2019), p. 177.

¹⁶⁰ Elkington (1994), pp. 90–100.

- Third, it would allow social enterprises to go one step further by formally recognizing that the interests of all stakeholders can (or even have to) be considered at the same level (“*stakeholder-mandatory*” conception, as opposed to the “*stakeholder-optional*” conception).¹⁶¹

However, the advantages arising out of the creation of a legal status for benefit corporation must be balanced with its downsides. Voices are being raised, in Switzerland and abroad, against the idea of introducing benefit corporations as new statutory alternative, since this could have the negative consequence of splitting the panorama of corporations into the “good” ones (the benefit corporations) and all the other ones which would be stigmatized as “bad” companies. This is the position defended at this stage by the Swiss government,¹⁶² and some scholars have also started to criticize and question the exclusionary effect that the introduction of a benefit corporation status might lead to.¹⁶³

A solution could therefore reside in inducing changes for *all* corporations, irrespective of their legal form, rather than polarizing the corporate world. As often, the stick or the carrot could be used to achieve this purpose. The stick could be to impose all existing businesses to set a “limit harm” in their statutes to push business in the right direction.¹⁶⁴ In other words, all corporations would have to do certain efforts towards a more sustainable economy. The carrot, in turn, could be to introduce incentives to become more SDG (or CSR) oriented. In exchange of pursuing a triple bottom line approach, companies could be granted certain tax benefits. This system is closer to what has been adopted recently by the French government.¹⁶⁵ In parallel, tax reliefs could also be introduced for investors who would invest in such “benefitable” corporations. This system already successfully exists since many years in the UK¹⁶⁶ and in the Netherlands.¹⁶⁷

¹⁶¹ See notably McDonnell (2019).

¹⁶² Interpellation 18.3455 of socialist national council member Mr. Fabian Molina and related statement issued by the Federal Council on 22 August 2018.

¹⁶³ See notably McDonnell (2019).

¹⁶⁴ This idea is being put forward in the United Kingdom by a draft Bill labelled Responsible Business Bill which intends to amend the UK Companies Act 2006 in material ways. Such Bill is being drafted and pushed forward by the law firm Bates Wells Braithwaite, in collaboration with Bill Clark, Of Counsel at Drinker Biddle & Reath. As the draft Bill states, the purpose of the proposed amendment is to “provide that companies must comply with the ten principles of the United Nations Global Compact and seek to do no harm and to provide an additional legislative option for those companies who wish to adopt a purpose to advance the United Nations Sustainable Development Goals.”

¹⁶⁵ Law No. 2019-486 of 22 May 2019: *Entreprise à mission*.

¹⁶⁶ Since 2014, policy measure called Social Investment Tax Relief (SITR). See also Lideikyte Huber and Peter (2020), pp. 207–221.

¹⁶⁷ Since 1995, the Dutch Green Funds Scheme. See also Lideikyte Huber and Peter (2020), pp. 207–221.

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Social Enterprises in the Netherlands: Towards More Institutional Diversity?



Coline Serres and Tine De Moor

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1 Introduction

Social purpose integration in businesses has been a long tradition in the Netherlands.¹ Practitioner reports estimate the number of Dutch social enterprises between 4000 and 6000 in 2017.² Social enterprises have emerged in the Netherlands in a variety of structures and legal forms for many years. Yet, the concept of social enterprise was introduced in the country only 10 years ago.³ While the definition of social enterprises used by the European Commission is commonly used in the Netherlands,⁴ the recent recognition of the concept has led to a lack of a common definition for social enterprises adapted to the national context, as well as to the absence of a legal framework for them.⁵ Because of that, virtually any organization can call itself a social enterprise,⁶ leading to blurriness as to which business is actually a “social” one. Similarly, lobby groups have created definitions of social enterprises that narrow them down to niche organizations (i.e., social businesses adopting a for-profit legal status), leaving aside non-profits and social cooperatives. Social enterprises in the Netherlands are thus poorly recognized and understood because of this lack of common framework at the national level.

Such a narrow approach is problematic because it does not consider the important civil-society initiatives present in the country,⁷ which makes the Dutch social economy sector look underdeveloped at first sight. In this chapter, we argue that the current state of the Dutch social economy is larger than it currently seems to be, and that if the entrepreneurial side of the large and diverse third sector were to be included in the definition, it would match the levels of its European neighbors. To this end, we define social enterprises as “hybrid organizations located between the realms of state, market and society and mixing their institutional logics,”⁸ based on Defourny & Nyssens’ vision.⁹

We thus aim to provide an overview of the situation—both situational and legal—of Dutch social enterprises. To do so, we adopt the perspective of the EMES school of thought, and we use the framework they provide to study and understand (the various types of) social enterprise in Europe. By adopting an EMES approach, we hope to broaden the current narrow definition adopted in the Netherlands when talking about social enterprises—which, in practice, limits them to social businesses

¹Karré (2021a).

²ABN AMRO, *De noodzaak van marktontwikkeling voor sociale ondernemingen. De romantiek voorbij*, July 2017; McKinsey, *Scaling the impact of the social enterprise sector*, October 2016.

³Backer (2019).

⁴However, that definition is only partially followed as, for instance, the social cooperative is not considered a social enterprise in the Dutch context.

⁵Hogenstijn M, *Catching up: The development of legal frameworks for social entrepreneurship in The Netherlands*, September 2021.

⁶Karré (2021a).

⁷Karré (2021b).

⁸Ibid., p. 292.

⁹Defourny and Nyssens (2017c).

(i.e., social enterprises adopting a for-profit legal form and following dominant market logics) often concentrated in the secondary and tertiary sectors.

We also review the five legal forms that social enterprises in the Netherlands can adopt; the choice of the legal form being dependent on their business activities and the way they aim at creating impact and contributing to their societal goals. We also reflect on the new label the Dutch legislature is currently considering to bring clarity to the social enterprise definition (namely, BVm, whereby the “m” refers to “maatschappelijk,” meaning: societal¹⁰). This label would be specifically intended for social businesses with a private-limited company legal status. In the light of such a restrictive definition, we pinpoint several pitfalls, since social businesses are not the ones in most urgent need of recognition. Indeed, social organizations that adopt a cooperative, a foundation, or an association legal form are heavily overlooked by the social economy sector in the Netherlands,¹¹ while historically being its keystone.¹²

We argue that in the Netherlands there is a need for a more holistic, institutionally diverse approach to “the” social enterprise, which might also result in due time in giving social enterprises more explicit recognition than they are currently given by the legislature. To this end, we offer to revise the proposed Dutch label to include more mechanisms inherent to social enterprises. Moreover, since none of the current legal forms available are specific to social enterprises, we discuss the possibilities for Dutch social enterprises to gain in recognition by adopting external labels such as the B-Corp Certification or the Dutch Code Social Enterprises. Indeed, such labels bring assurance to external parties that these organizations are “walking the talk.”¹³ We further suggest that a combination of labels might help Dutch social enterprises to gain more recognition.

After introducing the working framework of EMES, we reflect on the place of social entrepreneurship in the Netherlands and contrast it with the EMES approach. We then introduce the existing legal forms that social enterprises can opt for. Finally, we present labels as a solution for social enterprises to gain in recognition and, to that end, introduce the B corp certification (and their legal requirements under the Dutch law) and the characteristics of the future-to-be BVm-label. We conclude by reflecting on the future of social economy in the Netherlands.

2 Social Enterprises in Europe: The EMES Approach

Social enterprises have a long tradition in Europe, with their first formation as associations dating from several centuries ago.¹⁴ To understand their variety, EMES—an academic network of researchers specialized in the study of social

¹⁰BVm = Besloten Vennootschap-maatschappelijk (Social limited-liability company)

¹¹Karré (2021a).

¹²Defourmy (2017).

¹³Christensen et al. (2020) and Schoeneborn et al. (2020).

¹⁴Defourmy (2017).

enterprises—conducted an international research project (namely, ICSEM¹⁵) on social enterprises over the past few years.¹⁶ This project has contributed to mapping out the field of social economy in Europe and providing a global framework to understand it.

EMES' outline of the European social economy sector builds on a typology developed by Defourny & Nyssens¹⁷ which distinguishes between different types of social enterprise based on the intricacies between their core interest (general, capital, or mutual) and their types of resource (non-market, market, or hybrid). In the EMES approach, a social enterprise emerges from the initiative of a group of citizens and serves the community.¹⁸ In their theoretical typology, Defourny & Nyssens identify four types of social enterprise model: (1) entrepreneurial non-profit, (2) public-sector, (3) social cooperative, and (4) social business.¹⁹ To finalize the ICSEM project, EMES scholars applied a cluster analysis to over 700 social enterprises in the world (of which 328 in Europe) to empirically test their typology.²⁰ This analysis revealed that three out of the four social enterprise models proposed in the typology did exist. First, the entrepreneurial non-profit social enterprise model is generally composed of non-profits and foundations. Despite being non-profits, these organizations adopt goals, processes, and rhetoric that are similar to business organizations.²¹ Second, although some examples of it exist (for instance the company *Stroomopwaarts*²² in the Netherlands), the public-sector social enterprise model was not confirmed by the cluster analysis. Third, the social cooperative model was confirmed but the authors acknowledge that it remains challenging to distinguish social cooperatives from traditional cooperatives. Fourth, the social business model is generally adopted by for-profit companies that combine a social mission with strong commercial logics.²³ The results from the ICSEM project provide us with a guiding star for our analysis of the Dutch social enterprises. In the following sections, we introduce the various legal forms available to social enterprises based on the understanding of social enterprises as organizations between state, market, and society²⁴—which is broader than the traditional Dutch definition that limits social enterprises to social businesses as for-profit companies.

¹⁵ICSEM = International Comparative Social Enterprise Models.

¹⁶E.g., Defourny et al. (2020) and Defourny and Nyssens (2017a).

¹⁷Defourny and Nyssens (2017b).

¹⁸Bacq and Janssen (2011), Defourny and Nyssens (2014), and Sengupta et al. (2018).

¹⁹See Defourny et al. (2021a) and Defourny and Nyssens (2017c).

²⁰Defourny et al. (2021b).

²¹Maier et al. (2016).

²²For more information about *Stroomopwaarts*: <https://www.stroomopwaarts.nl/> (accessed: 31.01.2022).

²³Defourny et al. (2021b).

²⁴Defourny and Nyssens (2017c).

3 Social Economy, Social Enterprises, and Social Entrepreneurship in the Netherlands

The Netherlands stands alone amid its neighboring countries when it comes to the social economy sector. Indeed, next to Germany, it is one of the biggest European Member State countries without a specific regulation for social economy and social enterprises.²⁵ It is interesting to note that although the Netherlands was included in the ICSEM project,²⁶ it was not part of the final cluster analysis conducted by Defourny et al.²⁷ while 19 other European countries were. Despite the lack of legal framework, the sector has evolved from a bottom-up approach, with the first businesses incorporating social goals starting to appear in the late 1800s.²⁸ This long tradition of a strong Dutch third sector²⁹ has led many to think that a legislation is not necessary for social enterprises to thrive. Moreover, after the recent decentralization of the state, municipalities were left with the responsibility of shaping the environment for social enterprises.³⁰ The cities of Amsterdam, Rotterdam, Utrecht, and The Hague are examples of municipalities that have implemented specific policies and programs for social entrepreneurship.³¹ Additionally, the City Network G40 initiative has been guiding the 40 largest municipalities of the Netherlands in organizing, fostering, and strengthening social entrepreneurship initiatives at the local level.³² Furthermore, the Dutch government has been encouraging both businesses and citizens to take up responsibilities as part of its plea for the “participation democracy.”³³ In practice, this has left citizens without any other option than to form bottom-up initiatives since, especially in many less-populated areas across the country, commercial initiatives did not develop sufficiently to fill the gaps left by the central government; this was for example the case in the care sector. The social economy sector is traditionally quite weak at the institutional level (top-down) but rather strong at the entrepreneurial level (bottom-up). Yet, the lack of framework has led many (for-profit and non-profit) organizations to reference themselves as social

²⁵For information on the German context for social enterprises, see Chapter “The Suitability of French Law to B Corp” of this book.

²⁶See Karré (2021a).

²⁷Defourny et al. (2021b).

²⁸Hogenstijn M, *Catching up: The development of legal frameworks for social entrepreneurship in The Netherlands*, September 2021.

²⁹Karré (2021b).

³⁰Karré (2021a).

³¹PwC, *Prille kansen: de samenwerking tussen sociale ondernemingen en gemeenten in Nederland*, March 2018.

³²Aisenberg L et al., *Boosting social entrepreneurship and social enterprise development in the Netherlands: In-depth policy review*, 2019/01, 29 January 2019.

³³Grasseni C (2018) Food Citizenship? Collective Food Procurement in European Cities. <https://www.europenowjournal.org/2018/09/04/food-citizenship/> (accessed: 28.11.2021).

enterprises since the term is more fashionable than “charity” or “foundation.”³⁴ To cope with this lack of clarity, two Dutch lobbies—Social Enterprise NL and Code Social Enterprises (*Code Sociale Ondernemingen*)—have worked on definitions to delimitate Dutch social enterprises. According to Social Enterprise NL’s definition, a social enterprise is a legal structure that provides a product or service in an entrepreneurial fashion, has multiple clients, is financially independent for at least 50% of market income, determines its own strategy, determines prices of its products and/or services on its own, and uses its profits to achieve societal objectives. In addition to this definition, Code Social Enterprises has developed five principles to assess whether an organization is a social enterprise or not.³⁵ The code is active since the end of 2018 and is based on the line of conduct “impact first,” which should be fundamental to social enterprises. The five principles relate to (1) the inclusion of the mission in the articles of incorporation, (2) stakeholder involvement, (3) a financial policy supporting “impact first,” (4) compliance to the code, and (5) transparency. Social enterprises can opt to abide by the code and officially (but not legally) enter the register of Code Social Enterprises as a social enterprise. This code had the intention to serve as an underlying guideline for collaborations between social enterprises and the Dutch government over the past few years.³⁶ Although the code provides structure to the sector, its main drawback is that it is too stringent on finance, with the need to be financially independent at minimum 50% of market income. Because of this, it does not cover all types and variations present within social enterprises, and only acknowledges those social enterprises that are also social businesses (i.e., for-profit legal structures). Other initiatives for the recognition of social entrepreneurship activities and the measure of social impact have popped up in the Netherlands, with for example the Performance Ladder Social Entrepreneurship (PSO; *Prestatieladder Socialer Ondernemen*), which acknowledges organizations inserting vulnerable people in the labor market.³⁷ However, in this chapter we do not cover such initiatives extensively since they are focused on specific aspects of social entrepreneurship, instead of dealing with social entrepreneurship at large.

Following the definitions of Social Enterprise NL and Code Social Enterprises, it appears clearly that the Netherlands distinguishes the social economy sector from the non-profit sector.³⁸ This approach is rather opposed to the perspectives of the EMES school of thought, which considers non-profits (i.e., associations, NGOs, and foundations) as the founders of, and playing a key role in, the social economy sector.³⁹

³⁴Karré (2021a).

³⁵Full Code Social Enterprises (in Dutch): https://www.codesocialeondernemingen.nl/application/files/6216/2244/6915/00._Toelatingscriteria_vastgestelde_versie_31-05-2021.pdf (accessed: 04.11.2021).

³⁶Hogenstijn M, *Catching up: The development of legal frameworks for social entrepreneurship in The Netherlands*, September 2021.

³⁷Aisenberg L et al., *Boosting social entrepreneurship and social enterprise development in the Netherlands: In-depth policy review*, 2019/01, 29 January 2019.

³⁸Karré (2021a).

³⁹Defourmy (2017).

Non-profits indeed combine logics of mutual interest with logics of general interest when using hybrid (financial and non-financial) resources⁴⁰ and engage into entrepreneurial (and sometimes, market) risk.⁴¹ In this book chapter, we wish to give a full representation of the legal forms available to all types of social enterprise in the Netherlands. This is why we adopt the EMES lens to introduce the various Dutch legal forms for social enterprises to incorporate and go beyond the definition of social business provided by private lobbies such as Social Enterprise NL and Code Social Enterprises.⁴²

4 Legal Environment for Social Enterprises in the Netherlands⁴³

Dutch enterprises with a societal purpose have many options to incorporate as a structure. The focus on social entrepreneurship as an approach has led Dutch organizations to have a long tradition of integrating a social purpose in their businesses, already before the use of the term social enterprise became mainstream.⁴⁴ Indeed, Dutch law allows private companies limited by shares to insert in their articles of incorporation additional obligations for shareholders beyond profit maximization,⁴⁵ such as a social mission. Because of that, and due to the lack of specific legal form mentioned earlier, Dutch social enterprises can adopt any of the available legal forms for traditional organizations—and sometimes even combine some of these options.⁴⁶ We hereafter introduce each of them.

4.1 Private Limited Company: *Besloten Vennootschap*

Besloten Vennootschappen (BV) are private limited companies. It is the legal form most adopted by Dutch social enterprises.⁴⁷ BVs are relatively easy to create since

⁴⁰Defourmy and Nyssens (2017b).

⁴¹Defourmy et al. (2021b).

⁴²See also Karré (2021b); Karré (2021a).

⁴³This section has been largely inspired from the Dutch government website for government information for entrepreneurs: <https://business.gov.nl/starting-your-business/choosing-a-business-structure/business-structures-in-the-netherlands-overview/> (accessed: 31.01.2022).

⁴⁴Karré (2021a).

⁴⁵van der Sangen (2013).

⁴⁶In the context of this book chapter, we focus solely on legal corporate entities. However, Dutch social entrepreneurs can also enter business through non-corporate entities, such as through a general partnership (in Dutch: *Vennootschap Onder Firma*, VOF).

⁴⁷Karré (2021a).

0.01€ is needed as a starting capital. They are shareholder-owned organizations, and the equity is divided in shares between shareholders. BVs thus implement a shareholder supremacy governance regime, which means that the voting rights are equal to the share in capital of each shareholder. To oversee the day-to-day business, BVs must have one or more directors with limited private liability. A supervisory board may be appointed. It is worth noting that, in a BV, major shareholders (individuals owning at least 5% of shares) and directors have a “substantial interest,” meaning that they must pay both income and dividend taxes. Paying a salary to a director is thus a rather expensive option. Instead, most directors pay themselves through dividends. Dutch social enterprises can pick a BV form as it is easy to incorporate into and is the one of the most recognized forms for social businesses. Fairphone, a company producing ethical phones, is incorporated as a BV. The BV is the most popular form of company in the Netherlands, across all sectors (social enterprise or traditional business) with a total of 413,775 BVs incorporated at the end of 2021.⁴⁸

4.2 Public Limited Company: *Naamloze Vennootschap*

Naamloze Vennootschappen (NVs) are public limited companies. They create capital by issuing shares and require a starting capital of €45,000. NVs tend to be large companies with several directors. They are shareholder-owned structures with a shareholder supremacy governance regime. Shareholders appoint a supervisory board. Since they are public limited companies, NVs can be listed on the stock market and trade shares, provided they respect some conditions. Indeed, to be listed on the stock exchange, the organization needs to have been active for five years minimum, the total value of the shares must be more than €5 million, and the equity has to equal a minimum of €5 million. Additionally, the NV needs to have been profitable for at least three years in the past five years. A main advantage of the NV (compared to the BV) is that directors hold no personal liability and that shareholders’ liability is restricted to the amount of their investment. A social enterprise could be interested in incorporating as a NV if it aims to grow substantially and undertakes activities that require large sums of fundings. An example of a social business set up as a NV is Triodos Bank, which promotes sustainable development by offering customers sustainable financial products.

Despite the possibility for social enterprises to adopt the NV form, this legal form might be the furthest away from what is usually expected from social enterprises. Indeed, while social enterprises use market mechanisms to achieve a social mission,⁴⁹ they are traditionally expected to reinvest most of their surpluses into the

⁴⁸Source: Central Bureau voor de Statistiek: <https://opendata.cbs.nl/#/CBS/nl/dataset/81588NED/line> (accessed: 05.11.2021).

⁴⁹Saebi et al. (2019), Santos (2012) and Wry and York (2017).

organization, the social mission, and/or the community.⁵⁰ In that context, a social enterprise incorporating as a public limited company can be perceived as experiencing mission drift. Mission drift occurs when there is a deviation, by the social enterprise, from the social mission to pursue financial goals.⁵¹ The well-known case of Compartamos, a microfinance institution that performed an initial public offering in the late 2000s, has shown the dangers of mixing social entrepreneurship and stock exchange.⁵² In the EMES typology, social enterprises incorporated as BVs or NVs correspond to the social business model since they adopt a for-profit legal form and mix a social mission together with commercial goals.⁵³ At the end of 2021, there are 1085 NVs incorporated in the Netherlands,⁵⁴ all sectors taken together.

