FINAL DELIVERABLE

Legal Framework for the Development of a Human-Centered Enterprise

(HCBM Pillar #2)

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TABLE OF CONTENTS

1 – INTRODUCTION

The present study is part of the wider research of Pillar 2, *Legal Framework and Corporate Governance*, co-lead by the International Institute for the Unification of Private Law (Unidroit) and the University of Florence, Italy.[1]

The second Pillar of the Human-Centered Business Model aims at developing corporate governance mechanisms to enable businesses to use companies not only for profit maximisation (as is traditionally the case), but also for the pursuing of environmental and social goals, in an enforceable way that will grant protection to those who have invested in the company because of its "human-centered nature". In a so-called *Human-Centered Enterprise (HCE)*, social and environmental interests are no longer the "external" interests that directors *may* consider when managing the organisation while pursuing profit, but are the proper corporate goals, *on a par with* profit, and directors *have* consequently to strive for these goals, too, in compliance with their duties of administration.

The objective of the second Pillar is to develop a legal framework and several alternatives of corporate governance – to be suitable for different business sizes, sectors, and socio-economic and legal environments – with common characteristics which are supported by compliance and monitoring strategies in order to control the fulfilment of the legal model within the corporate governance framework. In greater detail:

- the legal framework and governance standards should assure sustainability and workability in various legal systems and environments;

- corporate governance solutions will focus on developing innovative techniques to ensure a more effective internalisation of interests *other than* profit maximization, including the interests of stakeholders.

In this context, a deep analysis of the existing legal framework seems necessary. Consequently, the present report aims to develop an inventory of the existing relevant initiatives, looking for examples that could inspire the development of a legal framework and corporate governance models for the Human-Centered Enterprise.

1.1. Legal Categories Considered within the Research

Activities that seek to generate a positive impact on the civil society (e.g., a positive social or environmental impact) can be carried out by different kinds of organisations as provided by law (the so-called "legal categories"):

1. not-for-profit organisations, such as associations, foundations or charities, that do *not* carry out any business;

[1] Within the Human-Centred Business Model project, Unidroit is represented by Ms. Frédérique Mestre, and the University of Florence is represented by Professor Andrea Zorzi.

2. not-for-profit organisations, whose goal is not-for-profit but to carry out business (e.g., some types of social enterprises);
3. for-profit businesses that do not solely pursue profit maximisation, which can be divided into:
    3.1. businesses that *can* pursue goals other than profit maximisation;
    3.2. businesses that *must* also pursue social goals.

The Human-Centered Enterprise will be designed as an organisation that carries out business by balancing the profit aim with goals of social and environmental sustainability, as defined in the by-laws, in respect with the Guiding Principles (see Pillar 1). Consequently, the present research will **focus only on categories #2 and #3**; while not-for-profit organisations, when they do not carry out any business (category #1), are *excluded* from the present study, since they are not relevant to the Human-Centered Business Model.

More in details, the legal categories considered within the research are:

- **Not-for-profit organisations** that *also* engage in business activities. This can be done *in order to* finance their main not-for-profit activity, but not-for-profit goals can also be pursued by means of carrying out business, such as a company created to employ former prison inmates or disabled persons; or a company that manages a childcare facility or a nursing home. In the latter case, the business profits are generically re-invested within the organisation; these are what are commonly defined a "social enterprises" (see for example the European Union framework for social enterprises, *infra* at Paragraph 3.4.1).
- **For-profit businesses organisations**, which can or have to pursue social goals. These are for-profit entities in which the goal is to make profit *and* distribute it to shareholders, but they *also* pursue not-for-profit goals. In more detail, Sub-category #3.1. refers to for-profit entities whose governing laws enable the shareholders to pursue not-for-profit goals. This could be the case, e.g., for companies under some US laws, which are traditionally of an enabling nature: in the certificate of incorporation, shareholders could set out special rules referring to the social or environmental sustainability of the business (see *infra* Paragraph 3.1). This cannot be the case in other jurisdictions, where some legal categories (normally companies) are only legally allowed to pursue profit only. This was the case of Italy until 2016, where companies could be used only for profit maximisation (Article 2247 of the Italian Civil Code); which is why, in order to do business that aims to balance profit with social/environmental goals, a new specific legal provision introducing the Italian benefit corporation was made necessary (see *infra* Paragraph 3.2.3). Sub-category #3.2., in contrast, refers to legal categories, specifically regulated by law, which the parties are free to choose to use or not, as the case may be, but, if they do, they *must* also pursue not-for-profit goals (as defined by the law). This includes, on the

more "profit" side of the spectrum, hybrid forms such as "benefit corporations" or "public benefit corporations", which can freely distribute profit, and – on the other side of the spectrum – forms such as public interest companies (in the UK), and some types of co-operatives in Italy and France, which can distribute profits, albeit with various limitations.