4.3 Cooperatives

The cooperative is another legal form that social enterprises can adopt. While incorporating as a cooperative signals a sense of belonging to social economy in some European countries (e.g., Belgium, France, and Italy), Dutch cooperatives are often not associated with social economy. Indeed, in the Dutch context, the cooperative principles—such as those defined by the International Cooperative Alliance⁵⁵—are not restricted to that particular legal form and can also be implemented under other legal forms,⁵⁶ sometimes leading to the need to distinguish cooperatives in a legal sense from cooperatives in a cultural sense.⁵⁷ Nonetheless, incorporating as a cooperative still signals the will to abide by the cooperative principles. These principles posit that besides an economic motive to benefit their members, cooperatives should—as a principle—also pursue non-economic interests such as societal, community, or ideological interests, making them suitable legal structures for social enterprises. Although these principles have been modified over the years, since their first version in 1844,⁵⁸ they have been used as a way to offer guidance to cooperatives internationally to model their governance and practice in a particular way, considering the well-being of both its members and society. In the Netherlands, a cooperative is an “association with a company” (*vereniging met een*

⁵⁰Doherty et al. (2014).

⁵¹Armendáriz and Szafarz (2011) and Ebrahim et al. (2014).

⁵²Ashta and Hudon (2012) and Hudon and Périlleux (2013).

⁵³Defourmy et al. (2021b).

⁵⁴Source: Central Bureau voor de Statistiek: <https://opendata.cbs.nl/#/CBS/nl/dataset/81588NED/line> (accessed: 05.11.2021).

⁵⁵International Cooperative Alliance (2021) Cooperative identity, values & principles | ICA. <https://www.ica.coop/en/whats-co-op/co-operative-identity-values-principles> (accessed: 16.12.2021).

⁵⁶van der Sangen (2013).

⁵⁷E.g., Bokhorst et al. (2015).

⁵⁸Birchall (1994).

bedrijf). Because of that, cooperatives are often seen as traditional businesses, despite being member-owned organizations in which members work as a collective. An example of a Dutch social cooperative is Schoongewoon: A cleaning worker cooperative.

Cooperatives are relatively easy to set up in the Netherlands since members can enter or exit the organization without jeopardizing the cooperative's existence. No starting capital is needed, and members can or cannot be legally answerable. A cooperative can exist with a sole partner, although generally more are involved. A Dutch cooperative must have two governing bodies: a board of directors and a general assembly, which appoints and dismisses board members. The board is in charge of entering into agreements with and for the cooperative's members. In the traditional definition of a cooperative, all members have equal voting rights, meaning that they follow the rule of "one person, one vote." This rule is in line with the International Cooperative Alliance principle of democratic governance.⁵⁹ However, the Netherlands offers some specificities when it comes to voting rights of cooperative members.

First, if mentioned in the articles of incorporation, Dutch cooperatives can extend their business activities to non-members.⁶⁰ This specificity is convenient for cooperative banks for instance⁶¹ since, in doing so, they can also serve non-member customers. In this case, cooperatives can also open voting rights to their non-members, to a maximum of 50% of the total voting rights at the general assembly. Hence, both members and non-members can vote. The integration of such stakeholders who are not members of the cooperative can play a role in guarding the societal goals of the organization. Indeed, their possibility to hold up to 50% of the total voting rights can act as a safeguard against mission drift since non-member stakeholders come in with a "fresh eye." Second, although the default governance rule is "one person, one vote," the cooperative's articles of association can provide otherwise. Overall, Dutch cooperatives tend to implement very flexible governance mechanisms leading also to the existence of what are often referred to as "pseudo-cooperatives": Enterprises that merely use the flexibility of the cooperative law but do not adhere to the principles of the cooperative.

Cooperatives can (but do not have to) redistribute profit in proportion to the work that a member has performed for the organization (and not in proportion of the capital held). However, it is worth noting that member capital cannot be traded nor distributed as dividends [not clear].⁶²

In the Netherlands, there are two types of cooperative: the business cooperative and the entrepreneurs' cooperative. On the one hand, a business cooperative aims to support its members in the business aspects of their activities (e.g., a dairy farmers'

⁵⁹International Cooperative Alliance (2021) Cooperative identity, values & principles | ICA. <https://www.ica.coop/en/whats-co-op/co-operative-identity-values-principles> (accessed: 16.12.2021).

⁶⁰Hansmann (2000).

⁶¹van der Sangen (2013).

⁶²Ibid.

cooperative). On the other hand, an entrepreneurs' cooperative helps individual entrepreneurs to temporarily work together on certain projects and undertake tasks they could not have tackled on their own.

A subtype of cooperative is the mutual insurance (*onderlinge waarborgmaatschappij*). Since there are no specific legal forms for mutual insurances in the Netherlands, they must incorporate as cooperatives. In a mutual insurance, members make rules and save in common to benefit from it when needed.⁶³ Social enterprises incorporated as cooperatives and mutual insurances are regarded in the EMES typology as social cooperatives.⁶⁴ The total number of cooperatives in the Netherlands (including mutuals) at the end of 2021 is 3285.⁶⁵

4.4 Foundations

Foundations (*stichting* in Dutch) are non-profit legal entities that receive income through donations, loans, subsidies, and legacies. They do not have members, only beneficiaries. A social enterprise could have an interest in incorporating as a foundation since it enables them to receive donations from philanthropic entities. Patronage is tax deductible, which is an incentive to donate to foundations. No minimum capital is required to set up a foundation in the Netherlands. Foundations pursue social and/or non-profit causes and are usually not business themselves. However, in case a foundation is set up as a business—which is possible by combining the legal forms of a foundation and a BV—then it needs to reinvest all its profits in the mission and purpose. Such a setting was adopted by the circular and secondhand “kringloop”-shops (“kringloop” referring to their re-use of the goods on offer in the shop). Since the company works closely with vulnerable people, it was expected to adopt a foundation status. It then combined that status with a BV to manage its business operations. The purpose served by a foundation is not necessarily charitable; for instance, it can be a hospital, a museum, or a professional football club. In terms of governance, a foundation has a board of directors (which may be monitored by a supervisory board) but does not have shareholders nor members.

When wanting to set up a Non-Governmental Organization (NGO), it is primarily required to incorporate it as a foundation. NGOs must pursue a societal, social, or scientific mission at a national or international scale. NGOs differ from traditional foundations in that they do not make a profit and are intrinsically committed to societal purposes. NGOs generally work mostly with volunteers and receive income through donations. In that sense, they are highly dependent on donors and volunteer

⁶³Talonen (2016).

⁶⁴Defourny and Nyssens (2017c).

⁶⁵Source: Central Bureau voor de Statistiek: <https://opendata.cbs.nl/#/CBS/nl/dataset/81588NED/line> (accessed: 05.11.2021).

work. Another difference with traditional foundations is that NGOs are eligible for subsidies from the Dutch government, provided they are recognized as public benefit organizations (in Dutch: ANBI (*Algemeen nut beogende instellingen*)). The most important condition for an NGO to be recognized as a public benefit organization is that it dedicates at least 90% of its activities to the public benefit.⁶⁶

4.5 Associations

In the Netherlands, the association legal form (*vereniging* in Dutch) is mostly used to organize social activities such as sports and cultural clubs; they are generally active at a local scale and no starting capital is required. Although an association's main objective is not to make a profit, it can make one. In such cases, profits must be entirely reinvested in the development of the association. Profit redistribution to members is forbidden and income is generally collected through members' contributions via donations and fundraisers. Just like for foundations, the donations system enables funders to deduct tax and can be an incentive to fund social enterprises that are incorporated as associations. Moreover, both the legal forms of foundation and association signal a strong focus on purpose rather than on profit. The total number of associations, NGOs, and foundations at the end of 2021 was 41,725.⁶⁷ In the EMES typology, all these three forms are entrepreneurial non-profits. Indeed, associations, NGOs, and foundations all adopt a non-profit legal form and use profits in the sole interest of their social purpose.⁶⁸

There are two types of association in the Netherlands: the association with full legal capacity (*volledige rechtsbevoegdheid*) and the association with limited legal capacity (*bepaalde rechtsbevoegdheid*). On the one hand, the association with full legal capacity has rights and duties similar to those of a natural person. There is no personal liability in this type of association. It is the only form of association eligible for governmental subsidies. On the other hand, in associations with limited legal capacity, both the organization and the members are legally answerable. Like foundations, Dutch associations can apply to be recognized as public benefit organizations.

The Netherlands thus offers several options for social enterprises to incorporate, both as for-profit and non-profit. Dutch social entrepreneurs additionally have the option to combine some of these legal forms, with the most common combination being between a (non-profit) foundation and a (for-profit) BV. Generally speaking,

⁶⁶Tax Administration (2021) What conditions must be met by an ANBI? https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/business/business-public-benefit-organisations/public_benefit_organisations/conditions_pbos/ (accessed: 26.11.2021).

⁶⁷Source: Central Bureau voor de Statistiek: <https://opendata.cbs.nl/#/CBS/nl/dataset/81588NED/line> (accessed: 05.11.2021).

⁶⁸Defourmy et al. (2021b).

the current lack of a common definition for social enterprises is at the advantage of non-profits. Indeed, in the current context, social enterprises can incorporate under any of the legal forms presented above, non-profit organizations can thus also introduce and signal themselves as social enterprises, although the national trend is to acknowledge social businesses only. However, this lack of recognition of non-profit organizations as social enterprises is also a pitfall since not all social enterprises receive the attention they should from the government. The on-going discussion on a new governmental label (see Sect. 5.2) reflects this lack of attention to the whole picture. Such a lack of recognition can lead to two problems. First, non-social businesses (but social enterprises nonetheless) fail to be recognized as social enterprises by peers or funding institutions, leading them to be potentially excluded from (funding) opportunities aimed at social enterprises.⁶⁹ Second, the scarcity of governmental financing programs for social enterprises,⁷⁰ forces these organizations to compete with more profit-oriented, and often robust, companies to get governmental funding.

5 Labelling Purpose-Driven Companies?

To cope with the pitfalls associated with the lack of domestic recognition, social enterprises can seek external recognition, for instance through labels and certifications. While recognized—but private—labels exist internationally (e.g., certified B Corporations) and nationally (e.g., Code Social Enterprises), the Dutch government has also been working on a new label for social enterprises. In this section, we elaborate on the place of certified B Corporations (B corps) in the Netherlands and present reflections on the new-to-be governmental label for Dutch social enterprises.

5.1 *Certified B Corporations in the Netherlands*

Since the lack of a common definition of social enterprises—besides the recent one developed by Social Enterprise NL and Code Social Enterprises—social entrepreneurship is often identified in traditional businesses that implement some social components, such as advanced corporate social responsibility (CSR) (i.e., CSR going beyond national legal requirements). To go further than that, and be

⁶⁹ Serres C (2021) *Social Ventures and the Commons*. Unpublished doctoral dissertation, Université libre de Bruxelles; Serres et al. (2022).

⁷⁰ Aisenberg L et al., *Boosting social entrepreneurship and social enterprise development in the Netherlands: In-depth policy review*, 2019/01, 29 January 2019.

recognized for it, social enterprises can apply to become B corps. By 15th February 2022, 208 Dutch companies are registered at B Lab as B corps.⁷¹

The status of B corp is a label, which means that any type of corporation can apply for it. The label was originally created in the United States (US) by the non-profit B Lab, which also instigated the creation of the benefit corporation legal form in the US. The certification recognizes businesses with high social and environmental impacts, that “do well by doing good.”⁷² Additionally, it emphasizes the need to have a stakeholder-oriented governance approach, rather than a shareholder one. The B corp certification has become a world-known label and “stamp of approval” for companies to display their CSR- and value-oriented practices.⁷³

To assess whether candidate firms deserve the certification, each of them takes the B Lab Impact Assessment on its internal and external practices. Every three years, a benchmark is made by B Lab to determine practice standards in different industries. Standards are developed and measured by actors from businesses and academia. For an organization to be considered for certification, it needs to score minimum 80/200; 80 being considered as the average B impact score in the industry.⁷⁴ B Lab thus considers an organization worth of the B corp certification only if equal or above that standard. Items measured are for example governance, workers, community, environment, and customers. This list is not exhaustive as over 50 variations of the assessment exist depending on company’s size, industry, and geographic situation. B corps must rerun the B Lab Impact Assessment every three years. Taking the assessment costs €250. Moreover, to benefit from this private certification, companies must pay an annual fee based on annual sales, ranging from €1000 to €50,000 in Europe.⁷⁵

It is important to keep in mind that B corps can be classic profit maximizing firms as long as they are above the standards set by B Lab. However, social enterprises can also be B corps and join this growing, recognized, international network.

With the development of the certification, B Lab has worked towards more legitimacy, accountability, and conformance for the label. To this end, certified B corps are now required to amend their articles of incorporation to reflect the criteria highlighted by the certification. Companies with less than 50 employees are required to amend their articles of incorporation prior certification, while companies with more than 50 employees are granted 90 days after obtaining the certification to make the changes. These legal amendments are crucial to the certification as the latter can be revoked in case of non-compliance. Moreover, in countries with designated legal

⁷¹ Certified B Corporation (2022) Certified B Corporation. <https://bcorporation.eu> (accessed: 15.02.2022).

⁷² Tietz et al. (2018), p. 209.

⁷³ Cao et al. (2017) and Honeyman and Jana (2019).

⁷⁴ Gehman and Grimes (2017).

⁷⁵ Certified B Corporation (2022) Certified B Corporation. <https://bcorporation.eu> (accessed: 15.02.2022).

frameworks for social enterprises (i.e., benefit corporation), B corps are expected to reincorporate under that dedicated legal structure.⁷⁶

5.1.1 Becoming a B Corp for BVs and NVs

Since there is no dedicated legal form for social enterprises in the Netherlands yet, private companies (BVs and NVs) wishing to become B corps can do so by amending their articles of incorporation—if they do not already include all the necessary elements. They need to reflect a triple bottom-line approach, meaning that the company’s mission must reflect a societal purpose. Additionally, the articles of incorporation must specify that stakeholder interests must be considered in decision-making, leading to a non-shareholder supremacy governance system. The Certified B-Corporation website indicates that the following changes must be implemented for BVs and NVs to become B corps in the Netherlands. Changes apply to both legal forms:

1. *Amendment to the company object: “One of the goals of the Company is, through its operations and activities, to have a significantly positive impact on society and the environment in general.”*
2. *Amendment to the articles of association in the chapter regarding Directors: “In making their decisions, the directors shall also consider the social, economic, legal or other consequences of the conduct of the Company’s business with respect to (i) the employees, subsidiaries and suppliers (ii) the interests of the customers of the Company and its subsidiaries, (iii) the communities and society in which the Company, its subsidiaries and suppliers conduct their business, (iv) the local and global environment and (v) the short and long-term interests of the Company.”⁷⁷*

5.1.2 Becoming a B Corp for Other Legal Forms

Since the certification targets corporations, very little information is available on the possibilities for other Dutch legal forms to be certified and the implications certification would have on their articles of incorporation. However, since foundations and associations are non-profit organizations, it is very likely they cannot be certified. Moreover, such a certification might not be beneficial since it is not only costly but also targets companies that evolve in ecosystems than are intrinsically different from the ones in which non-profits evolve. Indeed, Dutch foundations and associations

⁷⁶Ibid.

⁷⁷Our own translation. Source: https://bcorporation.eu/certification/legal-requirements?field_lr_country_tid_selective=30&field_lr_corporate_structure_tid_selective=20&field_lr_state_tid_selective=14&field_lr_publicly_traded_owned_value_selective=0 (Certified Benefit Corporation website, accessed: 05.11.2021).

can apply for the public benefit organization status, which is far more beneficial for them in the Dutch system. Hence, seeking a certification like the B corp one might not even be on their radar.

As for cooperatives, although they are considered as private limited companies in the Netherlands,⁷⁸ their possibilities to become B corps are also uncertain. Obtaining such a label could prove useful to distinguish traditional, business-oriented cooperatives from socially oriented ones (as studied by EMES scholars), which are social enterprises but not recognized as such in the current legal system. It is however interesting to note that cooperatives could also apply for Code Social Enterprises registry.

5.2 The Introduction of a New Label for Social Businesses: The BVm (Social Limited-Liability Company)

To complement national and international labels and certifications, and to provide public, national recognition, the Dutch government is currently in consultation to create a new legal vehicle for social enterprises: the BVm (in Dutch: *Besloten Vennootschap-maatschappelijk*, whereby the m stands for *maatschappelijk*, meaning “societal”). According to the draft bill presented in 2021, a BVm must offer a product and/or a service, inscribe a social mission in their articles of incorporation and prioritize that mission over profit making, reinvest most of its profits into the mission (with a suggestion of at least 50%), and limit profit distribution to shareholders.⁷⁹ In line with the definition brought forward by Social Enterprise NL and Code Social Enterprises, the BVm must be built with an “impact first” approach. Additionally, BVms are expected to be in contact with their stakeholders and be transparent regarding social value creation on their website, as well as to be independent in their strategy building.⁸⁰ BVms are further required to publish an annual social report.⁸¹

It is crucial to understand that the BVm is not a new legal form per se but rather a label attached to the private limited company (BV) legal form. The BVm is thus in no means a Dutch equivalent of the US benefit corporation. To become a BVm, a social enterprise must first incorporate as a BV. Social enterprises incorporated under other legal forms (i.e., NVs, cooperatives, and foundations) cannot become BVms, unless they first reincorporate as BVs. Then, once a BV meets the conditions stated above, it can apply to receive the “BVm” label. The company’s compliance with BVm features is then checked by a civil-law notary. However, this check is

⁷⁸ van der Sangen (2013).

⁷⁹ Hogenstijn M, *Catching up: The development of legal frameworks for social entrepreneurship in The Netherlands*, September 2021.

⁸⁰ Keijzer M (2020) Brief van de staatssecretaris van Economische Zaken en Klimaat.

⁸¹ Driessen and De Moor (2021).

done only once, when the status of BVm is obtained. There are no follow-up checks made afterwards, so a BVm could potentially still have the label but not behave as one anymore. This is a pitfall already denounced by several law and social entrepreneurship scholars.⁸²

The bill as currently written presents other limitations. First, there is no clear advantage for a social enterprise to adopt the BVm form. Indeed, the label does not grant them any tax or other financial advantages.⁸³ Second, there is no mandatory implementation of an asset lock,⁸⁴ meaning that in case of dissolution of the social enterprise the assets can be redistributed to shareholders. Third, the proposal remains sketchy about compliance in terms of transparency and participative governance, opening doors for potential greenwashing.⁸⁵ Yet this could be corrected if the requirements for the BVm would also incorporate the ones set by Code Social Enterprises. Moreover, it could be a requirement for BVms to apply for the B corp certification. By adopting such a combination, strong pre-requisites would be required from an organization to obtain the BVm label. Moreover, the compulsory application to the B corp certification would enable a regular control of BVms' social orientation since they would have to take the assessment every three years. Additionally, such a scheme would grant the organizations more recognition at the national level. In any event, in February 2022 the law had not passed yet and changes could still be implemented.

6 Conclusion: The Future of Social Economy in the Netherlands

In this chapter, we reviewed the state of social economy in the Netherlands, using the perspective of the EMES school of thought to analyze the Dutch situation. Such an analysis has pointed out the singularities of the Dutch system compared to its European neighbors. We also have seen the different possibilities for social enterprises to incorporate in the Netherlands. Since there is no specific regulation for social enterprises so far, the latter can incorporate under five different legal forms—namely, private limited company (BV), public limited company (NV), cooperative, foundation, and association. Yet, cooperatives and non-profit organizations (i.e., foundations and associations) are traditionally not seen as social enterprises.⁸⁶ The Netherlands has thus been implementing a narrow definition of the concept of social enterprise and has been focusing on for-profit legal forms. In doing so, the legislature

⁸²E.g., *ibid.*

⁸³Hogenstijn M, *Catching up: The development of legal frameworks for social entrepreneurship in The Netherlands*, September 2021.

⁸⁴Driessen and De Moor (2021).

⁸⁵*Ibid.*

⁸⁶Karré (2021a).

disregarded instruments already incorporated in other legal forms to work for the common good. Examples of such instruments are democratic governance mechanisms and stakeholder governance models—which are at the heart of legal forms such as cooperatives but also non-profits—asset locks, and limits on profit distribution.