1.2. Jurisdictions Involved

The present study analyses a diversified sample of jurisdictions to provide an overview of different legal solutions adopted in different legal systems. More jurisdictions could be analysed once the development of the HCBM project begins.

The inventory of the existing relevant initiatives has been carried out with the precious help of some interns of UNIDROIT, who have collected the relevant information for specific jurisdictions (see the Acknowledgements for further details).

The examined jurisdictions have included: (a) some Asian countries, such as: China, Malaysia, the Philippines, South Korea, and Thailand; (b) Australia; (c) the European Union Framework, specifically focusing on the Italian experience of benefit corporations, and the French trend to a more sustainable development; (d) Israel; (e) the South America legal framework; (f) Turkey; (g) the United Kingdom; and (h) the USA.

The international legal framework has also been analysed (see *infra* Paragraph 2).

1.3. Information to be Collected for each Jurisdiction

For each jurisdiction, it has been analysed whether the law foresees business organisations that can pursue goals other than *profit maximisation*, or whether these businesses, even when *not* expressly regulated by law, are, however, allowed – or at least tolerated – by law, meaning that different organisations (e.g., companies) could be used to pursue any goal, including not-for-profit ones. As mentioned above, only some jurisdictions provide for specific hybrid models, while many jurisdictions do not allow for-profit companies to modify their charters and pursue not-for-profit goals.

As anticipated, the research has focused on:

- Not-for-profit *business* organisations (organisations that can *only* pursue goals other than profit);
- For-profit *businesses* that *can* also pursue goals other than profit maximisation;
- For-profit *businesses* that *must* also pursue goals other than profit maximisation.

In order to make the collection of information from the various jurisdictions coherent, and to enable the comparison, the research has attempted to collect a consistent amount of information for each jurisdiction. In order to assist the creation of corporate governance

frameworks for the Human-Centered Enterprise, all these various corporate governance structures have been analysed, separating the various cases where these models have been created *ad hoc* (e.g., Benefit Corporations in Italy), from the cases where a social purpose can be pursued through one or more existing models.

Specifically, the research has focused on which goals other than profit-maximisation *can* or *must* be pursued. Whether it is any goal, as long as it implies a positive social impact (in the broader meaning), or any goal within a set of goals that are predetermined by law, or one or more goals predetermined by law. The law may, indeed, provide only for specific goals; or for any goal chosen by the members of the company as long as it fits within a broader definition, etc.

Whenever the "social" goals are determined by the parties involved, it is also important to investigate with whom the power to choose not-for-profit goals lies. This question aims to assess whether the goals were established by the directors, by the members/shareholders, and/or by the stakeholders; and which are the specific by-law amending procedures. The existence of limits to profit distribution has been also considered to determine the relevance of the organisation.

Specifically, the research has also focused on: the impact on the structure of business organisations; mechanisms to ensure the lock-in of capital (equity and debt) conferred in the light of the "human-centered" nature of the business; disclosure mechanisms; governance techniques (independent directors; special committees; representation of stakeholder interests within the organisation; stakeholders on the board of directors; *etc*.); compliance programmes; fiduciary duties and their enforcement.

The following paragraphs collect this information, as available.

2 – THE INTERNATIONAL FRAMEWORK FOR HUMAN-CENTERED ENTERPRISES

The growing awareness of the negative impact that businesses can exercise on the environment and on the civil society in which they operate has focused the attention of the international community on business incentives for more sustainable ways of exercising their activities. Since the middle of the twentieth century, several international, political and legal, documents have already begun to stress the urgency of human rights and environmental protection, but it is only during the first decade of this century that the international community has begun to develop documents (of soft law), which specifically address businesses.[2]

Quite a few initiatives and documents, which are relevant in terms of corporate governance of "sustainable" business, have recently been developed at the international level.

These are mainly documents of soft-law, addressed to states and policy-makers more than to corporations, since the latter are not legal subjects under international law.[3] However, even when they are not legally binding, those documents incentivise and orient the international debate towards a more sustainable economy.

Among the most recent international documents, some of the ones that are especially relevant in terms of business social and environmental sustainability are listed here, in chronological order. For each document a brief description is provided. For a detailed overview on the relevant international documents in terms of Guiding Principles, see the Pillar 1 report.

The **United Nations, *Guiding Principles on Business and Human Rights*** (2011), is the first international set of guidelines for states and companies to prevent, address and remedy human-rights abuses committed in business operations. The UN Special Representative John Ruggie had already proposed a framework on business and human rights to the UN Human Rights Council in June 2008. The framework rested on three pillars: *(i)* the state duty to protect against human-rights abuses by third parties, including businesses; *(ii)* the corporate responsibility to respect human rights; and *(iii)* greater access to effective remedy, both judicial and non-judicial, for the victims. The Human Rights Council unanimously approved the *framework* in 2008, but we had to wait for three years before than the Human Rights Council endorsed the Guiding Principles in its Resolution n. 17/4, of 16 June 2011.

[2] A pioneer in the field was OECD with its first version of the *Guidelines for Multinational Enterprises*, in 1976.

[3] Normally, international law concerns only States (with the main exception of the European Court of Human Rights system) that are then entrusted to impose a HRs protection over the businesses under their jurisdiction, since companies are mainly regulated by substantive national laws.

The **OECD, *Guidelines for Multinational Enterprises* (fifth version – 2011)**, are recommendations for responsible business conduct that the 44 adhering governments encourage their enterprises to observe wherever they operate. The first version was adopted in 1976. The actual version (2011) includes recommendations on disclosure, human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition and taxation.

The **United Nations (Global Compact), *Guide to corporate sustainability. Shaping a sustainable future* (2014)** is a document directly addressed to businesses, which lays out five defining features of corporate sustainability to strive towards, namely: (1) Principled Business; (2) Strengthening Society; (3) Leadership Commitment; (4) Reporting Progress; and (5) Local Action.

The **United Nations, *2030 Agenda for Sustainable Development*** is the result of the General Assembly Resolution adopted in New York, on the 25 September 2015. The Agenda is a plan of action for people, the planet and prosperity, whose main aims are the Sustainable Development Goals (SDGs) and the 69 targets announced in the Agenda. The 17 SDGs are the main outcome of the UN 2030 Agenda for Sustainable Development. They came into force on 1 January 2016. Even though they are not legally-binding, governments are expected to establish national frameworks for their achievement: "Countries have the primary responsibility for follow-up and review of the progress made in implementing the Goals, which will require quality, accessible and timely data collection. Regional follow-up and review will be based on national-level analysis and contribute to follow-up and review at the global level".

Finally, the **Global Reporting Initiative (GRI) Standards**, released on the 19 October 2016, is an international set of reporting standards, and provides a good example for the development of reporting mechanisms in the context of the research of the Human-Centered Business Model. This is a manual for the preparation of sustainability reports by organisations, and is useful for the preparation of any type of document requiring the disclosure of the environmental, social and economic performance and impacts of organisations. It takes into account the different corporate size, sector or location, and it also provides international references for all those interested in corporate disclosure. The "G4 Sustainability Reporting Guidelines" were superseded by the **GRI Standards**. They have been developed through a global multi-stakeholder process involving representatives from business, labour, civil society, and financial markets, as well as auditors and experts in various fields, and in close dialogue with the regulators and governmental agencies in several countries.

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All the above-mentioned soft-law instruments testify to a context of growing awareness of the impact of businesses on the environment, the local communities in which they operate, and society as a whole. Human rights and environmental regulations can no longer avoid

addressing businesses, especially those businesses organised through limited liability companies.

At the same time, businesses in (especially, but not only) Western societies are now moving beyond mere compliance with human rights and environmental protection, and are making a real business out of social and environmental sustainability. We are indeed going towards an economy "in which economic growth and environmental responsibility work together in a mutually reinforcing fashion while supporting progress on social development".[4] The following inventory of the relevant initiatives developed in the next paragraph will provide an example of this trend and serve as an inspiration for the development of more sophisticated ways of doing business in a sustainable way.

[4] Definition of the International Chamber of Commerce: ICC, *Green Economy Roadmap. A guide for business, policy makers and society to drive sustainable growth in a resource-constrained world with strong demographic growth*, 2012, available at https://iccwbo.org/publication/icc-green-economy-roadmap-a-guide-for-business-policymakers-and-society-2012.

3 – THE LEGAL FRAMEWORK FOR SUSTAINABLE WAYS OF DOING BUSINESS: EXISTING INITIATIVES AROUND THE GLOBE

The global market is no longer a place for the sole "for-profit" business model, as hybrid forms of business are arising in every economy. This paragraph aims to provide an overview of the existing forms of such businesses, which seek to generate a positive impact on society (e.g., a positive social or environmental impact), as described in paragraph 1.3.