With the introduction of the BVm, the Netherlands hopes to bring clarity in the definition of social entrepreneurship and social enterprises. Yet, the current state of the bill remains too vague so far, and the focus too narrow. All social enterprises that are incorporated under another form than the BV will officially be dismissed as such. A challenge thus remains in recognizing social enterprises beyond their legal form, especially when they have their roots in non-profit rather than for-profits set-ups. We agree that the creation of a label for more recognition of social enterprises is a necessity, but we deplore its narrowness on commercial orientation. Yet, time remains for government officials to revise the bill and focus on new possibilities that the BVm could offer.

Should the bill not pass, it will remain challenging for social cooperatives to distinguish themselves from traditional ones. The adoption of a label—such as B-Corp and/or Code Social Enterprises—could be a solution for these social cooperatives to gain recognition.⁸⁷ Yet, the B-Corp label itself does not control for the mechanisms that are traditionally inherent to social enterprises. Indeed, for instance the certification does not impose an asset lock nor a limit on profit distribution. This last criterion, however, is included in the BVm law project. The adoption of a triple label (i.e., B-Corp, Code Social Enterprises, and BVm, although administratively heavy) would provide all types of social enterprise in the Netherlands with the appropriate mechanisms, controls, and recognition they deserve. We realize this solution implies that there would be a mix of public and private normative requirements, but there is no reason to exclude this approach, at least at a first stage and until an appropriate set of hard law rules are in place. We thus urge the Dutch government to reconsider the BVm proposition and revise it to broaden it to other legal forms, as suggested by the EMES school of thought.

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⁸⁷Defourmy et al. (2021b).

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Social Enterprises, Benefit Corporations and Community Interest Companies: The UK Landscape



Stelios Andreadakis

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1 Introduction

During the past two decades, the newspaper headlines and the media have been flooded by stories of corporate scandals and misdeeds, such as Enron, WorldCom, Tyco, Adelphia, Parmalat, Satyam Computer Services, Lehman Brothers, AIG, Massey, Olympus, and MF Global. The impact of these scandals on the stability and the reputation of the global financial markets was tremendously negative and has led governments and the business community to revisit the concept of the traditional corporation. In the context of the required transformation of the corporate purpose, reference was made to terms such as social enterprises,¹ social purpose, public

¹The term ‘social enterprise’ refers to public benefit organisations that pursue the satisfaction of social needs through the imposition of at least a partial non-profit constraint and by devoting the majority of their positive residuals and patrimony to socially oriented activities. See Borzaga et al. (2009). In the United States, the term has a broader meaning and social enterprise are those using traditional business methods to accomplish charitable or socially beneficial objectives or companies with a significant mission-driven motive, regardless of whether profit is the primary objective. See

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interest and blended value.² As a result, both the United States and several European Union Member States have introduced special legal frameworks for social enterprises.

According to the European Commission, the social economy is dynamic and constantly growing. It employs more than 14.5 million people in the EU, corresponding to 6.5% of the active workforce.³ The development of the social economy is not only seen in the EU but also globally, not least in the US, where there has been a wave of initiatives to promote social enterprises.⁴ The solutions range from amendments to the existing company legislation through to certification schemes and to new corporate forms, such as benefit corporations, community interest corporations (CIC), limited liability companies (L3C), benefit limited liability companies (BLLC), flexible purpose corporations (FPC), social purpose corporations (SPC) and, lastly, the certified B corporations. All these initiatives reflect a fundamental change to the traditional business model implemented in both sides of the Atlantic Ocean and are all part of a movement towards greater transparency and commitment to pursuing social and environmental objectives in addition to profits.

The present chapter will focus on the social enterprises' landscape in the United Kingdom, with emphasis on certified B corps, benefit corporations and the CICs. Section 1 discusses the background to the introduction of special rules for social enterprises. This is followed by Section 2, where an overview of the benefit corporations and B corps will be provided using evidence for the United States and the United Kingdom. Section 3 looks at the formation and the operation of CICs and an attempt is made to reflect on the experience from their operation in the United Kingdom so far. Section 4 concludes.

2 The Shift Towards Social Enterprises

Before we discuss the gradual, but steady, shift towards social enterprises and delve into the regulatory framework currently in place in the UK, it is essential to offer an overview of this concept and its basic characteristics. Social enterprise is defined as 'the use of market-based strategies to promote the public good'.⁵ Another commonly used definition provides that it is 'an organisation or venture that achieves its primary social or environmental mission using business methods, typically by operating a

Brewer (2011), p. 679; Lane (2012), p. 3. There are also narrower definitions put forward, according to which social enterprises must directly address social needs through their products and services or through the numbers of disadvantaged people they employ. See Boschee et al. (2010), p. 1.

²Bugg-Levine and Emerson (2011), pp. 10–11, where blended value is used to describe the mix of economic, social, and environmental value that social enterprises produce.

³European Commission (2013), p. 45.

⁴Defourny and Nyssens (2008), p. 4; Doeringer (2010).

⁵See Cummings (2012), p. 578.

revenue-generating business'.⁶ As it becomes apparent from these definitions, the main feature of social enterprises is that they combine the performance of a commercial activity with a social one and there is no exclusive emphasis on profit-maximisation. The European Commission has defined a social enterprise as 'an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders'.⁷ This definition signals that it concerns companies that have a social agenda and demonstrate a commitment for the achievement of this agenda. Social enterprises are expected not only to give priority to social considerations than profits, but to actually use part of their profit for social purposes.

A careful consideration of the current status quo in the United Kingdom reveals we are still far away from being able to talk about a social economy and stakeholder-focused businesses. In fact, company directors, guided by a commercial and legal system that was designed to prioritise shareholder welfare, never had any strong incentives to consider pursuing any other purpose. This idea, known as the principle of shareholder primacy, came to prominence in the United States and the United Kingdom throughout the 19th and 20th century on the basis that maximising shareholder returns would maximise total social welfare, and that corporate resources should be diverted toward social goods, such as environmental welfare. Although not explicitly enshrined in statute, a substantial body of case law held that the interests of a company are the interests of its shareholders and that company resources could not be diverted for any purpose that would not benefit them.⁸ Milton Friedman has been famously quoted as a justification for the prevalence of a sheer profit-maximisation corporate paradigm and it has become a slogan that the 'There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits',⁹ same as the judgement in *Dodge v Ford*, where it was stated that 'a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes. . .'.¹⁰ There have been several other quotes that

⁶See Katz and Page (2010), p. 85.

⁷European Commission (2011), p. 2; in the UK, the Department of Trade and Industry (DTI) has adopted a very similar definition: a social enterprise is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners'; see DTI (2002), p. 7.

⁸*Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 690; *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* [No 4] (1988) 14 ACLR 569, 577; *Parke v Daily News* [1962] Ch 927; *Ngurli Ltd v McCann* (1953) 90 CLR 425.

⁹Friedman (1970).

¹⁰*Dodge v Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919), para 684.

could have been used for slogans, such as Henry Ford's statement that, instead of boosting dividends, he would rather use the money to build better cars and pay better wages¹¹ or Johnson & Johnson's credo, written by General Robert Wood Johnson in 1943, that the company's first responsibility was not to investors but to doctors, nurses, and patients, but shareholder primacy was so deeply embedded in the Anglo-Saxon corporate world that it was extremely difficult to deviate from it.¹²

The late 20th century saw a relaxation of this position, which was accompanied by greater corporate involvement in the wider community through corporate social responsibility (CSR) initiatives. The introduction of the UK Companies Act 2006 and the adoption of the Enlightened Shareholder Value theory through section 172 was hailed as the end of short-termism and the beginning of a new era in corporate behaviour. We have to accept that section 172 did not bring the expected change of culture in corporate boardrooms and it has been argued that it has not lived up to the expectations and in effect shareholder primacy remains at the core of the UK company law system.¹³ However, it became apparent that blind short-termism can only have a negative effect on modern corporations and stakeholders' interests should not be ignored or overlooked in favour of those of shareholders.

Having regard to the interests of stakeholders is not a legally enforceable duty and falls short in disincentivising any investment that would detract from profit maximisation; nevertheless, companies can no longer afford to be disengaged from the society within which they operate, ignoring their social responsibilities. The financial crisis has highlighted this need to focus on the responsibilities, including social ones, of companies, investors, consumers and public authorities in relation to the challenges of climate change, the limits to natural resources and respect for human rights.¹⁴ There is no expectation that companies solve the problems that our society experiences on their own, while at the same time are struggling to remain competitive and profitable, although the market though will react positively to the fact that a company is actively seeking to be socially responsible and sustainable.¹⁵ For instance, it can give companies a competitive advantage in attracting new investors and trading partners, while it will boost sales and increase customer loyalty. At the same time, socially responsible companies can attract better qualified staff, who share the same values and aspirations, and increase the productivity and commitment of their existing employees, who will feel that they are being part of a larger cause.¹⁶

¹¹ Ibid.

¹² https://www.jnj.com/_document/our-credo-english?id=00000159-6a64-dba3-afdb-7aef76350000.

¹³ Collison et al. (2011), p. 44; Fettiplace and Addis (2010), pp. 61–62; Linklater (2007), p. 129; Greier (2014), p. 108; Grant (2015), p. 256.

¹⁴ Taylor (2009/2010), p. 743.

¹⁵ See, for instance, Sjafjell (2012) and Zrilic (2012). Many have expressed doubts about such a requirement, see, for instance, Yan (2013), Deva (2011) and Dine and Shields (2008).

¹⁶ See von Arx and Zeigler (2008); Salzmann et al. (2005), p. 27. See also European Commission (2009), pp. 106–121.

Without strong and clear incentives, it is hard for companies to initiate a radical transformation of their business operations; not only the costs associated with this transition are likely to be high, but also without legal enforcement companies are unlikely to be convinced to take the risk, especially during the current times of uncertainty.¹⁷ As Liao notes, it is the board of directors, who should step up and be the drivers for change.¹⁸ This is why there have been introduced provisions allowing companies to adopt a legal structure that deviates from the traditional shareholder value paradigm and expands the corporate purpose beyond the narrow limits of the pecuniary interests of its shareholders. The next section will examine two of the most popular initiatives that have attracted the attention of entrepreneurs and serve as evidence that a shift towards more pluralistic corporate forms is actually taking place.

3 Benefit Corporations and B Corps

Starting with the benefit corporation,¹⁹ this is a legal structure for a business, which exists in several countries across the globe, including the USA, Italy and Colombia. In the US, the ‘benefit corporation’ form was introduced in 2010 and so far, it has been adopted in 38 states as well as the District of Columbia, while more than 40 state jurisdictions across the country have enacted at least one social enterprise statute. It is designed for ‘for profit’ undertakings that also wish to take account of social and environmental considerations.²⁰ Their purpose must be to ‘create general public benefit’, which is defined as having ‘a material positive impact on society and the environment’. There is no obligation to reinvest profits, nor are there limits to the distribution of profits, as the legal requirement for creating a ‘general public benefit’ can be met through the normal operation of the company, by having regard to its stakeholders and trying to combine profit maximisation with positive stakeholder impact.²¹ From a first glance, it seems that there are similarities with the enlightened shareholder value theory that the UK government has tried to implement through section 172 of the Companies Act 2006 (CA 2006). One could not help but wonder whether the benefit corporations has been another attempt to deviate from the shareholder value paradigm with an element of flexibility, considering that the adoption of this corporate vehicle is optional. Although there is no evidence that the introduction of the rules regarding the benefit corporation has any connection with ESV, it can still be argued that the swift towards a different type of corporations

¹⁷Wessing (2010), p. 20. See also Stout (2012), p. 60.

¹⁸Liao (2015), p. 318.

¹⁹Hemphill and Cullari (2014), pp. 7–9. See also Koehn (2016); Murray (2014); Nass (2014); Brakman Reiser (2011); Cummings (2012).

²⁰Blount and Offei-Danso (2013), p. 617; Brakman Reiser (2011), p. 591.

²¹See Clark Jr and Babson (2012); Clark Jr and Vranka (2013).

and a more pluralistic mode of governance is gradually becoming a reality. Is this the result of a process of enlightenment or just of the pressure exercised by the market and stakeholder groups? It does not really matter, because the two main supporters of shareholder primacy, the United States and the United Kingdom, have been actively exploring different options. What is also extremely important is that these options have the potential to introduce a different culture in the boardrooms and ultimately to drive corporate management away from short-termism towards a more long-run perspective.

Benefit corporations are often confused with certified B corporations. The main difference is that B corp is a certification, while benefit corporation is a legal form. The B corp certification of social and environmental performance is a third-party certification administered by the non-profit B Lab, based in part on a company's verified performance on the B Impact Assessment. B Lab was founded in 2006 by Stanford University alumni and businessmen Jay Coen Gilbert and Bart Houlihan, and former investment banker and Stanford colleague, Andrew Kassoy. The companies that have obtained this certification can designate themselves as 'Certified B Corporations'. Some companies are both certified B corporations and benefit corporations, and the benefit corporation as a corporate structure fulfils the legal accountability requirement of B corp certification. The certification is a prima facie indication for a company's environmental performance, employee relationships, diversity, involvement in the local community, and the impact a company's product or service has on those it serves. The rationale behind the establishment of this certification system was that there was uncertainty about the scope for a company's management to take account of social purposes.²² Therefore, it was considered necessary to help these new entities organise their affairs in such a way that they will be able to pursue their dual purpose within the existing regulatory framework. To obtain certification as a 'Certified B Corporation', an impact assessment is conducted, during which the company goes under the microscope as a whole, i.e. its management, suppliers, employees, social and environmental impact, so that it is determined whether it meets the requirements for certification. Particularly, the B Impact Assessment examines a company's impact on their workers, community, environment, and customers as well as its governance structure and accountability. Questions are split into two categories: Operations, which covers the day-to-day activities, and Impact Business Models, which awards additional points for business models designed to create additional positive impact. Companies have to score at least 80 out of a possible 200 marks to become certified, pay an annual fee of between £500 and £25,000 a year, depending on their size and structure, and undergo a regular reassessment every two years. The B Impact Assessment is updated every three years to ensure that companies maintain the required minimum standards and work towards their improvement through the feedback provided during the reassessment process.

²²Clark Jr and Babson (2012), p. 842; Clark Jr and Vranka (2013).

Apart from the certification, a B corp constitution must provide that a managing member shall [. . .] give due consideration to [. . .] the long-term prospects and interests of the Company and its members, and the social, economic, legal, or other effects of any action on [. . .] the Stakeholders [. . .], together with the short-term, as well as long-term, interests of its members and the effect of the Company's operations [. . .] on the environment and the economy of the state, the region and the nation.²³ It is also required to incorporate in the Articles of Association commitments to standards of social and environmental performance, accountability and transparency; and B corps must sign a declaration that includes a commitment to 'aspire to do no harm'.²⁴

B corps are illustrations of a commitment to a 'triple bottom line' approach to business,²⁵ an accounting framework that incorporates three dimensions of performance: social, environmental and financial, with emphasis on the 3Ps: people, planet and profits. This commitment should not only be mentioned in the company's objects clause, but the whole company should be organised in such a way that it actually has a positive impact on the society and the environment. To put it differently, the overall fulfilment of obligations to the community, the employees, the customers and the other stakeholders should be measured, audited and reported exactly in the same way as the financial performance of public companies.²⁶

The scheme started in 2007 and, as of September 2020, there are over 3,522 certified B corporations across 150 industries in 74 countries. For a voluntary arrangement, its expansion has been remarkable and indicates that there is a growing interest amongst companies internationally for ways to diversify their operation and their business model. Any company of any size can get B corp certified, even sole traders, as there are no requirements for minimum size. It is important to highlight that B corporation certification, apart from being entirely voluntary, does not bring any legal significance to a company's shareholders, stakeholders or to its employees. As described above, the certification (B Impact Assessment) allows companies to benchmark themselves against some of the world's leading exponents of 'profit with purpose' business, while the scores of all certified B corps are publicly disclosed, so there is a very strong incentive to improve. The process highlights the areas of weakness, providing a clear roadmap for improvement and practices that should be implemented. It remains to be seen whether the certification will be applied in a consistent way, while the assessment criteria are flexible enough on the one hand to accommodate all different types of companies and, on the other hand, to reflect the best standards in the market.²⁷ Until then, the recognition that companies, such as Patagonia and Ben and Jerry's, have received shows that the certification brings

²³B Corporation (2013).

²⁴Woods (2016), pp. 89 and 93.

²⁵Elkington (1998); Henriques and Richardson (2004); Willard (2002); Slaper and Hall (2011), p. 4.

²⁶Norman and MacDonald (2004), p. 257.

²⁷Bridgers Ventures (2015).

significant branding benefits to the corporation, including greater outreach, broader recognition and impact. The higher the level of trust that is established between the corporations and the stakeholders, the higher the valuation of the brand and the position in the market. The recent 'B the Change' marketing campaign aimed to encourage certified companies to make greater use of the B corp branding on their packaging and marketing materials, so that there is more visibility and the consumer body learns more about what the movement is all about and what these companies are trying to achieve.

While there is not much doubt that the B corps are based on a more pluralist model of governance, there are concerns expressed for the lack of a legislative framework that would monitor compliance with the required standards in a more robust way, due to the fact that within the period between the reassessments, directors have unlimited discretion to shape the company's strategy and operation in any way they deem appropriate without any oversight. Criticisms also focus on the possibility that the B corps movement undermine the existing social economy and the contribution that charities and charitable trusts have been making.²⁸ The other side of the coin is that B corps do not necessarily redirect resources away from the civil society into the private sector; quite the contrary, social enterprises can complement charities and help in the expansion of the notion of social purpose to all sectors of the economy. The fact that there is a swift towards companies being committed to have a positive impact through their operation can create a momentum for a 'new social contract developing between business and society, in which businesses engage with stakeholders beyond their current narrow remit to create benefits for employees, citizens and society at large'.²⁹

B Corp UK, the organisation responsible for trying to implement B corporations in England and Wales, was hoping to sign up roughly 50 B corps in 2015 and there are currently 275 companies that are certified B corporations across many industries including legal services, advertising, accounting, telecommunications, even hair-dressing! Some of the most notable companies that have achieved certification are the Jamie Oliver Group, Activia, Danone and Abel & Cole. Considering that the United Kingdom is widely recognised as having the most highly evolved social enterprise sector in the world,³⁰ it is rather surprising that on the one hand benefit corporation legislation does not exist in the United Kingdom, while on the other hand the B corps certification system has not really taken off. There can be two explanations for this: at first, that the UK Companies Act 2006 is a very flexible instrument, designed to enable businesses to have regard to different groups of stakeholders through the duty of directors to promote the success of the company. Despite the concerns as to the enforceability of this duty and the overall success of the Act to instil a more enlightened way of doing business in the UK, people are still sceptical regarding the extent to which B corps really have a different modus

²⁸See LeClair (2014).

²⁹Advisory Panel to the Mission-led Business Review (2016), p. 3.

³⁰Regulator of Community Interest Companies (2013), p. 35.

operandi. The second justification is that there is the community interest company and, as it will be discussed in the next section, this form has managed to create strong supporters within the UK markets and business community in general.

4 Community Interest Companies (CIC)

‘The CIC idea was initially hatched over a bottle of claret in Balls Brothers Wine Bar in Cheapside by myself and Roger Warren-Evans, a serial social entrepreneur’.³¹ This is how Stephen Lloyd, the founding father of CICs, described the formation of the idea behind this *sui generis* corporate form. Their motivation was that they were dissatisfied by the reduced status and low profile of industrial and providence societies, and they agreed that there was room for a new legal form for social enterprises. The government endorsed their plans for creating public interest companies and shortly after the community interest company, a special form of social enterprise, was introduced in the United Kingdom under the Companies Audit Investigations and Community Enterprise Act 2004. The 2004 Companies Act became especially effective when given effect by two subsequent Regulations: the Community Interest Company Regulations of 2005 and the Community Interest Company (Amendment) Regulations of 2009. The first CIC incorporated in the United Kingdom on 11th August 2005 and 15 years later there are more than 15,700 CICs on the public register providing community benefit in all business types across the United Kingdom. The rapid growth and the fact that CICs quickly outnumbered both cooperatives and mutual, two quite old and traditional corporate structures, serves as evidence that the establishment of the CIC has been a very positive development and a successful addition to the business vehicles available in the UK business environment.

From the beginning, it became apparent that the whole concept of benefit corporations has been applied differently in the United Kingdom compared to the United States. For example, up until 2015 a close look at the companies that have applied to B Lab to become B corps in the United Kingdom, the majority were small and medium-sized businesses, not large or multinational companies that would try to get access to foreign markets and sell their products internationally.³² The motivation has been different and, despite the fact that companies can significantly benefit from the B corp branding, increased awareness and wider profit margins at a global basis, CICs seem to be more focused on the local communities within their country of registration, such as nurseries, community groups, spin-outs from health, youth services and other public sector areas. It would not be an exaggeration to say that CICc bear greater resemblance to non-profit organisations rather than for-profit

³¹ Fisher and Ormerod (2013), pp. 58 and 118.

³² Williams-Grut (2015).

businesses.³³ This motivation can be seen in the UK government's website, where it is mentioned that CICs are effectively companies 'working for the benefit of the community',³⁴ providing services by and for communities. Another interesting fact is that a significant number of CICs, especially during the first years after the introduction of the CIC form, have been companies limited by guarantee, which in practice means that they can never pay out dividends, as they have no share capital and no shareholders. Of course, this can change as time goes by, depending on the nature of the CIC's business, because if private investors wish to invest in the company, they cannot get shares.

Under the 2005 Regulations, companies (both limited by shares and limited by guarantee) can be re-registered as CICs.³⁵ To be registered as a CIC, a company must declare how it will benefit society, providing information about the nature of the community interest that it will pursue. This statement of purpose is also being assessed through a 'community interest test', which stipulates that 'a reasonable person might consider that its activities are being carried on for the benefit of the community'.³⁶ For example, the pursuit of political aims, such as support for political campaigns, is not allowed.³⁷ Any benefits or advantages provided by the company in the context of its operation should favour the wider community. Thus, specific social groups are favoured, as long as this does not undermine the genuineness of the social purpose pursued.³⁸ Such examples are when a hospital is built, a museum is established, or clinical trials are supported.

Practically, companies limited by guarantee must either re-invest their profits in the company or use the profits for social purposes. Companies limited by shares must combine the pursuit of the stated social purpose with the promotion of their success, financial or of any other kind. The transformation into a benefit corporation requires a 75% majority of the shareholders and any minority shareholders, who wish to express their opposition to the conversion, can refer the matter to the courts within 28 days, to have the decision blocked.

CICs are regulated by the CIC Regulator, an independent statutory office holder, appointed by the Secretary of State. The Regulator is responsible to screen companies that seek registration as CICs and monitors their activities, since CICs are subject to restrictions on the payment of dividends, transfer of assets and capital investment. The Regulations governing CICs do not contain any special guidelines or any specific provisions on the duties of management, other than the implicit obligation to pursue social purposes.³⁹ All CICs must publicly file a 'CIC Report' within 21 months of incorporation (and subsequently, annually), describing the

³³Borzaga et al. (2020), pp. 30–31.

³⁴Department for Business, Energy and Industrial Strategy (2016a), p. 5.

³⁵DBEIS (2016c), Chapter 4.

³⁶Companies (Audit, Investigations and Community Enterprise) Act 2004, section 35.

³⁷DBEIS (2016c), Chapter 4, section 4.6.

³⁸DBEIS (2016b), Chapter 2, section 2.3.

³⁹DBEIS (2016e), Chapter 9, p. 4.

actions the CIC has taken to benefit the community in line with the company's initially stated community interest purpose.⁴⁰

The Regulator is entrusted with the task of facilitating the formation of CICs. More specifically, the Regulator will not take an inflexible or bureaucratic approach towards new applications and an attempt will be made to resolve any problems informally and without undue delays. However, this does not imply any pro-active supervision of individual CICs or any pre-judgement by the Regulator.⁴¹ For example, in 2009–2010, 1,572 applications were received, out of which 1,298 were accepted.⁴² In 2016, the applications received were 4,007, but there was a 30% rejection rate.⁴³ These statistics indicate that the scrutiny can be quite robust, and a certain level of minimum standards needs to be met before certification is provided. In this way, there is a degree of certainty that all social enterprises that have received the certificate by the authorities are in compliance with the requirements of the law.

In the US, some states have introduced a requirement for benefit corporations to appoint a 'benefit director', who is responsible for monitoring, on a continuing basis, whether the company complies with its obligation to pursue or create public benefit or a specific public benefit. Although the respective laws do not provide for any liability to pay compensation in case this obligation is breached, there is an element of monitoring on a continuous basis after registration, which can be seen as an additional mechanism of checks and balances that ensures that the pursuit of the social purpose is not abandoned.⁴⁴ Equally, as it was discussed above, B corps also have to be re-certified every two years and since the assessment criteria are being updated regularly in response to the current best practices, it can be more difficult and demanding to reach the required score each time.

When a company's primary purpose is of a social nature, this inevitably raises the question of whether the stakeholders whose interests the company must serve should be able to sue the company if their interests are not promoted in line with the company's stated purpose. In the UK, stakeholders cannot sue a CIC, but they can complain to the Regulator, who can in turn examine the complaints, ask for additional information or evidence in to verify the validity of these complaints.⁴⁵ Moreover, the Regulator can appoint, suspend or dismiss members of the board of directors where: (a) there is misconduct or mismanagement; (b) it is necessary to

⁴⁰See Regulator of Community Interest Companies (2015), p. 18. See also DBEIS (2016e), Chapter 9.

⁴¹DBEIS (2016g), Chapter 11, section 11.1.

⁴²See Department for Business, Innovation and Skills (2011), p. 7. See also Ishkanian and Szreter (2012).

⁴³Community Interest Companies Blog (2017).

⁴⁴Benefit directors are mandatory in Hawaii, New Jersey and Vermont. Section 302 of the Model Legislation for benefit corporations made provision for there to be a mandatory benefit director for all publicly traded corporations. See also Brakman Reiser (2011), pp. 604–605 and Brakman Reiser (2013), pp. 38–39.

⁴⁵DBEIS, Chapter 11, p. 11.4–5.

protect the assets of the company; (c) the company fails the ‘community interest’ test mentioned above; or (d) the company does not carry on any activities in pursuit of its social purpose.⁴⁶ The Regulator also has the power to institute proceedings to wind up the company.⁴⁷

When a company has a very broad or generic statement of purpose and, in light of the fact that there are no guidelines about the actual fulfilment of the social purposes or strict rules about management liability, it would be extremely difficult to stipulate such a right for the stakeholders. Particularly, it would be really challenging to identify the stakeholders, who have a right of action,⁴⁸ there will be uncertainty about the risk of liability and stakeholders deciding to start proceedings would be sailing in uncharted waters, as it will be hard to prove to what extent a company’s management has fulfilled its obligations towards them.⁴⁹ At this point, it is worth mentioning that in the US certified companies play the role of the watchdog themselves as to whether the other certified companies continue to fulfil the requirements for certification and it is thus not unheard for the B Lab to receive complaints from other certified undertakings.⁵⁰ This system of ‘checks and balances’ offers an effective solution to the problem of limited resources of the regulators or the supervisory authorities and can be characterised as self-monitoring, because it is the market participants themselves who are monitoring each other and are responsible to report any breaches that they may come across. The other side of the coin is that it is possible that complaints can be made without any support from evidence or based on rumours and suspicions or they can be driven by indecent motivations, such as to harm or eliminate the competition. Of course, such practices, apart from being unethical and unprofessional, do not fit with the whole purpose of social enterprises and should thus be avoided.

Reference needs to be made on the issue of how profits will be used and what proportion will be distributed to shareholders through dividends, the approach taken by the United Kingdom is that there should be restrictions on the shareholders’ discretion on the transfer of assets, such as payment of dividends or asset disposal, especially in the event of winding up or reincorporation as an ordinary company. A CIC can only pay its shareholders a maximum dividend of 5% over the Bank of England base rate. Only 35% of a CIC’s distributable profits in any one year can be paid out in private dividends to shareholders; the rest must be kept in support of the CIC’s mission. Until the law changed in 2014, there was a double asset lock: in addition to the 35% restriction, dividends could total no more than 20% of the value

⁴⁶ Companies (Audit, Investigations and Community Enterprise) Act 2004, section 31.

⁴⁷ DBEIS (2016g), Chapter 11, section 11.4.2.6.

⁴⁸ In companies that have adopted a two-tier board system, it would be perhaps easier to monitor the conduct of directors and through employee or stakeholder representation open the avenue for directors’ liability.

⁴⁹ Engsig Sørensen and Neville (2014), pp. 296–297.

⁵⁰ Engsig Sørensen and Neville (2014), p. 298.

of the shares held.⁵¹ In case that dividends are not paid in one year, the amount payable can be carried forward and be used in the distribution of profits in the following year. In the context of the adoption of the rules related to CICs, there was a number of proposals about dividends and distribution of profits, but this model was supported as more compatible with the whole idea behind the creation of CICs.⁵² An alternative solution could be to require that a payment be made for social purposes if it was decided that dividends would be paid to the company's shareholders. In this way, the company would in principle fulfil its dual purpose, as the company would in fact justify that it has sufficient financial resources to invest in the fulfilment of its social purpose as well as pay its shareholders without endangering the company's financial stability.⁵³

In terms of other kinds of disbursements, it is worth mentioning the following rules:

- (a) a CIC can only buy back shares at a price corresponding to what was paid for them;
- (b) if a reduction of capital is decided, a CIC may not pay out on shares that have not been fully paid up, and the maximum that can be paid out is equal to a fully paid-up share;
- (c) the maximum interest that can be paid on a loan where payment is dependent on the company's profits is 10% of the principal; the rationale behind this rule is to prevent owners from providing loans instead of buying shares to avoid the restrictions on the payment of dividends;
- (d) the directors of a CIC only receive reasonable salaries or fees and the reasonableness of these is monitored as per the provisions of the 2005 Regulations.⁵⁴

The imposition of all the restrictions (asset locks⁵⁵) aims at preventing greenwashing⁵⁶ and protecting the social character of CICs. The wording of the rules reflects an attempt to limit the flexibility allowed to shareholders and prevent

⁵¹ Community Interest Company Regulations 2005, section 17 ff. Under Section 30 of the Companies (Audit, Investigations and Community Enterprise) Act 2004, the Regulator has authority to determine the limits for dividend payments and other disbursements. See also DBEIS (2016d), Chapter 6, section 6.3.

⁵² Cross (2004), p. 312. See also Neville (2013), pp. 179–217.

⁵³ Engsig Sørensen and Neville (2014), p. 300.

⁵⁴ Community Interest Company Regulations 2005, section 30.

⁵⁵ An asset lock is a commitment by CICs and those who set them up to lock profits and assets into the company irrevocably, through the implementation of the following two measures: (a) prohibit or impose limits on the distribution of assets by community interest companies to their members, and (b) impose limits on the payment of interests on debentures issued by, or debts of, community interest companies.

⁵⁶ The flipside of this trend towards increased transparency is the risk of 'green washing' or 'purpose-washing' where large businesses present a social or environmental front that is not backed up by realised social or environmental impact. It can be hard to distinguish between a company that is genuinely creating value for society and the environment, from one that is good at marketing. Amongst others, see Ramus and Montiel (2005), Laufer (2003) and Bowen (2014).

practices whereby the profits are paid back to the shareholders instead of being used for the pursuit of the company's social purpose. For instance, in relation to the directors' salaries, there are no criteria as to what constitutes a reasonable salary or a formula that would allow the authorities to set minimum or maximum standards for the companies to adhere to. The restriction is clearly aimed to prevent the manipulation of the companies' financial statements and the undue setting of the levels of the executive pay.⁵⁷

A more important set of restrictions is related to the CICs' de-registration and conversion. A CIC is not allowed to convert into an ordinary company.⁵⁸ It is not possible for a CIC to simply denounce their social purpose and decide to become a normal 'for profit' company, because there would be room for fraudulent activities through companies opting in and out of the CIC scheme. If the conversion of a CIC into a normal company would be allowed, the shareholders would be able to take control of all the assets created during the period that the company was operating as a CIC without any obligation to account for them to the stakeholders. Therefore, it is decided that a CIC is wound up, its assets cannot be distributed to the shareholders. Shareholders may only be paid an amount corresponding to their original capital investment in the company, while the remaining assets must be allocated to other CICs. If the articles of association of the CIC in question does not specify which CIC (s) should receive the assets in the event of its winding up, then the Regulator will decide.⁵⁹ The only conversion that is allowed is the conversion of a CIC into a charitable trust or an Industrial and Provident Society, and the company's assets will be entirely devoted to social purposes.⁶⁰ Interestingly, in benefit corporations a conversion into a normal corporation is allowed without any restriction related to the use of the assets as long as the decision has the support of the two thirds of the shareholders.⁶¹

The restrictions described above are supplemented by reporting requirements, which promote transparency, so that the company's stakeholders as well as the authorities are informed about the CICs' performance, especially in relation to the fulfilment of the social purposes. This is why the 2005 Regulations specifically mention that the reporting obligations must cover how the company has served the community interest, how the company has consulted the interest groups affected by the company's activities (and the results of these consultations), information about payments to directors, information about dividends, information about payments of interest on loans which are dependent on the company's profitability and a review of activities carried out by the company without charging a full fee.⁶² These reporting

⁵⁷DBEIS (2016d), Chapter 6, section 9.3.6.

⁵⁸DBEIS (2016f), Chapter 10, section 10.5.

⁵⁹DBEIS (2016f), Chapter 10, section 10.4.4. See also Community Interest Company Regulations 2005, section 23.

⁶⁰See DBEIS (2016f), Chapter 10, section 10.2 and 3.

⁶¹Model Benefit Corporation Legislation 2017, section 105(a).

⁶²Community Interest Company Regulations 2005, section 26ff.

requirements cannot be considered as excessive compared to the information that public companies are required to disclose. In addition, the social purpose that these companies pursue make the content of such disclosures significant not only for its own shareholders, but also for competitors, investors interested in investing and the interest groups which are to benefit from the social purpose pursued.⁶³

Before concluding, it is essential to engage with the criticism that the CIC form has received and the drawbacks that have been identified so far by academics and practitioners.

One quite commonly argued criticism in relation to CICs is that this corporate form can easily be used by ‘weasely people who want to hide behind a veneer of social benefit without the same level of accountability’.⁶⁴ This line of thought is based on the premise that charities can be used if the aim of the business is to have social impact, instead of using CICs, which offer ‘the simplicity of company structure without the extra level of governance’ and ‘a less intense regulatory regime’, considering that the Office of the Regulator is a rather ‘light-touch and rarely goes public when following up [with] complaints’.⁶⁵ It is true that the Regulator openly acknowledges that its role is intended to be light-touch, but this does not mean that it will allow abuses or it will not apply the Complaints Procedure Protocol in the event that complaints are received. Particularly, the fact that CICs seem to work closely with the local communities is indicative of their intention to be more transparent and directly accountable to the same local communities that they intend to work for. The pressure from such communities can be substantially the same as the reputational damage if the CICs fail to live up to the expectations created by their purpose statement. Phil Horrell, the Office Manager at the CIC Regulator, argued that a CIC ‘theoretically offers greater potential for rapid expansion and diversification, not only because of the looser financial regulation but also because of the greater opportunities for raising capital’.⁶⁶ However, he emphasised that the choice between a charity and a CIC is an important one, same as the distinction between these two forms. Particularly, CICs and charities are two separate entities because they cover two distinct degrees of benefit: benefit to the community and general public benefit.⁶⁷ Therefore, a company should decide to become a CIC over a charity mainly to ‘be branded as a social business’ that the public will view ‘like [a] charit[y]’ while still operating under the ‘dynamism’ of for-profit businesses.⁶⁸ Perhaps, the UK government and the Regulator should try to draw some inspiration from the United States and promote more the CIC brand and its value as a business

⁶³ See Nicholls (2010), p. 384. See also Brakman Reiser (2011), p. 613.

⁶⁴ Senscot (2015). See also Cho (2017), p. 167.

⁶⁵ See Third Sector (2015).

⁶⁶ Jump (2007).

⁶⁷ See Edmonds (2014), p. 4 (Although the community interest test to become a CIC is whether the CIC’s activities would benefit the community, charities must pass a different test, the charitable test of public benefit.). See also Borzaga et al. (2020).

⁶⁸ Jump (2007).

vehicle for global expansion even under demanding market circumstances, as the ones that currently exist.⁶⁹

Another issue that has attracted criticism is the lack of any provisions granting tax relief for the CICs, as it is the case for charities. A CIC is not entitled to any specific corporation tax exemptions and its profits are fully taxable unless it can be shown that the terms of the contract are such that, in tax law, the organisation does not amount to a taxable trade. In most cases, a CIC will enter into a contract with a third party to provide goods or services and it is difficult to see the contract as anything other than a commercial arrangement freely entered into. This leaves the question of whether the services are provided for reward or, perhaps more meaningfully, for profit.⁷⁰ A CIC is, of course, required under its articles of association to apply any profits for the benefit of the community. However, this not-for-profit motive does not affect the corporation tax position on earning profits; it merely directs how those profits are to be applied. A CIC's not-for-profit motive does not, therefore, affect its corporation tax status.⁷¹ Until now, there is no evidence to support that there will be a change of approach in relation to tax reliefs or lower corporate tax rates for CIC any time soon, so it is unlikely that this concern will be addressed by the government in the short-run.

5 Conclusion

In the early years of the development of the CICs in the UK, it was noted that this corporate form 'assumes [there is] a pool of investors with an appetite for wedding financial and social return and sufficient brand awareness and confidence to appeal to them . . . [It also], however, requires these investors to be especially devoted to the blended enterprise concept by substantially limiting the upside of their investments'.⁷² While it seems that this has not been a deterring factor for entrepreneurs and investors, at least looking at the number of CICs registered so far, time will show whether the CIC form will stand the test of time and to what extent it can play a central role in the UK's corporate sector. It is also very difficult to predict whether it will expand to all industries and sectors of the economy and it will be of critical importance whether multinational corporations will be tempted to become CICs or use this form for their subsidiaries.⁷³ Equally, it has to be seen how well CICs will cope with the competition that B corps and benefit corporations will create in the next few years. Even if the CIC model becomes a credible complementary model to the traditional/mainstream corporate models, it will be a huge success, because it will

⁶⁹Cho (2017), pp. 169–170.

⁷⁰See *BBC v Johns* [1964] 1 All ER 923.

⁷¹Batty (2015), pp. 25–26.

⁷²Brakman Reiser (2010), p. 649.

⁷³Liao (2015), pp. 311–312.

definitely challenge them and it will oblige corporate executives to re-think the purpose and mission of their companies.

This conclusion is based on the fact that increasing jurisdictions have been introducing or are seriously considering introducing new or hybrid structures with a more social orientation. All these new initiatives, such as B corps and CICs, are voluntary and still represent a trend, not an integral part of the international business landscape. They need to evolve, improve and become more attractive. One of the major challenges in regulating social enterprises is to find a solution that is both flexible and credible. On the one hand, it is necessary to ensure that companies that are designated ‘social enterprises’ do indeed pursue social goals. This may call for specific requirements for qualification as a social enterprise, as well as restrictions on what companies may do as long as they are classified as social enterprises. On the other hand, the regulations should be sufficiently flexible, so that the social enterprise regime is not solely for those whose activities have a purely charitable aim. It is not easy to balance the interests of those who are profit-driven and those who wish to pursue social purposes.⁷⁴ However, what should not be overlooked is the fact that the topics of social economy, social enterprises and corporate pluralism are now part of the agenda of discussion at all international political, economic and business forums. Even if the discussion takes a long time to mature and lead to any resolutions or initiatives, at least an exchange of views has been initiated and, as long this exchange does not halt to a stop, this is a positive development.

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⁷⁴Engsig Sørensen and Neville (2014), pp. 268–269.

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Social Enterprises and Benefit Corporations in the United States



Alicia E. Plerhoples

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1 Introduction

The United States is the birthplace of benefit corporations precisely because of American society's over-reliance on the private sector to solve societal problems. U.-S. federal and state regulation continuously fails to provide robust social safety nets or prevent ecological disasters. American society looks to companies to do such work. And yet companies will never voluntarily do what is needed to slow the climate crisis, end economic inequality, or achieve racial and gender justice, three

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major activist shareholder demands during the 2021 proxy season.¹ Neither corporate law nor market forces require companies to internalize such external costs. As an example, while the Walmart family is worth \$148.8 billion, Walmart workers cost the United States \$6.2 billion annually in public assistance.² Similarly, a U.-S. company might, for example, have called for racial justice in the wake the killing of George Floyd by a Minneapolis police officer, but rebuke shareholder proposals to conduct a racial equity audit of its own practices and policies that adversely impact Black Americans. Corporate directors share an explicit acknowledgement that a firm can be profitable by declaring its social and environmental values but a tacit acknowledgement that a firm cannot go too far in pursuing social or environmental impact without harming shareholder value. With employer-provided healthcare and less public spending on social safety nets than most industrialized countries,³ Americans remain at the mercy of companies whose primary pursuit is profit.