The findings are organised by countries. Within the examined jurisdictions, the analysis focuses on any "legal categories" (meant as types of organisations as provided by law), through which it is possible to set up "sustainable" (in the broadest meaning) businesses. For each legal category, various governance characteristics have been analysed in order to assist the designing of corporate governance frameworks for the Human-Centered Enterprise.

3.1. The United States of America

Companies under US laws are traditionally of an enabling nature: shareholders can set out, in the certificate of incorporation, special rules which refer to social and/or environmental pursuits.[5] However, there are three main models that specifically reflect the cultural shift that has begun to occur in the debate about the role of business in society: *(i)* the Washington Social Purpose Corporation, *(ii)* the Delaware Public Benefit Corporation, and *(iii)* the California Social Purpose Corporation. Each model has taken a slightly different approach to balancing the trade-offs involved when businesses pursue both profits and social goals. They all enable and foster a business environment in which businesses can pursue goals other than profit maximisation and play a more socially responsible role in society.

A central role is then played by the B-corp certification system, of B-lab – a no-profit organisation that "serves a global movement of people using business as a force for good", and which is developing rapidly in other countries (e.g. in Europe and Latin America).

3.1.1. The Washington's Social Purpose Corporation

The Washington Social Purpose Corporation is the first legal framework for socially-oriented corporations in the USA; prior to its enactment, there was no separate legal framework for socially-oriented corporations.

[5] As it will be analysed, this may not be the case in other jurisdictions, where some legal categories (normally companies) are legally allowed to pursue profit maximization only (e.g. in Italy), see *infra* Paragraph 3.2.3.

The Corporate Act Revision Committee worked for two years on researching and drafting House Bill 2239, which was introduced in the Washington State Legislature on 10 January 2012. It passed the House and Senate with few amendments, and took effect on 7 June 2012. The Committee studied the legislation adopted in other US states that authorised the formation of corporate governance structures known as benefit corporations. Ultimately, the approach that the committee took, and that became law – termed a social purpose corporation – is a different version of the benefit corporation governance structure enacted in other US states.

The Social Purpose Corporation legislation was crafted to provide more flexibility to businesses than comparable benefit corporation legislation. The aim for the legislation was to enable good corporate behaviour, while avoiding legislating corporate behaviour.[6]

The Revised Code of Washington (RCW), Chapter 23B.25, "*Social Purpose Corporations*", is the law governing social purpose corporations.[7]

The SPC is a type of corporate governance structure, and any corporation may elect to be governed as a SPC.[8] At the time of incorporating, this can be done by registering articles of incorporation that comply with the legal requirements for a SPC with the Secretary of State for the State of Washington.[9] Alternatively, an already-incorporated corporation may become an SPC with approval by two-thirds of the shareholders to amend the corporation's articles of incorporation to comply with the legal requirements for a SPC, and then by filing the amended articles with the Secretary of State.[10]

Social Purpose Corporations must have a general social purpose, as defined by the legislation, and have the option to have one or more specific social purposes. Both the general social purpose and any specific social purposes must be defined in the SPC's articles of incorporation. The general social purpose is defined in Section 3 of the law: "Every corporation governed by this chapter must be organized to carry out its business purpose (…) in a manner intended to promote positive short-term or long-term effects of, or minimize adverse short-term or long-term effects of, the corporation's activities upon any or all of (1) the corporation's employees, suppliers, or customers; (2) the local, state, national, or world community; or (3) the environment."[11]

Note that the general social purpose, while required in order to make a corporation a SPC, allows flexibility to the SPC, in terms of the focus of its social purpose, as well as how the social purpose is used in decision-making.

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[6] Reed and Wellman Lewis (2012).

[7] Relevant definitions are found at RCW Chapter 23B.01. House Bill 2239, which created Chapter 23B.25 and amended Chapter 23B.01, is attached to this report at Annex 1.

[8] Wash. Rev. Code § 23B.25-1(1).

[9] Wash. Rev. Code § 23B.25-1(1)(a).

[10] Wash. Rev. Code § 23B.25-1(1)(b) and 14.

[11] Wash. Rev. Code § 23B.25-3.

In addition, the law allows for specific social purposes, which are left to the SPC to define: "every corporation governed by this chapter may have one or more specific social purposes for which the corporation is organized."[12] "Specific social purpose" is defined in the law as "the specific social purpose or purposes for which a social purpose corporation is organized as set forth in the articles of incorporation of the corporation".[13] Thus, SPCs have a great deal of latitude in defining and pursuing social goals.