The innovation of social enterprise entities such as the benefit corporation and the social purpose corporation attempt to upend the U.S. legal framework which binds fiduciaries to focus on shareholder value. These entities are permitted, and sometimes required, to consider environmental, social, and governance (“ESG”) impacts of their operations, essentially internalizing ESG costs that would otherwise be paid by American communities and the environment. This chapter traces the development of social enterprise forms under U.S. law, starting with a brief discussion of corporate law as a creature of state law. It then provides an overview of two major types of social enterprise entities in the United States: (1) the Delaware Public Benefit Corporation and (2) the California Social Purpose Corporation. This chapter also discusses (i) the model benefit corporation act in comparison to the Delaware Public Benefit Corporation, (ii) the trend in shareholder proxy proposals for public companies to convert to public benefit corporations, and (iii) the proposed Accountable Capitalism Act. The chapter briefly examines other types of U.S. social enterprise entities, including hybrid ventures, worker cooperatives, and the low-profit liability company. The chapter concludes with a discussion of responses to companies’ ESG efforts by legal scholars, asset managers, and the U.S. Securities and Exchange Commission. These responses and the uptake of publicly traded public benefit corporations indicate a seismic shift forward in the use of ESG frameworks in the United States.

¹For highlights from the 2021 proxy season, see Shirley Westcott, 2021 Proxy Season Review (2021). <https://corpgov.law.harvard.edu/2021/08/05/2021-proxy-season-review/>. Accessed 7 March 2022.

²See Americans for Tax Fairness (2022).

³Valenta (2019), para. 3.

2 Fiduciary Duty and Federalism

U.S. corporate law does not exist as a single body of law. Rather, U.S. corporate law relies on a federalist system; corporate governance is primarily regulated by a company's state of incorporation or registration, although there are exceptions such as long-arm statutes, federal securities regulations, and capital markets' requirements. U.S. social enterprise law, therefore, varies state by state. Under Delaware corporate law, corporate directors' fiduciary duties are owed to the corporation and shareholder primacy reigns supreme. Management under a shareholder primacy regime sees corporate directors advancing and prioritizing shareholder interests over non-shareholder interests. However, under Tennessee law, for example, fiduciary duties are broader and the primary purpose of a corporation can encompass multiple purposes, including creating social value.⁴ Thirty-three U.-S. states have adopted constituency statutes that allow corporate directors to consider the interests of persons or groups other than its shareholders.⁵ Nonetheless, constituency statutes are viewed as not providing investors with sufficient notice as to when a corporation will pursue constituents' interests over shareholder value. Constituency statutes are also permissive, not mandatory. For these reasons, many states with constituency statutes have also adopted new entity forms such as the benefit corporation to put investors on notice of the multi-stakeholder nature of their investments and to require balancing shareholder and stakeholder interests.

3 The Delaware Public Benefit Corporation

Unlike other states' corporation statutes, Delaware General Corporation Law does not contain a constituency statute. Adoption of an entity form that specifically allows directors and managers to consider non-shareholder interests was the most viable route for expanding the social enterprise sector under Delaware law. Three years after the first introduction of the benefit corporation under Maryland law, Delaware adopted the public benefit corporation (PBC), a corporate form that is similar to but distinct from the model benefit corporation act relied upon by other states.⁶

Why focus on Delaware law to discuss benefit corporations in the United States? Delaware is the preeminent U.S. state with respect to corporate law. Firms that seek access to capital and financial markets look to Delaware for well-established case law, a judiciary that specializes in business law, a modern statute, a pro-business legislature, and the ability to conduct business in another state without paying Delaware corporate income tax.⁷ 67.6% of Fortune 500 companies are registered

⁴Tenn. Code Ann. § 48-103-204.

⁵Alexander (2018), p. 138.

⁶Del. Code Ann. tit. 8 § 362(a).

⁷Black Jr (2007).

in Delaware and 93% of U.S.-based initial public offerings in 2020 were completed by companies domiciled in Delaware.⁸ In the State of Delaware's press release announcing adoption of the public benefit corporation law, Delaware's Secretary of State highlighted what Delaware could bring to bear on the benefit corporation movement: "This law will provide benefit corporations with the stability, efficiency and predictability that are the hallmarks of Delaware corporate law."⁹ By adopting its own form of benefit corporation, Delaware's role as a corporate leader would not be preempted by other states.

Directors of a Delaware PBC must manage the corporation in a manner that balances (i) stockholders' pecuniary interests, (ii) the best interests of those materially affected by the corporation's conduct, and (iii) the public benefit¹⁰ identified in its certificate of incorporation.¹¹ A Delaware PBC varies significantly from the benefit corporation. The benefit corporation has been adopted in thirty-six states and Washington, D.C.,¹² and is based on the Model Benefit Corporation Legislation drafted by lawyer William Clark on behalf of B Lab, the nonprofit organization which provides private certifications of B corps and lobbies for benefit corporation adoption.¹³ Like the Model Benefit Corporation Legislation, the Delaware version embraces stakeholder governance by requiring directors to balance shareholder and non-shareholder interests.¹⁴ Unlike the Model Benefit Corporation Legislation, incorporators and shareholders of a Delaware PBC must state a specific public benefit within the corporation's charter. Requiring a specific public benefit was likely intended to enhance accountability, but it also reduces commitment to a holistic social and environmental impact.¹⁵ Directors of Delaware PBC pursue a specific mission rather than the broad general public benefit¹⁶ imposed by the Model Benefit Corporation Legislation. The differences between the Model Benefit

⁸Bullock (2020), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf>.

⁹State of Delaware Press Release (2013), State of Del., Governor Markell Signs Public Benefit Corporation Legislation (July 17, 2013) <http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/>.

¹⁰Public benefit means "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." Del. Code Ann. tit. 8, § 362(b).

¹¹Del. Code Ann. tit. 8, § 362(a).

¹²Data provided by B Lab at Benefit Corp Information Center, <http://www.benefitcorp.net/state-by-state-legislative-status>. Accessed 7 March 2022.

¹³Alexander (2018), p. 66.

¹⁴Id., p. 89.

¹⁵Murray (2014), p. 353.

¹⁶General public benefit means "a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard." Model Benefit Corp. Legis. § 102.

Table 1. Model benefit corporation legislation vs. Delaware public benefit corporation law

Statutory provision	Model benefit corporation legislation	Delaware public benefit corporation law
General public benefit	Required ^a	Not required, nor mentioned in statute
Specific public benefit	Not required (optional) ^b	Required to provide in charter ^c
Third-party standard	Required ^d	Not required unless mandated in charter ^e
Benefit report to shareholders	Provide to shareholders annually ^f	Provide to shareholders biennially ^g
Benefit report to public	Required to be made public ^h	Nor required to be made public unless mandated in charter ⁱ
Benefit director	Required for public companies ^j	Not required, nor mentioned in statute
Fiduciary duty to beneficiaries	Directors have no fiduciary duty to beneficiaries to create public benefit; directors have no personal monetary liability for failure to create public benefit ^k	Directors have no fiduciary duty to beneficiaries to create public benefit ^l
Benefit enforcement proceeding/ derivative suit	Benefit enforcement proceeding is the exclusive remedy to enforce public benefit ^m	Ability to bring derivative suit for failure to balance stockholder and non-stockholder interests the same voting threshold as other derivative actions against a conventional corporation
Conversion	Two-thirds vote of outstanding stock ⁿ	Majority vote of outstanding stock ^o

^a Model Benefit Corp. Legis. § 201(a)^b Model Benefit Corp. Legis. § 201(b)^c Del. Code Ann. tit. 8, § 362(a)(1)^d Model Benefit Corp. Legis. § 401(a)^e Del. Code Ann. tit. 8, § 366(c)(3)^f Model Benefit Corp. Legis. § 402(a)^g Del. Code Ann. tit. 8, § 366(b)^h Model Benefit Corp. Legis. § 402(b)ⁱ Del. Code Ann. tit. 8, § 366(c)(2)^j Model Benefit Corp. Legis. § 302^k Model Benefit Corp. Legis. §§ 301(c)(2) and 305(b)^l Del. Code Ann. tit. 8, § 365(b)^m Model Benefit Corp. Legis. § 305(a)ⁿ Model Benefit Corp. Legis. § 104(a)^o Del. Code Ann. tit. 8, § 251

Corporation Legislation and the Delaware Public Benefit Corporation Law are set forth in Table 1.

Delaware has modified its public benefit corporation law twice. It made significant changes to the Delaware PBC in 2020. First, Delaware changed the threshold for conversion of a corporation into a PBC from 90% of outstanding stock in the

original 2013 law, to two-thirds majority in a 2015 amendment, to majority vote in the 2020 amendment to the PBC law.¹⁷ Delaware eliminated the statutory appraisal rights of stockholders who did not vote for the conversion.¹⁸ Delaware also amended the PBC law to make clear that a director's failure to balance shareholder and non-shareholder interests (as required by Section 365(a) of the PBC law) cannot lead to personal liability derived from a 102(b)(7) carveout claiming lack of good faith.¹⁹ Finally, Delaware also amended the PBC law to make the derivative suit threshold the same as other Delaware corporations.²⁰

Practitioners have credited these amendments with an expansion in the number of Delaware PBCs.²¹ At the beginning of 2020, there were three publicly traded PBCs; by the end of 2021 there were at least 12.²² Sustainable retail brands such as Allbirds and Warby Parker are publicly traded public benefit corporations. Companies like Warby Parker state on their initial registration forms with the U.S. Securities Exchange Commission that their "duty to balance a variety of interests may result in actions that do not maximize stockholder value."²³ While Delaware law does not require a PBC to conduct a third-party assessment of its specific public benefit, some publicly traded companies are choosing to. Indeed, Delaware PBC and sustainable footwear company Allbirds worked with ESG thought-leaders from companies, rating agencies, academia, and investment firms to create the Sustainability Principles and Objectives Framework (SPO Framework) for late-stage private companies preparing to go public and wanting to disclose their ESG principles and metrics.²⁴ The SPO Framework goes beyond any specific public benefit and is holistic, similar to a general public benefit. The SPO Framework covers ESG commitments around climate and environment, corporate governance, value chain, people management, and transparent assessment.²⁵ Company self-assessment is not allowed. Allbirds chose Institutional Shareholders Services (ISS), the largest proxy advisory firm, to independently assess and verify Allbirds' performance against the SPO Framework.²⁶ Companies like Allbirds who take on additional stakeholder accounting

¹⁷Littenberg et al. (2020), para. 9.

¹⁸Littenberg et al. (2020), para. 10.

¹⁹Del. Code Ann. tit. 8, § 365(c).

²⁰"Any action to enforce the balancing requirement of § 365(a) of this title, including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action own individually or collectively, as of the date of instituting such action, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least \$2,000,000 as of the date the action is instituted." Del. Code Ann. tit. 8, § 367.

²¹See Littenberg et al. (2020).

²²Marquis (2021), para. 2.

²³Warby Parker, Form S-1 (Aug. 24, 2021).

²⁴See Sustainability Principles (2021).

²⁵Id.

²⁶For full text of the ISS assessment of Allbirds, see <https://www.isscorporatesolutions.com/file/documents/spo/spo-20211004-Allbirds.pdf>.

clearly see the Delaware PBC law as the floor and not the ceiling with respect to their ESG efforts. Indeed, an independent, third-party assessment mimics the requirement of the model benefit corporation act.

Further evidence of PBCs gaining ground come during the 2021 proxy season. 19 shareholder proposals were submitted asking public companies to convert to a PBC.²⁷ While none of the proposals were successful, organizations like The Shareholder Commons, an influential nonprofit that promotes a sustainable economy, continue to launch investor campaigns to get companies to convert to PBCs. For example, The Shareholder Commons sought a shareholder proposal for Fox Corporation to convert to a PBC with the reasoning that media companies should forgo profits derived from misinformation that threatens democracy and instead adhere to journalistic integrity.²⁸ In its 2022 proxy voting guidelines, BlackRock, the world's largest asset management firm, states that it will only support shareholder proposals for PBC conversion that protect shareholder interests and specify how shareholder and stakeholder interests will be impacted; even then, it will only do so on a case-by-case basis.²⁹

3.1 *The Accountable Capitalism Act*

Although innovations in social enterprise law have primarily been left to state legislatures, there have been efforts in the U.S. Congress to bring all major U.S. public companies into line with ESG principles. The Accountable Capitalism Act was introduced to the U.S. Senate by Senator Elizabeth Warren in August 2018 and reintroduced in January 2020.³⁰ The Act would require very large American corporations to obtain a federal charter to become a U.S. corporation, with requirements based on the model benefit corporation legislation.³¹ The directors of federally-chartered American corporations would have to consider the interests of all relevant stakeholders, not just shareholders, when making decisions.³² The Accountable Capitalism Act categorizes a large entity as one that (i) is organized as a corporation, body corporate, body politic, joint stock company, or limited liability company, (ii) engages in interstate commerce, and (iii) has annual revenue over \$1 billion.³³

²⁷Gibson Dunn (2021), p. 27.

²⁸For full text of The Shareholder Commons' shareholder proposal for Fox Corporation, see <https://theshareholdercommons.com/media-markets-and-systemic-risk/>.

²⁹BlackRock (2022), p. 20.

³⁰S. 3348 – 115th Congress: *Accountable Capitalism Act* (Aug. 8, 2018); accessible at <https://www.congress.gov/bill/115th-congress/senate-bill/3348/text>; see also S. 3215 – 116th Congress: *Accountable Capitalism Act* (Jan. 16, 2020), accessible at <https://www.congress.gov/bill/116th-congress/senate-bill/3215/text?r=2 & s=2>.

³¹See id.

³²S. 3215 – 116th Congress: *Accountable Capitalism Act* § 5C.

³³S. 3215 – 116th Congress: *Accountable Capitalism Act* § 4A.

The Act would also require the federally-chartered corporation (i) to have a board that includes substantial employee participation, (ii) to abide by restrictions on the sale of company shares by directors and officers, and (iii) obtain shareholder and board approval for all political expenditures.³⁴ Under these general requirements, specific standards must be met. The Act aims to prioritize employees' interests by having a federally-chartered corporation's employees elect at least 40% of its board of directors.³⁵ To discourage stock-based compensation and reduce the traditionally exclusive focus on shareholder returns, corporate executives' shares must be held for at least five years after they are received, and at least three years after a share buyback.³⁶ To ensure that corporate political activity truly represents a consensus among stakeholders, corporate political activity must be specifically authorized by both 75% of shareholders and 75% of board members.³⁷ Finally, the Act would also establish the Office of U.S. Corporations, which would have various duties such as reviewing and granting charters for all large entities.³⁸

The Act gained traction when Senator Warren campaigned for president in the Democratic primary preceding the 2020 presidential election.³⁹ On January 16, 2020, Senator Warren introduced an updated version of the Act (S. 3215), but it did not receive a referral to a specific committee or vote.⁴⁰ Federally-chartered corporations seem implausible given ongoing partisan gridlock in Congress.

4 California Social Purpose Corporations

Although benefit corporations are the most well-known new corporate form to fuse profit with purpose, other forms abound in the U.S., most notably the California Social Purpose Corporation. Through the Corporate Flexibility Act of 2011 (the "Act"), California became the sixth state to adopt a law recognizing benefit corporations and the first to recognize what the state initially called a "flexible purpose corporation" (an "FPC").⁴¹ The Act amended the California Corporations Code to allow companies formed as benefit corporations and FPCs to balance

³⁴ Summary: S. 3215 – 116th Congress (2017–2018), Congressional Research Services, accessible at <https://www.congress.gov/bill/116th-congress/senate-bill/3215?r=2 & s=2>.

³⁵ Accountable Capitalism Act One-Pager, Office of Senator Elizabeth Warren (2018), <https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf>.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ See Leonhardt (2018).

⁴⁰ S. 3215 (116th): Accountable Capitalism Act, GovTrack <https://www.govtrack.us/congress/bills/116/s3215>. Accessed 11 Jan. 2022.

⁴¹ S.B. 201, 2011-12 Leg., Reg. Sess. (Cal. 2011) (enacted); A.B. 361, 2011-12 Leg., Reg. Sess. (Cal. 2011) (enacted); Westaway (2011).

profit-maximizing goals with social goals.⁴² While both benefit corporations and FPCs allow corporations to pursue a purpose outside of and in addition to profit-maximization, the two forms differed in how they defined permissible additional purposes.

California FPCs were formed for the purpose of achieving a specific, flexible purpose.⁴³ Permissible specified purposes included (a) charitable and public purpose activities that could be carried out by a nonprofit public benefit corporation, or (b) the purpose of promoting positive short or long-term effects (or minimizing adverse short or long-term effects) on (i) the FPC's employees, suppliers, customers and creditors; (ii) the community and society; or (iii) the environment.⁴⁴ Directors of FPCs were guided, but not required, to consider the short and long-term prospects of the FPC, the best interests of FPC, and the purpose for which the FPC is formed when making decisions.⁴⁵

In 2014, California passed a bill that renamed the Corporate Flexibility Act of 2011 the "Social Purpose Corporations Act" and what were formerly known as FPCs became social purpose corporations ("SPC").⁴⁶ An SPC must state that it is organized as an SPC and must include "SPC" or "social purpose corporation" in its name.⁴⁷ Unlike benefit corporations, SPCs may select a narrow purpose or purposes (a "Social Purpose" or "Social Purposes") to pursue in addition to shareholder maximization.⁴⁸ SPCs are required to either (1) state their specific social purpose in their articles of incorporation or (2) include a statement that the corporation has the purpose of promoting the positive effects of (or minimizing the negative effects of) the SPCs activities upon any of the following: (i) the SPC's employees, suppliers, customers, and creditors; (ii) the community and society; or (iii) the environment.⁴⁹ Where benefit corporation directors must consider the impact of their decisions on the general benefit, defined broadly by statute, SPC directors may focus on the best interests of the corporation and on their chosen narrowly tailored focuses.⁵⁰

SPC boards must include a discussion and analysis (an "MD & A") of the corporation's performance with respect to its social purpose set forth in the SPC's annual report.⁵¹ The MD & A must identify and discuss actions taken to achieve the corporation's social purpose and discuss any standards used to measure social purpose objectives and the process for selecting these standards.⁵² SPCs are also

⁴²See *id.*

⁴³S.B. 201, 2011-12 Leg., Reg. Sess. (Cal. 2011) (enacted).

⁴⁴Cal. Corp. Code § 2602.

⁴⁵S.B. 201, 2011-12 Leg., Reg. Sess. (Cal. 2011) (enacted).

⁴⁶S.B. 201, 2013-14 Leg., Reg. Sess. (Cal. 2014) (enacted).

⁴⁷Cal. Corp. Code § 2602.

⁴⁸Cal. Corp. Code § 2513.

⁴⁹Cal. Corp. Code § 2602.

⁵⁰Cal. Corp. Code § 2700.

⁵¹Cal. Corp. Code § 3500.

⁵²*Id.*

required by law to provide shareholders with a “Current Report” within 45 days of: (i) any significant expenditures used to further the corporation’s social purpose; (ii) any withholding of expenditures in furtherance of social purposes; or (iii) deciding that the social purpose has been satisfied and should no longer be pursued.⁵³

Amending an SPC’s stated purpose requires approval from two-thirds of the shareholders of each voting class, or by a greater number of shareholders if required by the articles.⁵⁴ Similarly, a reorganization or merger that would materially alter or eliminate the social purpose or purposes requires approval from two-thirds of the shareholders, unless otherwise specified by the articles.⁵⁵ SPC shareholders are also entitled to maintain derivative lawsuits to enforce duties of directors to weigh additional factors between their fiduciary duties of care and loyalty to the corporation.⁵⁶

There are over eighty SPCs (and over twenty FPCs) that are active in California and whose activities span industries and social purposes.⁵⁷ LifeArk, Spc. is an SPC that registered in 2017 and whose social purpose is to create “safe, sustainable and affordable homes for people living in low-income, marginalized communities around the world.”⁵⁸ Higher Grounds Coffee House SPC, Inc. is a California SPC that offers a less concrete purpose: to provide “an atmosphere that allows others to experience faith, hope, and love.”⁵⁹ Homeboy Recycling is an SPC that provides B2B electronics recycling services nationwide and offers job training and placement programs to formerly gang involved and previously incarcerated men and women.⁶⁰ Homeboy Recycling has two social purposes: (i) to help minimize the impact of electronic waste on society by conducting socially responsible recycling; and (ii) to assist members of society facing barriers to employment.⁶¹ As these three diverse SPCs show, SPCs can vary widely in purpose and in sector.

⁵³ Cal. Corp. Code § 3501.

⁵⁴ Cal. Corp. Code § 3000.

⁵⁵ Id.

⁵⁶ Cal. Corp. Code § 2701.

⁵⁷ Business Search, Cal. Sec’y of State, <https://businesssearch.sos.ca.gov/>. Accessed 1 Nov. 2021 (select “Corporation Name” in Search Type, then search “SPC,” “Social Purpose Corporation,” “FPC,” and “Flexible Purpose Corporation” in Search Criteria, and filter results by state and activity status).

⁵⁸ Articles of Incorporation of LifeArk, SPC. a Social Purpose Corporation, <https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=04088089-23316465> (Dec. 4, 2017).

⁵⁹ Articles of Incorporation of Higher Grounds Coffee House SPC, Inc., <https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=04070520-23000340> (Sept. 8, 2017).

⁶⁰ Homeboy Recycling, <https://homeboyrecycling.com/about-us/social-impact/>. Accessed 3 Nov. 2021.

⁶¹ Articles of Incorporation of a Social Purpose Corporation, <https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=03959573-21477276> (Nov. 4, 2016); Homeboy Recycling, <https://homeboyrecycling.com/about-us/social-impact/>. Accessed 3 Nov. 2021.

5 Other U.S. Social Enterprise Forms

5.1 *Hybrid Ventures*

While a conventional corporation may pursue profit and a nonprofit organization may pursue a charitable mission, some social enterprises pursue dual missions that are co-equal. This dual-mission purpose is distinct from a commercial firm that seeks to consider their ESG impacts on various stakeholders. The dual-mission organization typically is pursuing a charitable or quasi-charitable mission and funding that mission through revenue-generating activities. Although the hybrid venture purpose could be carried out as a public benefit corporation or social purpose corporation, there may be benefits to obtaining tax-exempt status, which is not available to a PBC or SPC. Nonetheless, nonprofit organizations that are tax-exempt under Section 501(c)(3) of the U.S. tax code (most commonly “public charities”) are subject to the nondistribution constraint, meaning that they cannot distribute profits. Furthermore, the U.S. tax code limits the amount of revenue-generating activity a public charity can engage in if it is not closely tied to its charitable purpose.⁶² The U.S. Internal Revenue Service (“IRS”) can also deny or revoke the tax-exempt status of a public charity that engages in revenue-generating activity that is beyond the scope of its exempt purpose.

For example, the IRS denied tax-exempt status to an organization that operated a grocery store staffed by “hard-core unemployed” persons because its commercial grocery store operations went far beyond the scope of its exempt purpose: training the unemployed.⁶³ The grocery store was conducted in large part for the purpose of providing a low-cost retail grocery outlet in the community as an end in itself.⁶⁴ As such, the commercial operations were larger than reasonably necessary to accomplish its charitable purpose.⁶⁵ Importantly, the IRS found that the operation of a grocery store where food is sold to residents in need at marked-down prices is not in itself a charitable purpose under common law doctrine or the U.S. tax code.

When a social enterprise seeks to pursue a social or environmental mission but is prevented from engaging in substantial commercial activities as a nonprofit organization, a hybrid venture is a viable option. A common hybrid venture structure entails two entities—a 501(c)(3) tax-exempt nonprofit corporation and a for-profit entity (typically a corporation or benefit corporation)—that form a parent-subsidiary relationship. The nonprofit entity wholly or partially owns the for-profit subsidiary. A hybrid venture enables the social enterprise to preserve its tax-exempt status and charitable purpose but distribute profits (and potentially raise capital) through the

⁶²For a definition and discussion of unrelated taxable business income, see Treas. Reg. § 1.513-1(d)(2); Hopkins (2005), p. 42.

⁶³Rev. Rul. 73-127, 1976-1 C.B. 221.

⁶⁴Id.

⁶⁵Id.

for-profit entity.⁶⁶ It is difficult to quantify the number of hybrid ventures in the United States due to the diffuse nature of company records in a federalist system. There are approximately 1.5 million nonprofit organizations registered in the United States⁶⁷ and it is likely that only a fraction of these are hybrid ventures.

5.2 Worker Cooperatives

Worker cooperatives are an older form of entity than most other social enterprise entities. Some date back to the Civil War and were a means of creating economic stability, particularly among farmers, including those in black communities, in the rural South.⁶⁸ U.S. worker cooperatives have experienced a resurgence with an estimated 30% growth since 2019.⁶⁹ Worker cooperatives are companies owned, run, and controlled by and for the benefit of their members to realize economic, social, and cultural needs and services.⁷⁰ Key features of worker cooperatives include democratic member-control, typically through equal voting rights, and member economic participation through profit-sharing. Worker cooperatives can be categorized as social enterprises which focus on ESG efforts because they return economic power to laborers rather than to shareholders or managers. According to a national census of worker cooperatives conducted in 2021, the average top-to-bottom pay ratio of U.S. worker cooperatives is 2:1 compared to traditional corporations' 320:1 with the average starting wage \$5 more than the highest state minimum wage.⁷¹

The New York Cooperative Corporation Law, adopted in 1985, exposes the benefits of worker cooperatives, including (1) increased job satisfaction, (2) increased productivity, (3) economic benefits from workers' own labor, (4) the creation of new jobs, and (5) greater community economic stability.⁷² More recently, New York City local government has been active in growing the worker cooperative sector by providing technical, financial, and legal support to worker cooperatives through the Worker Cooperative Business Development Initiative ("WCBDI")

⁶⁶A hybrid venture adds administrative complexity and risks. A for-profit subsidiary can jeopardize its nonprofit parent's tax-exempt status if it is merely an instrumentality of the parent without a real and substantial business function. The two entities must maintain separate operational, administrative, and legal functions to preserve the nonprofit parent's tax-exempt status. I.R.C. § 512(b)(13)(d)(i)(I).

⁶⁷Urban Institute (2019), para. 2.

⁶⁸Gordon Nembhard (2014), p. 48.

⁶⁹United States Federation of Worker Cooperatives (2021b), p. 2.

⁷⁰Gordon Nembhard (2014), p. 2.

⁷¹United States Federation of Worker Cooperatives (2021a), Census, para. 3; United States Federation of Worker Cooperatives (2021b), State of the Sector, p. 2.

⁷²N.Y. Coop. Corp. Law § 80 (McKinney 2021).

which it launched in 2015.⁷³ Successful New York worker cooperatives include Cooperative Home Care Associates (“CHCA”), the largest worker cooperative in the United States.⁷⁴ CHCA was founded in 1992 and provides home care services and training throughout Manhattan, Brooklyn, and the Bronx in New York.⁷⁵ CHCA started with 12 personnel yet has grown to over 2,000 staff and provides pro bono home health aid and personal care assistant training to over 600 low-income women annually.⁷⁶ CHCA is also a certified B corp with an Impact Score of 140.2 out of 200, which illustrates that B-Corp certification, discussed elsewhere in this text, is compatible with worker cooperatives.⁷⁷

5.3 *Low-Profit Limited Liability Company*

Another form of social enterprise is the low-profit limited liability company or L3C. The L3C is a limited liability company formed to attract investment from both the private and nonprofit sectors, and specifically comply with IRS rules on program-related investments (PRIs) by private foundations.⁷⁸ Although investments, private foundations use PRIs to pursue charitable purposes and not monetary gains. A L3C must be organized to advance one or more charitable or education purposes defined in the U.S. tax code and cannot have a significant purpose of producing income.⁷⁹ As a limited liability company, L3C members have flexibility to agree through contract how the company is governed and financed. L3Cs are not eligible for exemption from income tax as 501(c) tax-exempt organizations are. L3Cs have not found much success in the United States because the IRS never sanctioned their presumptive use by private foundations for PRIs.⁸⁰ Without such presumptive approval, private foundations still seek IRS preapproval for PRIs. Moreover, conventional limited liability companies can be used to meet the same charitable purpose as L3Cs.

⁷³For information about WCBDI, see Worker Cooperative Business Development Initiative (2020) A Report on the Sixth Year of the Worker Cooperative Business Development Initiative. https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy20.pdf. Accessed 8 March 2022.

⁷⁴Dewan (2014), para 3.

⁷⁵See Cooperative Home Care Associates (2022).

⁷⁶Id.

⁷⁷B Lab (2022).

⁷⁸Callison and Vestal (2010), p. 282.

⁷⁹See, e.g., Illinois’s Low-Profit Limited Liability regulations, 805 Ill. Comp. Stat. Ann. 180/1-26.

⁸⁰Brakman Reiser and Dean (2017), p. 64.

6 Conclusion: Seismic Shifts Forward

Despite the growth of social enterprise entity forms, corporate ESG efforts face a high degree of skepticism among American legal scholars who note the lack of transparency and accountability that legal entity innovations confer. Brakman Reiser and Dean highlight the “trust gap” between investors and the various forms of social enterprise entities discussed in this chapter—why would an investor invest in a company that prioritizes neither the investor nor the stakeholder and makes social or environmental commitments that are difficult to monitor and enforce?⁸¹ Where corporate directors are not fiduciarily bound to shareholders, and non-shareholder stakeholders have no legal recourse, corporate directors may find it hard to internalize social and environmental externalities. Additionally, the lack of universal, regulated standards for measuring ESG efforts are breeding grounds for fraud and greenwashing.

Despite these criticisms, there has been a seismic shift towards ESG management, monitoring, and disclosures since the first benefit corporation legislation was enacted. U.S. capital markets are moving forward with ESG frameworks. BlackRock claims to embrace stakeholder theory and the importance of material ESG factors to achieving long-term value creation.⁸² In its 2022 proxy voting guidelines for U.-S. securities, BlackRock states that it may vote against (i) boards that fail to adequately manage or disclose material ESG factors and (ii) boards that do not provide proper oversight of material ESG risk factors.⁸³ BlackRock’s proxy voting guidelines also makes clear that it supports executive compensation plans that incentivize long-term valuation creation which necessarily requires mitigating ESG risks.⁸⁴ Additionally, BlackRock’s proxy voting guidelines recommends that companies use and disclose ESG metrics based on the Sustainability Accounting Standards Board or similar reporting standards.⁸⁵

The SEC is responding to public companies’ ESG efforts as well and is expected to propose a rule requiring climate and possibly other ESG-related disclosures in public company filings. In 2021, Acting SEC Chair Allison Herren Lee directed SEC staff to review public companies’ existing climate-related disclosures and assess their compliance with existing federal securities laws.⁸⁶ Acting Chair Lee also sought public comments on climate-related disclosures to facilitate the SEC’s rulemaking.⁸⁷ The comments were favorable towards mandatory climate-related disclosures that are material, including quantifying direct and certain indirect greenhouse gas emissions. Notably, the comments called for the use of metrics that are

⁸¹ Brakman Reiser and Dean (2017), pp. 66–74.

⁸² BlackRock (2022), p. 18.

⁸³ BlackRock (2022), p. 3.

⁸⁴ BlackRock (2022), p. 13.

⁸⁵ BlackRock (2022), p. 16.

⁸⁶ Herren Lee Feb. (2021a), para. 1.

⁸⁷ Herren Lee Mar. (2021b), para. 1.

consistent with existing ESG measurement standards.⁸⁸ While focused on climate-related risks, SEC rules on other ESG related risks are not off the table.

One cannot deny the power that BlackRock, as the world's largest asset manager, and the SEC can wield in shifting public companies and capital markets to embrace ESG management, monitoring, and disclosures. Whether the emerging ESG frameworks model themselves on public benefit corporations or other social enterprise entities is yet to be determined.

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⁸⁸Brisson et al. (2021), p. 2.

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Innovation in Uruguayan Business Law: The “Benefit and Collective Interest Companies and Trusts”



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1 Introduction: Purpose and Context – “Benefit Companies”

The purpose of this chapter is to describe the situation of the so-called “benefit companies” in Uruguay. It does not intend to provide a comprehensive explanation of the social and cooperative enterprises in Uruguay. Thus, its scope is limited to the analysis of benefit companies in Uruguay.

Considering that the Uruguayan Parliament has recently passed a specific regulation on this matter (Law No. 19.969, dated July 2021, called “Ley de sociedades de beneficio e interés colectivo”) it is necessary to introduce the concepts of “benefit companies,” or “triple impact companies,” which—as a result of their novelty—present neither doctrinal development nor jurisprudential treatment, but are the object of increasing attention paid by business, social, and political circles in Uruguay.

In a comparative perspective, it can be said that this type of company is born in the context of two great problems that mankind is experiencing in this postmodern age.

On the one hand, an important global issue is damage to land. Humans consume natural resources in amounts that exceed what can be regenerated by nature. We have gone beyond the planetary eco-systemic limits to the point that if we stopped our present practices, the ecosystem would nevertheless continue to suffer degradation. In this sense, it is no longer enough to stop these consuming practices; it becomes necessary to regenerate.¹

The other major global problem is the increasing inequality in terms of social, economic, and technological development and in terms of the distribution of wealth between people and countries. Since September 2015, when the United Nations 2030 Agenda for Sustainable Development was approved, including the 17 Sustainable Development Goals (SDGs), there has been a clear awareness and strong recognition that the current model of social development is unsustainable and that we must transform the global economy by adopting a development model guided by the paradigm of sustainability.

Meaning, at a global level, that the paradigm adopted by our social and economic organizations is not useful for solving our massive problems. This is why different alternatives and responses to this situation are being tested and rehearsed in different places and areas. In his encyclical “Laudato si,” Pope Francis holds that “we can once more broaden our vision. We have the freedom needed to limit and direct technology; we can put it at the service of another type of progress, one which is healthier, more human, more social, more integral.”²

¹See the conclusions of the Climate Summit Cop25 Chile. Madrid, December 2019, available at www.cop25.mma.gob.cl.

²Pope Francis (2015), para 112.

The category of “benefit companies” is inspired by the need to find new solutions to the challenges mentioned above. On the one hand, there has never been such a large population on the planet; on the other, never has nature been so oppressed.

2 “Benefit Companies (BIC)” and “B” Companies

It is in this context that the so-called “System B”³ was born and consolidated; it aims to redefine the meaning of success in the economy, proposing a model where success is not measured exclusively by economic growth, but by a more complex set of indicators pointing to the well-being of people, society, and nature.⁴ How can this be achieved? Inter alia, by building and strengthening a favorable ecosystem of those companies that use the force of the market to solve social and environmental problems: the “B companies.”

Estimates indicate that there are between 125 million and 160 million companies in the world; therefore, there are at least as many opportunities to solve these challenges.⁵ Companies have the potential to open paths of transformation, to be part of the construction of a new lifestyle that might be more collaborative and produce shared economic growth, just by understanding that financial statements may not only assess the level of profits, billing, or dividends, but may also show how businesses integrate benefits with the impact on the environment and society in a measurable and scalable way.

This is how the model of B companies arises; they are companies that seek to be the best companies “for” the world and not “of” the world.

In other words, we are leaving behind an era in which the focus was exclusively on good products and processes, and we are entering the age of sustainability through economic activity which brings with it the era of good companies, and companies working to create integral value.

3 Characteristics of “B Companies”

We highlight four essential features of all B companies.

³ www.sistemab.org.

⁴ As an example of this vision, we mention the Human Development Index created by the United Nations Development Program, which proposes to measure human development by considering not only economic parameters, but going far beyond them, to include social, cultural, political, spiritual, and environmental elements. See also Sen (1999).

⁵ Pedro Tarak, co-founder of “Sistema B.” See www.sistemab.org.

3.1 Purpose

The aim of B companies is not only to achieve economic profit. They have a broader purpose and place this purpose as a guideline for the activity of the company, defining it in the company's articles of incorporation—that is, in its business core. Therefore, as an essential constitutive element, B companies maintain a commitment to create economic, social, and environmental value together with pursuing profit.

A good example could be the “Guayakí” company, which produces yerba mate.⁶ The purpose of this company, as expressed in its articles of incorporation, is “the regeneration of the forest in the region of Misiones (part of Argentine, Paraguay, and Brazil) and the reconstruction of the social fabric of the people who depend on the forest.” It is, therefore, a for-profit company that includes in its articles of incorporation a purpose that goes beyond mere financial gains, thus generating a new market identity (a new business DNA that incorporates the solution of social and environmental problems in its business core). In other words, it uses the force of the market, which is conceived in classic economic theory as neutral to ethical values other than freedom, to reach further objectives on equity and sustainability.

How does it proceed? Yerba mate is a beneficial species that helps regenerate other vegetable species that have disappeared due to monoculture. The Guayakí Company (Certified B) buys yerba, which is cultivated or harvested by small Aboriginal communities in degraded areas, and the company pays four to six times the ordinary market price. This product is exported in bulk to the United States and is used as a raw material to produce 21 different consumer goods, including energy drinks, which compete with others in the market.

What kinds of products do they offer? What is the business model? The product is certainly more expensive than those offered by competitors, but consumers are willing to buy them considering the planetary ecosystem services involved in that purchase. Therefore, the client purchases something that is useful to him—for example, yerba to prepare mates or drinks made from yerba mate - but his microeconomic decision is influenced, for instance, by the fact that half a kilo of yerba is equivalent to 573 grams of sequestered net carbon. Thus, his microeconomic decision is oriented by a purpose that exceeds the mere market consideration of the price/quality relationship, involving the feeling of being a responsible consumer, taking part in the solution to larger problems. The daily satisfaction of the need provided by the sales contract is complemented by the contribution to collective solutions that are external to the balance of demand and offer. “People using business as a force for good.”

⁶“Mate” is the national beverage in Uruguay, with the highest consumption of yerba mate per capita in the world.

3.2 Extension of the Liability of Administrators

The second characteristic of B companies is their administrators. In this type of organization, the fiduciary duties owed by administrators to shareholders are expanded to include all stakeholders as beneficiaries. This is known as “benefit-sharing thinking,” which implies expanding the exclusive consideration of the company’s shareholders to include the interests of all the affected parties or stakeholders. This allows the managers and the board of directors to carry out management strategies in which short-term interests are balanced with long-term ones. Therefore, their actions are not exclusively guided by obtaining short-term financial economic returns, generally expressed as financial earnings in annual income statements.

3.3 Commitment, Reporting, and Transparency (Certification)

To be formally considered a “B company,” the organization must assume a commitment to achieve a positive net impact in three dimensions: the classical economic-financial, the social, and the environmental domain. Furthermore, this commitment must be externally assessed. The management is evaluated by considering the satisfaction of all the interests involved, internal, and external. For this purpose, an “Impact Assessment Tool B” is used which considers the workers, community, environment, governance, and the impact business model.

This tool, used by an organization called “B Lab,”⁷ was designed to determine the impact of management in the social and environmental fields with the same accuracy as the assessment of financial results. It is confidential, free to access, and online; it allows any company to measure the progress of its social and environmental management in all areas of the business from the supply chain to the use of resources, how the company makes decisions, makes donations, and distributes benefits to its employees. The company commits to a certain level of net positive impact in all dimensions. This combination allows for the creation of a new market identity related to the evolution of the economic system.⁸

Today, there is an increasing interest in circular, blue, orange, collaborative economy, common goods, etc. More specifically, this refers to moving from good-quality products and processes to high-quality companies, and companies that create comprehensive value. These are B companies, and they represent a paradigm shift in the business world.

⁷<https://bimpactassessment.net/es/mide-lo-que-importa>.

⁸Carrelo (2021).

3.4 *B corps sign a Declaration of Interdependence as B Corps (which is a registered trademark) as a symbol of their commitment to the shared collective purpose.*

4 The “B Companies” and the “BIC Companies” (“Benefit Companies”)

Certified B corporations are often confused with “BIC companies” or “benefit companies.” The name “B companies” is often used mistakenly to refer to “BIC companies” with the intention of abbreviating their name. Indeed, BIC companies are complementary to B companies as they both have the same aims.

However, although they have much in common and may complement each other, they also correspond to distinct concepts: not all certified B companies use the legal structure of BIC companies, and not all BIC companies are certified B companies.

On the one hand, B companies have a market identity, certified by private organizations; their legal characteristics, although they may be coincident with those of BIC companies, are not necessarily identified with them.

On the other hand, BIC companies belong to a legally defined category, enforced in countries that have specific legislative provisions, called BIC companies, benefit companies (or, in the case of Uruguay, “Benefit and Collective Interest Companies”). As explained below, since July 14, 2021, Uruguay has been among the list of countries with such legislative provisions (Law No. 19.969 of Benefit and Collective Interest Companies and Trusts).

Hereinafter, we shall sketch a brief description of their differences and similarities.

The so-called benefit and collective interest companies involve a legal type that recognizes them as a business model in some countries’ positive law; therefore, it is necessary for their existence that a formal law incorporates them in the respective corporate legal typology, with the following characteristics:

- The expansion of the corporate purpose such as to include the obligation to generate a positive social and environmental impact in the community. We use the word “expansion” since it is always essential that the economic interest in profit remains in force. In this way, we speak of triple-impact companies: economic, social, and environmental.
- The requirement that the obligation to ensure a triple impact must be reflected in the original contract or bylaws. This makes it certain that we are in front of a benefit and collective interest company.
- The extension of the duties of the administrators, who are obliged, in the performance of their duties and decision-making, to consider not only the interests of the partners or shareholders, but also those of the dependent employees and, in general, the suppliers of workforce. Additionally, they consider the interests of the communities that they are linked with, the local and global environment, and the long-term expectations of partners and society. Otherwise,

administrators not directing their management exclusively according to the maximization of economic profit would be liable to the shareholders.

B corporations are not necessarily incorporated as benefit and collective interest companies. For example, it may be enough to be admitted as a B corporation since the corporation’s policies, practices, and management intends to generate positive impacts, contributing to the solution of social and environmental problems. Additionally, the corporation may commit to improve along this path in a consistent manner.

However, to be considered a “B corporation,” the entity must go through a certification process that evaluates all its dimensions, with high standards of transparency. Therefore, for companies who want to effectively follow a path of permanent improvement, the best possible combination is to be a certified B company, legally incorporated as a BIC company (in those countries where it is allowed by law).

However, the contrary is more common; there are countries where there is no BIC law and whose commercial or corporate regulations are not aligned with the requirements that system B requests from companies to certify them.

In these cases, triple impact companies encounter two difficulties. On the one hand, there is no law that recognizes their existence; on the other hand, internal regulations make it difficult for them to achieve international B Lab certification.

This is the prevailing scenario in Latin America, except for Colombia and Ecuador. There is a lack of legal frameworks that regulate and provide legal certainty for companies that pursue a collective benefit and interest and that do not want, or cannot be, certified by private entities.

In countries with legal provisions, both certified and non-certified companies can take the form of BIC companies, fulfilling legal requirements and obtaining deserved status.

As of January 2020, there were more than 10,000 benefit corporations and 3,200 certified B corporations.⁹

B Lab¹⁰ began in 2006 with the idea that a different kind of economy was not only possible, but necessary, and that business could lead the way towards a new, stakeholder-driven model. B Lab became known for certifying B corporations, which are companies that meet high standards of social and environmental performance, accountability, and transparency.

However, its aim goes farther beyond. The intention is to build the B corp movement to change our economic system—and to do so, the rules of the game must change. B Lab creates standards, policies, tools, and programs that shift the behavior, culture, and structural underpinnings of capitalism, mobilizing the B corp community towards collective action to address society’s most critical challenges.

⁹This information was provided by William Clark, legal consultant pro bono of B Lab, who redacted the model law that served as a ground for Benefit Corporation Legislation passed in 30 US states. It is available at www.sistemab.org.

¹⁰Lab, B, Global site, available at <https://www.bcorporation.net>.

By harnessing the power of business, B Lab positively impacts companies around the world, helping them balance profits with purpose. Together, we shift our global economy from a system that profits few to one that benefits all; advancing a new model that moves from concentrating on wealth and power to ensuring equity, from extraction to generation, and from prioritizing individualism to embracing interdependence. Their motto is “We won’t stop until all businesses are a force for good.”

System B asks its members to incorporate certain clauses that refer to the purpose of triple impact in the bylaws of the companies or incorporation contracts and to expand the fiduciary duties of the administrators (hereinafter called Clause B). Clause B has been defined as an essential requirement of B companies due to its purpose, which is to ensure the continuity of the triple impact purpose regardless of the will of the shareholders. Likewise, it allows the administrator to carry out his or her activities and make decisions by assessing aspects that exceed the maximization of profit.¹¹

Certified B corporations are legally required to consider the impact of their decisions on all stakeholders, a model known as stakeholder governance. The B corp legal framework allows companies to protect their mission and ensures that they will continue to practice stakeholder governance even after capital raises and changes in leadership. The legal framework also provides flexibility when evaluating potential sales and liquidity options.

The legal requirement ensures that B corps remain legally accountable to all their stakeholders—workers, communities, customers, suppliers, and the environment—not just shareholders.

Based on the above, the text to be included in the constitutive contract or statute is as follows.

Addendum 1—To be inserted into the clause that establishes the corporate purpose.

Its purpose, which must seek a positive material impact on society and the environment, considered as a whole (which will be evaluated taking into account the standards of an independent third party specialized in the matter), is: []

Addendum 2—To be inserted into the clause that establishes the powers of the administrative body.

In the performance of their duties, the administrator or the board of directors, as the case may be, must take into account in any decision or action, the effects of such a decision (i) on the employees and the workforce of the company, (ii) its subsidiaries and its suppliers, (iii) the clients and consumers of the company, (iv) the community, (v) the local and global environment, (vi) the performance of the company in the short and long term; and (vii) the capacity of the company to fulfill its corporate purpose, provided that this will not imply the creation of special rights in favor of third parties.

¹¹ <https://www.sistemab.org/ser-b/>.

5 “System B” and “B Companies” in Uruguay. Their Status Before Law No. 19.969

On July 10, 2015, the “Civil Association System B Uruguay” was created, governed by a General Assembly, the Board of Directors, which, to date, is made up of five members chaired by two female founders of two B companies in Uruguay and the Fiscal Commission.

It has several communities of practice, such as B Lawyers, B Accountants, B Multipliers, B Academy,¹² and B Business Council.¹³ In addition, in 2020, in response to the coronavirus pandemic, Sistema B Uruguay together with YPO (Young Presidents’ Organization)¹⁴ raised approximately US\$ 6 million in record time, to buy medical supplies, respirators, diagnostic tests, and clothing, and together with the public and private sector worked with an interdependent, resilient, and supportive search of the Common Good, responding to the health emergency.

Up to now, there have been ten “B companies” in Uruguay, certified by B Lab: 3 Vectors, Verdeagua, La Cristina, Neto, Gemma, Impulso Creativo, 4 D Lab, Neto, YOUHUB and Ecologito; and a company with “B pending” certification (because it has not yet reached the billing year): Omboo.

However, in Uruguay, at the time they were established, before the approval of Law 19.969 in July 2021, these companies did not have a regulation recognizing, supporting, and granting them legal certainty. The administrators of these companies also did not have sufficient security to allow them a broad exercise of their fiduciary duties to cover purposes other than profit exclusively.

Legislative difficulties, administrative uncertainties, and cost overrun hindered compliance with the requirements. These difficulties have different causes according to the different forms of business organization.

Attempting a form of systematization, it can be affirmed that in Uruguay, commercial enterprises¹⁵ usually organize themselves in three legal forms: commercial companies, sole proprietorships, and trusts. As such, “B companies” can adopt any (or all) of these legal forms.

(a) “Commercial companies” are regulated mainly by Law 16.060, which recognizes various types of companies. Public-limited and Limited Liability companies are the most common legal structures. Law 16.060, prior to the postmodern

¹²There are two unpublished pieces of research: “Caracterización y desafíos del liderazgo Femenino en empresas B de Latinoamérica” and “Are B Corps ready to be a gateway to the job market for women and young people in Latin America?”

¹³https://infonegocios.biz/y-ademas/para-seguir-redefiniendo-el-sentido-del-exito-en-la-economia-con-el-consejo-empresarial-b?utm_source=Doppler&utm_medium=email&utm_campaign=Julio.

¹⁴www.ypo.org.

¹⁵In Uruguay, sole proprietorships (“*empresas unipersonales*”) are considered companies and are thus recognized from a fiscal point of view. Therefore, these companies can be certified B companies.

conceptions to which we refer, regulates the duties and responsibilities of the administrators of commercial companies based on the standard of a general concept known as “the good businessman.” This is understood as one who carries out the business activity with a degree of professionalism, loyalty, fidelity, and absence of conflict of interest.

Although the General Corporations Law does not contain an express prohibition for the incorporation of B clauses, the Internal Audit,¹⁶ which evaluates public limited companies’ controls, has unofficially stated that these clauses exceed what the law allows,¹⁷ and therefore, their incorporation is not accepted. They maintain that this type of add-on cannot be included in the bylaws because they exceed what the law allows, and that they are corporate objectives that point to the activity to be carried out by the company in its normal operations. Although these may be broad objectives, they do not foresee the possibility of including issues of compliance with social objectives and the environment.

Specifically, this position has been held by the state control and registration bodies of commercial companies in similar cases (e.g., inclusion of corporate governance clauses).

It is important to note that Public Limited Companies in Uruguay are regulated by a public agency called “Auditoría Interna de la Nación,”¹⁸ which allows for the incorporation of all these companies. In effect, the restrictive nature of current legislation makes it difficult for companies whose incorporation process requires the intervention of such an agency to comply with the requirements for B Certification, since the “Auditoría Interna de la Nación” does not admit the incorporation into the bylaws of the provisions required by *sistema B*.

Other commercial companies, including Limited Liability Companies and recently approved Simplified Joint-Stock Companies (SSC), do not require control of the “Auditoría Interna de la Nación,” but they are under the control (albeit to a lighter extent) of the Commercial Registry. One must keep in mind that all state agencies act under a strict framework of what the law mandates.

For Public Limited Companies, which is the most common legal structure for medium and large companies in Uruguay, it is difficult to assume the statutory changes required to be considered B companies since the change of statute to incorporate B clauses implies a cost. Furthermore, the period for this procedure would take at least one year, with an unlikely result because, as stated, the position of the regulatory bodies is adverse.

(b) In Uruguay, a form of business organization known as a “sole proprietorship” is widely used. It is not a commercial company; thus, it does not have legal

¹⁶See footnote 18 below.

¹⁷The doctrine that we cite is not a written doctrine, but opinions of professors Alicia Ferrer and Alejandro Miller. The Internal Audit did not officially pronounce or reject a statute for containing these clauses, however, in meetings with the legal advisers of the organization they advanced a negative opinion.

¹⁸<https://www.gub.uy/ministerio-economia-finanzas/auditoria-interna-nacion>.

personality or property separation. However, for tax purposes, it is considered an independent contributory unit, with a simplified tax regime. These companies do not have a statute in which to incorporate the B clauses, yet they carry out economic activity with a triple impact purpose, for which there is a history of B certification of some sole proprietorships.

(c) “Trusts” are recognized by Law 17.703 of 2004¹⁹ and have been widely used in Uruguay to structure the most diverse economic ventures (commercial operations, real estate projects, energy projects, etc., whether in the private sphere or with public participation).

Through trust, independent wealth is created, which is administered by the Trustee in favor of the beneficiaries, always following the fiduciary mandate included in the constitutive contract. In other words, the constitutive contract must contain orders for the Trustee to administer the estate, achieve the objective, and comply with all the specifications, conditions, or purposes that are included in the contract.

In this case, neither the law nor the control bodies place limitations; therefore, inclusion into the trust constitution contract of clauses on the expansion of fiduciary duties is widely allowed.

In fact, there is a precedent: YOUHUB, a B certified company, is organized under the legal form of trust, which provides co-working and consulting services.

6 Law No. 19.969 of Benefit and Collective Interest Companies and Trusts

The legal and regulatory difficulties outlined above highlight the need for a law that could grant recognition to these companies and provide them with security in their business. Particularly, their administrators encountered legal limitations and inconveniences that hindered their proper development, as the legal structures provided for the business organization did not coincide with the purpose and ways of acting of purpose-driven companies. This is due in part because these companies make their decisions not only seeking to maximize their profits, but also considering other factors to generate a positive impact on society and the environment.

Thus, on August 14, 2017, the Special Committee on Innovation, Science, and Technology of the Chamber of Representatives (Folder C / 2469/17, section 803) received the members of Uruguay’s B Legal Group,²⁰ who presented a draft bill to regulate the benefit and collective interest companies, having taken as a model the bill that was then under study by the National Congress of the Argentine Republic.

¹⁹ Available at <https://www.impo.com.uy/bases/leyes/17703-2003>, accessed 05.16.2022.

²⁰ Legal Group, B formed by Dr. Ivana Calcagno, Dr. Soledad Capurro, Dr. Magdalena Pereira, Dr. Patricia Di Bello, and Dr. Natalia Hughes.

The team draw on William Clark so that the provisions were aligned with international legislation in this regard.

Finally, in July 2021, the Uruguayan Parliament enacted Law No. 19.969,²¹ regulating benefit and collective interest companies and trusts.

From a political point of view, the Uruguayan bill recognizes and supports triple impact companies or purpose-driven companies in the fulfillment of objectives that seek the common good and are aligned with public interest. It seeks to create conditions and legal support that allow these companies to focus on the creation of long-term economic value, while generating a positive impact on society and the environment. However, according to most BIC legislation, any tax incentive or general comparative advantage with respect to other market participants is envisaged.

The legislative technique of the Uruguayan bill under analysis is characterized by harmonization with laws 16,060 of commercial companies and 17,703 of trusts. It does not modify the general regime of commercial companies and trusts, enacting only an extension of the social types and trusts already defined by former regulations.

Under bill's Article 1, in the constituent instrument of the company, "the partners - in addition to being obliged to make contributions to be applied to the production or exchange of goods and services with the aim to participate in the profits and bear the losses - are obliged to generate a positive social and environmental impact on the community, in the forms and conditions established by this law and the regulations."

A peculiarity of the Uruguayan BIC law is that Article 1 allows trusts to be considered subjects of benefit and collective interest when the terms of the trust include generating a positive social and environmental impact in the community under the forms and conditions established by the BIC law and its regulations. In this case, they are called collective benefit and interest trusts (BIC).

Under Article 3, these companies or trusts must include in their statute or constitution contract the obligation to generate a social and environmental impact, positive and verifiable, in addition to the requirements demanded by the regulations of a particular application.

The project asks companies to include in their social contract the requirement of a vote in favor of three-fourths (seventy-five percent) of the partners, with the right to vote for any modification of the objective and social purposes, not corresponding to the plurality of votes.

Article 4 stipulates that, in the performance of their functions, the execution of the acts within their competence and in decision-making, "administrators and trustees must take into account the effects of their actions or omissions regarding: (i) the partners or beneficiaries, (ii) current employees and, in general, the contracted workforce, (iii) the communities with which they are linked, the local and global environment and (iv) the long-term expectations of the partners and of the company,

²¹Law No. 19.969, available at <https://legislativo.parlamento.gub.uy/temporales/docu6384358019499.htm>.

and of the beneficiaries and of the trust, where appropriate, in such a way that the purposes of the company or of the trust are materialized. The responsibility of the administrators and trustee for the fulfillment of the aforementioned obligation may only be enforced by partners and beneficiaries.” In other words, it departs from the exclusive consideration of business profit.

Article 5 adds to the general obligations of accountability and information imposed by other norms an obligation of “preparing an annual report by means of which they provide evidence for the actions aimed at fulfilling the positive social and environmental impact foreseen in its constitutive contract or statute. This report must be publicly accessible and submitted within a maximum period of six months from the close of each year to the body or authority determined by the regulations.”

Finally, for companies that have modified their bylaws to become benefit and collective interest companies, Article 6 of the bill confers the right to withdraw on partners who have voted against such modification, as well as those who are absent but prove to be shareholders at the time of the meeting.

7 Final Reflections and Conclusions

7.1 Introduction

From this description of the state-of-the-art, it is possible to raise some reflections and conclusions.

The legal doctrine has classically considered that the regulation of the way in which goods and services are produced, distributed, and consumed can be twofold: centrally organized or, instead, regulated through private autonomy and initiative.²² A regime based on private autonomy works in a paradigmatic way through contracts and the market. Doctrine usually refers to “acts of commerce,” not so much in the formal sense of commercial law, but in the meaning of legal transactions through which the so-called “legal commerce” or “legal circulation” (production, distribution, and consumption) is channeled.²³

²²Cafaro and Carnelli (1996), p. 7.

²³In the field of obligations and contracts, legal theory in Latin America is centered on the concept of “negocio jurídico.” This concept, that can be hardly translated into English, and even into French, originated in Germany, where it was coined the concept of “*Rechtsgeschäft*,” that is, an expression of will with legal effect (*Willenserklärung*) (and was adopted also by the Italian authors with great influence on Latin American scholars). In that construction, this concept represents how goods and services are exchanged in the market. In Italy: Allara (1955); Benedetti (1997); Betti (1959); Bianca (2000); Carnelutti (1933, 1951); Ferri (2006); Galgano (1992, 2002); Messineo (1946).

In Spain and Latin America: Albaladejo (1958); De Castro (1985); Cafaro and Carnelli (1996); Guzmán Brito (2000); Lorenzetti (2018); Ospina Fernández (2019).

The Brazilian Civil Code, in force since 2002, adopts the concept of “negocio jurídico” as a fundamental legal category. Code’s Book number three (LIVRO III, “Dos Fatos Jurídicos”), begins

Supply and demand meet in the market, the place where the exchange of goods and services—that is, the contract—becomes perfected.

In this context, the very concept of a contract, especially in the idea of a bilateral and onerous contract, such as the contract of purchase and sale, implies an instrument operating in the market, where supply and demand for products and services meet each other, and autonomous subjects satisfy their needs by exchanging goods through willful agreements. In Uruguay, although Article 1247 of the Civil Code does not include this contextualization in the definition of a contract, it is understood that the essence of the contract is the confrontation between two parties with conflicting interests. Professor Gamarra, a leading teacher in Uruguay, affirms that, for the prevailing doctrine, there is always opposition or conflict of interest between the contracting parties, with the contract representing the voluntary composition of this conflict. Further, he adds that the conflict (opposition or antagonism) of interests is the main idea that determines the emergence of the contracting parties.²⁴ In monetary economies, the composition of opposed interests is carried out through prices, which consist of sums of money deemed to be the equivalent of goods or services that are exchanged. It is well known that buyers want to buy cheaper products and sellers want to sell more expensive products.

On the tradition in civil law, a contractual law is rooted in the concept of “causa.” Although there is a lot of discussion surrounding this, it is accepted that “causa” is the element that represents the reason both parties enter voluntarily into a contract and accept to be bound.

For legal doctrine in civil law systems, the cause (meaning, the reason why both parties accept to exchange voluntary goods or services) of the onerous contract consists precisely in the consideration of the advantage or profit sought by the other party, which acts as an impulse or motivation for the sacrifice or burden assumed by the other contracting party (e.g., seller or purchaser). That is why price acquires a central relevance in the structure of the onerous contract, constituting one of the expressions of the object of the contract. The relation between price and goods or services purchased configures the essence of the onerous cause. Further, it represents the moment of composition of the opposition or conflict of interest, which is why the breach in its payment radically affects the contract, and is the origin of serious and far-reaching legal consequences, that is, the option of the innocent party either to request the termination of the contract or its forced execution, and compensation for damages.

with title number one (TÍTULO I, Do Negócio Jurídico), containing a complete regulation (80 articles).

²⁴Gamarra (1995), p. 14.

7.2 *The Purchaser’s Side*

Let us consider first the purchaser’s side.

Departing from the price, i.e., the sum of money that constitutes the equivalent of any good or service, two types of business can be conceived: investment and disinvestment or liquidation.²⁵ The price paid by the investor (who may be a final consumer or a company that acquires goods or services to incorporate them into the production or distribution cycle) supposes certain information based on which the investor makes his decision to dispose of his money in exchange for goods or services.

Besides onerous exchange, which is based on market negotiation, economic circulation may also be explained by other motivations not grounded in economic profit. In this case, the logic of exchange is not found in the utility provided by the counterpart, but rather in the consideration of disinterest and liberality.

Neither System B nor the entities of benefit and collective interest abandon the dynamics of onerousness; they do not propose adopting a centralized model or a system based on gratuities. They suggest broadening the scope of the information considered by the investor or consumer as a ground for the process of the individual microeconomic decision. Their motivation (meaning the contractual “causa”) incorporates an aspect that is external to the individual monetary utility: the social and environmental impact. In this way, the microeconomic decision of the investor or consumer is based on a more complex and comprehensive perspective, including aspects not only consisting of money (price/quality relationship) but also related to environmental sustainability and equity in income distribution. In a certain sense, this is a repeat of the idea of the Human Development Index by Mahoub ul Haq and Amartya Sen adopted by the United Nations Development Program.

Thus, although certain investors or consumers may choose to stay within the market system, others may decide to acquire goods or services even at a higher price, if they can perceive that in their purchase, there are valuable aspects related to sustainable development and social justice goals.

In a free market system, this consideration cannot be mandatory; however, the legal system must ensure the transparency of information, protect consumer decisions, and guarantee that the production and distribution of goods and services is in accordance with the information provided about them.

We thus aspire to create a more complex, civilized, and evolved market system.

7.3 *The Provider’s Side*

Let us now look at the provider’s side.

²⁵De Cores (2009), p. 3.

The said considerations about the individual contract are transferable to the whole business system, through which the productive factors are organized: capital, human labor, and information, all of which, are combined, to generate goods and services that will be acquired by investors or consumers.

Companies can assume different legal forms that may or may not imply legal status and a desire for profit. In this sense, we can conceive of two categories.

On the one hand, “not-for-profit organizations”, and on the other, “commercial companies”. In not-for-profit organizations, associates or members do not pursue personal economic interests nor do they have the right to participate; they are not entitled to dividends or the result of the liquidation. In Uruguay, for instance, regarding foundations, there is a rule that determines that they can “pursue an object of general interest, without profit purpose” (Art. 1 Law 17.163).

Not-for-profit organizations do not exclude their own economic profit because they have to support their own financial needs; They do not allow members to make a profit. For instance, in Uruguay, we do not find any restriction involving the association’s profit in the law regarding civil associations. No mention of this can be found in the Model Statute for Civil Associations of the Ministry of Education and Culture of Uruguay. It only mentions that, in the case of dissolution, the assets must be transferred to a non-profit entity. But in fact, they cannot, by nature, imply the profit of the associates.

On the other hand, in the realm of companies, the practical purpose of the owners of the stock is to obtain participation interest in the company’s assets, consisting mainly of the right to withdraw dividends and participate in the result of liquidation. Contractual companies include the mention that the parties contribute goods “with the aim of sharing the benefits among themselves” (Art. 1875 CC, for civil companies), or “participate in the profits and bear the losses” that produce the social activity (Art. 1 Law 16,060, for commercial companies).

This right indirectly implies that the company’s purpose mostly focuses on maximizing the partner’s profit, since the interest of the partner or the stockholder is to have the highest possible yield.

The Italian doctrine has coined an interesting distinction between “objective” profit (which is the eventual profit that an association or foundation can pursue to achieve the fulfillment of the purpose that constitutes its object) and “subjective” profit (which is the profit of the partner or stockholder).²⁶

This implies that while companies, whether civil or commercial, admit subjective profit, this is not allowed in not-for-profit organizations.

Indeed, the protection of the creditors of the companies determines that, in comparative law, it is considered that the traditional “cause” of the companies, namely, obtaining a profit that can be distributed among the partners or stockholders, is opposed to altruistic purposes, which has repercussions in the limitations to the

²⁶Di Raimo (2021), p. 715, Granelli (2018), p.715.

administrators. Spanish jurisprudence has allowed modest, free, but marginal provisions.²⁷

7.4 *General Conclusion*

It is obvious in predominant perspective that any gratuitous provision is opposed to the onerous goal, both on the side of the provider and on the side of the consumer, which are considered solely from an economic point of view, excluding the so-called cultural, professional, moral, or spiritual benefit.

Indeed, the classic Aristotelian distinction between economics and chrematistics applies to this problem. While economic activity considers material needs, in the context of other values, chrematistics is preached as a case of reductionism: only profit matters, without any restriction or limit.

Therefore, while “chrematistics” excludes any consideration not linked to profit, except, eventually, in a marginal and extraordinary way, the “economic” vision includes purposes added to the increase in profit (e.g., sustainability, environmental protection, and environmental and social ecology, as largely explained in encyclical *Laudato Si*).

The phenomenon of B or BIC companies connotes the overcoming of the dichotomy between economy and chrematistic as well as between objective profit and subjective profit, both for providers and for investors or consumers. It affirms that business activity—that is, the organization of people with a view to economic activity that in principle leads to subjective profit of its partners—is not incompatible with other aims or purposes which can add to, rather than replace, the profit of the entity and the partner. These additional aims undoubtedly serve as a limit for economic greed yet provide for a more human face of social life.

In other words, in our opinion, it implies the overcoming of the reductionism of the purpose of onerous economic activity, as directed to obtain only monetary profit. This disproportionate and disorderly search is deemed to have produced pernicious effects on the environment, on the well-being of workers, and on society as a whole, as confirmed in the introduction to this article.

From a theoretical approach, the phenomenon of B or BIC companies also implies overcoming (or at least an attempt to redefine) the distinction between contractually onerous versus gratuitous causes to incorporate social and environmental purposes in microeconomic decisions, both by consumers and providers of goods and services.

²⁷Cebriá (2016), p. 351.

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Legal Regulation of Social Enterprises in Other European Countries



Carlos Vargas Vasserot

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1 Introduction

Apart from the countries analyzed in the previous chapters of this book, there are other countries that have legal regulations for social enterprises. These have either issued special rules for such enterprises or included their legal framework in a general law of social and/or solidarity economy. Without being exhaustive, we focused only on Europe, where this phenomenon has been very significant since the publication in 2011 of the Social Business Initiative by the European

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Commission.¹ As a culmination to this part of the book, we briefly outline the features and fundamental characteristics of the legal framework of social enterprises in nine European countries. The countries analyzed are arranged chronologically, beginning with the one with the oldest legislation on social enterprises.

2 Finland

In Finland, social enterprises were regulated early by Law 1351/2003 on social enterprises (*Laki sosiaalisista yrityksistä*), which underwent a major reform in 2012. As is clear from Article 1, Finnish law limits the object of social enterprises to providing employment opportunities to people with disabilities and to the long-term unemployed. To be registered in the Register of Social Enterprises and thus legally use the name social enterprise (*sosiaalinen yritys*) (Article 2), the entity, which may have any legal corporate form, must meet a number of requirements. Among others, at least 30% of the workers should be persons in the vulnerable situation described above and should be paid the usual industry wage in which they carry out their activities. Since social enterprises registered and recognized as such in Finland are only those whose purpose is to provide employment to vulnerable groups, the designation applies only to work integration social enterprise (WISE) policymaking, leaving out of its scope other entities that develop activities with a different social impact. Thus, its scope is very limited.

3 Slovenia

Slovenia, a European Union member, was one of the first countries in the world to have a social entrepreneurship law (*Zakon o socialnem podjetništvu*) enacted in 2011 (amended in 2014 and 2018). Slovenian law defines social entrepreneurship as:

The permanent exercise of a business activity through the production and sale of products or the provision of services in the market where obtaining profits is not the main objective of the business activity, but rather to achieve social impact (Article 2.9).

Further, a social enterprise according to it is:

A non-profit legal entity that acquires this status to clarify that they have not been established solely for the purpose of making profit (Article 2.8).

However, after defining a social enterprise broadly, the law establishes a series of requirements to be met by legal entities that intend to acquire the status or statute of a social enterprise (Article 8, which must be integrated with the principles of social

¹Vargas Vasserot (2021), pp. 315–321.

entrepreneurship contained in Article 3.2 and must be followed by all social enterprises). The most relevant being the following:

- The assets and profits must be invested in the activity of the social enterprise, and their distribution among the partners is not admissible, as they are non-profit entities.
- Decisions should be made by all members of the company according to the principle of one member, one vote, regardless of the share of the capital invested.
- Stakeholders, such as workers, volunteers, and users of products or services must participate in decision-making (Article 2.3).
- The company must work permanently to benefit its members, users, and the community in general.

Thus, although in principle, any private non-profit legal entity can be classified as a “social enterprise,” for example, associations, institutions, foundations, institutes, cooperatives, disability companies, employment centers—which are expressly cited by the law (Articles 2.6 and 8.2)—and even business corporations, the high level of demand for an entity to be classified as a social enterprise and the lack of tax incentives for its constitution² have meant that so far, the number of these is quite scarce, and very few of them are business corporations. In 2017, only 251 obtained legal recognition as social enterprises, of which 31.9% were non-profit institutions, 29.1% were cooperatives, 26.3% were associations, and 10.8% were limited liability companies (i.e., 25).³

4 Denmark

Law 711/2014 on the registration of socioeconomic companies (*Lov om registrerede socialøkonomiske virksomheder*) was issued with the aim of establishing a company registration system that, by complying with certain standards in their commercial and transparency operations, would obtain the exclusive right to use in its company name the mention of a registered socioeconomic company (*registreret socialøkonomisk virksomhed*) or its acronym RSV (§ 1). Any legal person (except for sole proprietorships and jointly owned companies, Article 4) can register as an RSV if they:

- Have “a social purpose” as its objective, that is, to be beneficial to society with a social, cultural, labor, health, or environmental objective;
- Develop a “significant commercial activity,” which must be the company’s main source of income;

²Tomažević and Aristovnik (2018), p. 45.

³Data obtained from Hojnik (2019).

- Have an “inclusive and responsible governance,” involving workers, clients, partners, and interested parties in their management, which must be carried out in a responsible manner in accordance with social objectives;
- Carry out “a social management of its profits,” applying these to reinvestment in the company, investments, or donations to other registered social companies, charities, non-profit organizations, or payment of a limited payment of dividends to investors and owners (Article 5).⁴

There is freedom of form to be an RSV (although prior registration in the Trade Registry and having the CVR number that certify it is required). The three main legal forms used are those of foundations, associations, and limited liability companies.⁵

5 Romania

Romania regulates social enterprises under Law 219/2015 on the social economy (*Legea economia socială*). As established in Article 1, the purpose of the law, apart from regulating the social economy and establishing measures to promote and support it, is to regulate the requirements for certification of social enterprises and social insertion enterprises. The law defines social enterprise (*intreprinderilor sociale*) as:

any legal person under private law that carries out activities in the field of social economy, that has a certificate of social enterprise and that respects the foreseen principles of the social economy (Article 6.1.d).

The law itself provides a list of social enterprises (cooperatives, associations, foundations, mutual benefit societies for employees and pensioners, and certain agricultural enterprises), which it leaves open by including:

the other categories of legal persons that cumulatively meet the definition and principles of social economy provided for in this law (Article 3.1).

The law dedicates the chapter “The Social Enterprise Movement and the Birth of Hybrid Organizational Forms as Policy Response to the Growing Demand for Firm Altruism” to social enterprises, made up of two precepts (Articles 8 and 9), which must be integrated with regulatory development through Decision 585/2016 to establish a procedure for obtaining ministerial certification as a social enterprise.

Based on its legal and regulatory framework, the status of social enterprises is recognized through the granting of a certificate by the Ministry of Labor for a five-year renewable period, which accredits the entity’s contribution to the field of social economy. This certificate is granted to the legal entities that make a request, provided

⁴The text in quotation marks is the text of the law, and the text in brackets is the interpretation of the legal text provided by Hulgård and Chodorkoff (2019), p. 25.

⁵Hulgård and Chodorkoff (2019), p. 28.

for in Article 3, which we have already mentioned, and documents the corporate purpose of the social enterprise and compliance with the principles of the social economy established by law in addition to meeting the following requirements:

- Conduct acts for social purposes and/or for the general interest of the community.
- Allocate at least 90% of the profits obtained to the development of the corporate purpose or reserves.
- Transfer the remaining assets after liquidation to one or more social enterprises.
- Apply the principle of social equity to employees, guaranteeing fair salary levels.

6 Greece

In 2011, Greece enacted Law No. 4019 on social economy and social entrepreneurship, which was one of the first laws on this subject in the world. Despite the mention in its title of social entrepreneurship and that it was based on a broad concept of “social economy” as the set of economic, business, productive, and social activities carried out by legal persons or associations of people whose statutory purpose is the achievement of the collective benefit and the service of the general social interests (Article 1.1), later in its articles, reference was made only to the “social cooperative enterprise” (*Koin.Sa.Ep.*). This left out other types of cooperatives and typical entities in the social economy. This law was repealed in 2016 by Law No. 4430 on the social and solidarity economy. However, this change of name and the reference to the *solidarity economy*, as it has become clear,⁶ has not meant a change in general orientation of the previous law. It entails a mere updating of concepts and a change of perspective of the social economy in an ambitious attempt to introduce new subjects in it. For example, the legal definition of “social and solidarity economy” in the new law is still very much attached to a traditional concept of social economy: “set of economic activities based on an alternative form of organization of production, distribution, consumption and reinvestment relations, based on the principles of democracy, equality, solidarity, cooperation and respect for mankind and the environment” (Article 2.1).

On the latter, in the list of entities of the social and solidarity economy contained in the law (Article 3.1) includes, together with the former social cooperative company, other types of cooperatives [“limited liability social cooperative” (*Koi.S.PE.*) and the “workers cooperative”] and “any other non-sole proprietorship, which has acquired legal personality” (and particularly cites agricultural cooperatives, civil cooperatives, and civil societies). Additionally, they must cumulatively satisfy the following conditions:

- Develop collective and social benefits, as defined in the law. “Collective benefit” is defined:

⁶Fajardo García and Frantzeskaki (2017), p. 50.

as the joint service of the needs of the members of the Social and Solidarity Economy field, through the formation of egalitarian production relations, the creation of stable and dignified employment, the reconciliation of personal, family and professional life (Article 2.2).

“Social benefit” is defined as:

the service of social needs of a local or broader nature with the use of social innovation, through activities of “sustainable development” or the provision of social services of general interest or social inclusion (Article 2.3).

- Provide information and participation of their members and apply a democratic system in decision-making according to the principle of one member, one vote, regardless of the contribution of each member.
- Established by instituting a series of restrictions on the distribution of profits: 5% is destined for a reserve fund, 35% for workers, and the rest to create new jobs or reinvest them in the entity.
- With some exceptions, the maximum salary of workers cannot exceed three times the minimum salary.
- Its objective is to strengthen its economic activities and maximize the social benefits produced through horizontal and egalitarian networking with other entities in the social economy.
- It does not depend directly or indirectly on public entities.

This package of requirements is added to the general rule that the partners or members of the entities of the social and solidarity economy that are not workers do not have the right to distribute benefits, except for a specific type of cooperative (Article 3.2). These harsh conditions are difficult to meet by non-cooperative companies and especially by trading companies, given the requirement of the vote by head and the non-profit concept of these entities with the prohibition on profit distribution.⁷

7 Latvia

The Social Enterprise Law (*Sociālā uzņēmuma likums*) was enacted in Latvia in 2017. It aims to:

promote the improvement of people’s quality of life and employment of population groups at risk of social exclusion - which it calls the target group - by creating a favorable environment for the economic activities of social enterprises (Article. 1).

The law defines a *social enterprise* as: “a limited liability company that has been granted the status of a social enterprise in accordance with the procedure specified in this Law and that carries out economic activities that generate a favorable social impact” (Article. 2.1), such as the provision of social services, the formation of an

⁷Fajardo García and Frantzeskaki (2017), p. 75.

inclusive civil society, the promotion of education, conservation, the protection of animals, or the safeguarding of cultural diversity. Obtaining the statute of social enterprises and the consequent registration in the Register of Social Enterprises depends on whether the entity, which must necessarily be a limited liability company, meets the following requirements (Article 5):

- Corporate purposes correspond to the objectives of the law, which carry out economic activities with a positive social impact.
- A social resolution is taken in favor of acquiring the statute of a social enterprise approved by at least 2/3 of the votes present and represented at the meeting held for this purpose.
- There is no distribution of profits that are reinvested in the entity to achieve social objectives.
- A representative of the target group participates in the administrative or supervisory body and/or advisory board of the entity.

8 Slovakia

Slovakia adopted in 2018 the Law on the Social Economy and Social Enterprises (*zákon o sociálnej ekonomike a sociálnych podnikoch*), distinguishing two categories of social enterprises. The social enterprise (*sociálnym podnikom*) is defined (Article 5.1) as an entity of the social economy (Article 4.1: “An association, non-investment fund, non-profit organization, church special purpose facility, commercial enterprise, cooperative or natural person entrepreneur” that is not controlled by the public administration, carries out activities typical of the social economy, and if they perform other profit-making activities, they do not perform them with the objective of making a profit) that meets the following requirements:

- It must perform economic activity on a continuous basis, independently, on its own account, and under its own responsibility.
- Its main objective should be to achieve a measurable positive social impact. In general, it determines that a positive social impact is the fulfillment of a public interest (such as the provision of socially beneficial services for society as a whole or for disadvantaged or vulnerable people) or of a community interest (such as the provision of social services for a group of people that can be delimited and identified according to territorial criteria, membership, interests, or other objective criteria) (Article 2.1). However, it then differentiates according to the type of registered social entity that is understood by positive social impact. On the other hand, the law classifies registered social enterprises into three categories: “integration enterprises” (whose positive social impact is the promotion of employment through the employment of disadvantaged or vulnerable persons—Article 12), “social housing enterprises” (whose positive social impact is the provision of socially beneficial rental housing—Article 13) and “other registered social enterprises.”

- The goods or services that they manufacture, supply, provide, or distribute must be made using methods that contribute to achieving a positive social impact.
- If it makes a profit, it must use more than 50% of the after-tax profit to achieve the primary social objective, and the distribution of the remainder cannot interfere with the achievement of the primary social objective.
- It must involve stakeholders in the management of their economic activity (which means that the majority of the partners are company employees, and that the majority of the workers must be partners; all the partners have one vote and that workers with five years of seniority in the company, even if they are not partners, can vote in general meetings).

The *social impact company* (*podnikom so sociálnym dosahom*) is a social economy entity that fails to meet one of the last three requirements for social enterprises (Article 5.3). On the detailed process of accreditation by social enterprises that they meet all the requirements for registration, the obligation to document each (Article 6.1.c) stands out. This is something that does not always seem simple, as is the case with the need to describe how the entity produces or supplies its products and services in a way that contributes to achieving a positive social impact. On the other hand, although it is expressly admitted that a commercial company is a social enterprise, some of the conditions that are required are not well-suited to social types other than cooperatives.

9 Bulgaria

Since 2018, Bulgaria has had a Social and Solidarity Economy Companies Act, which, in addition to promoting the development of this economic sector, regulates its subjects, including social enterprises alongside cooperatives and non-profit legal entities engaged in public benefit activities (Article 5). Bulgarian law classifies social enterprises into two categories: Class A (Article 7) and Class A + (Article 8). The former must satisfy the following conditions.

- Develop a social activity that produces added social value.
- Be managed in a transparent manner with the participation of members, workers, or employees in decision making according to a procedure set out in the articles of incorporation, bylaws, or other documents.
- Fifty per cent of after-tax profits and no less than an amount (BGN 7500, approximately 3800 €) must be used to carry out an activity or social purpose.
- At least 30% and more than three employees of the company are people in certain situations of vulnerability listed in the law (disabled, long-term unemployed, or of a certain age or young people without work experience, ex-prisoners, refugees, etc.).

Class A + social enterprises, on the other hand, are of a socially superior category than the previous ones, since, in addition to the above conditions, they must comply

with any of the following: the aggregate social value of the enterprise should be developed entirely in municipalities that during the previous year had an unemployment level equal to or higher than the country's average. Further, and/or 50% of the after-tax profits and not less than an amount (BGN 75,000, approximately € 380,000) must be used for carrying out social activities.

Near the end of the law (additional provision: 1.^a 5), compiling the main characteristics that an entity must meet to be registered as a social enterprise, defines it as:

a company that, regardless of its legal organizational form, has as its object the activity of producing goods or providing services, combining economic results with social objectives, achieving a measurable positive social added value, managed in a transparent way with the participation in the managerial decision-making of the members and workers, that the average number of workers are vulnerable people in a certain proportion and/or the benefits are mainly used to carry out the activity and social purpose in accordance with the articles of incorporation or bylaws.

10 Lithuania

Lithuania has enacted in 2019 Law No. XIII-2427 on social enterprises. These:

aim to promote the return to the labor market, their social integration and the reduction of social exclusion by hiring people belonging to the target groups specified in this law, whose ability to work has been diminished or who cannot compete in the labor market under equal conditions due to disability, age, or long-term unemployment (Article 2).

Therefore, Lithuanian social enterprises limit their activities to recruiting people from vulnerable groups, as determined by law, as workers. Thus, the only social enterprises are WISE. On the other hand, Lithuanian law does not make any reference to what type of entities can be recognized as social enterprises, so any legal form of enterprise can be used, especially commercial companies. As for the obligations that are legally imposed on social enterprises (Article 7), they refer to the hiring, salaries, and training that must be given to people in vulnerable situations who work for the entity.

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