Any corporation may elect to be governed as a SPC. The social purpose can be established in one of three ways, depending on a corporation's circumstances:

(i) if a SPC is not previously incorporated, the SPC's social purpose or purposes are set out in the by-laws at the time of incorporating;[14]

(ii) if an already-incorporated corporation is seeking to become a SPC, it needs the approval by two-thirds of the shareholders to amend the corporation's articles of incorporation in a way complying with the legal requirements for a SPC;[15]

(iii) a SPC's social purpose or purposes can be amended. The proposed amendment "must be approved by two-thirds of the voting group comprising all the votes entitled to be cast (…), and by two-thirds of the holders of the outstanding share of each class or series, voting as separate voting groups, and of each other voting group entitled (…) to vote separately on the proposed amendment".[16]

In addition to the shareholder rights under Washington's general corporation law, shareholders of SPCs have additional rights. Specifically, a shareholder has a right to dissent from certain corporate actions, and "to obtain payment of the fair value of the shareholder's shares in the event of" these corporate actions. These corporate actions include: a corporation electing to become a SPC, a SPC electing to cease to be a SPC, and an amendment to a SPC's articles of incorporation that changes one or more of the SPC's social purposes.[17]

With regard to management and duties, the SPC does not place any restrictions on appointment of directors or officers, or methods of management, nor it have any restrictions or requirements regarding board composition.[18] Directors and officers are

[12]Wash. Rev. Code § 23B.25-4.

[13]Wash. Rev. Code § 23B.25-17(34).

[14] Wash. Rev. Code § 23B.25-1(1)(a).

[15]Wash. Rev. Code § 23B.25-1(1)(b) and 14.

[16]Wash. Rev. Code § 23B.25-10.

[17]Wash. Rev. Code § 23B.25-13.

[18] Directors and officers of a SPC must discharge their duties "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [the director or officer] reasonably believes to be in the best interests of the corporation" (Wash. Rev. Code § 23B.25-6(1) and 7(1)).

permitted, *but not required to* "consider and give weight to one or more of the social purposes of the corporation as the [director or officer] deems relevant".[19] However, an SPC's articles of incorporation may optionally require consideration of one or more of a SPC's social purposes. Any actions (or failures to take action) by a director or officer, that they reasonably believe is intended to promote one or more of the SPC's social purposes, is presumed "to be in the best interests of the corporation".[20] As long as a director or officer has complied with these requirements, they cannot be held liable for actions taken in the performance of their duties.[21]

In contrast, stricter requirements exist with regard to reporting duties: the Board of Directors is required to provide an annual report to shareholders that includes discussion of the SPC's efforts to promote its social purposes. The report may identify and discuss objectives related to the SPC's social purposes, actions taken or planned towards the achievement of its social purposes, and the report may describe "the financial, operating, or other measures used by the corporation (…) for evaluating its performance in achieving its social purpose or purposes".[22]

A separate report is not required; this information can be included in the corporation's regular annual report. However, the report must be made available to the public for free on the SPC's website.[23]

In spite of the absence of any tax benefits, there are currently 186 SPCs in the state of Washington, which operate broadly across industries, including education, health, and food, 37 of which are certified Benefit Corporations (discussed further below).[24] It should be noted, however, that there are no limits to profit distribution.

Within the main examples of Social Purpose Corporations in Washington see Female Founders Alliance, SPC; or Basic Steps Mental Health, SPC.

3.1.2. The Public Benefit Corporations (Delaware, Colorado, and Minnesota)

The state of Delaware has a huge impact on corporate law in the US, with roughly two-thirds of Fortune 500 companies, and 89% of corporations engaged in initial public offerings, being incorporated there.[25] Delaware passed benefit corporation legislation in 2013; the 14th US state to do so. Delaware's benefit corporation law differs from B Lab's

[19] Wash. Rev. Code § 23B.25-6(1) and 7(1).

[20] Wash. Rev. Code § 23B.25-6(3) and 7(3).

[21] Wash. Rev. Code § 23B.25-6(4) and 7(4).

[22] Wash. Rev. Code § 23B.25-16(2).

[23] Wash. Rev. Code § 23B.25-16(1).

[24] "Find a B Corp: Washington", *available at*: https://www.bcorporation.net/community/find-a-b-corp?search=&field_industry=&field_city=&field_state=Washington&field_country=United+States.

[25] Dorff (2017).

model legislation (see below) and is called a Public Benefit Corporation (PBC). Colorado and Minnesota also followed the same approach.[26]

PBCs must adopt a specific public benefit and identify it in their certificate of incorporation.[27] "Public benefit" is defined extremely broadly: "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."[28]

A great deal of latitude is given to the corporation in the management and balancing of different interests. The board of directors is required to manage the PBC "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". In balancing these interests, directors cannot be held liable and their fiduciary duties to stockholders and the corporation are satisfied as long as the "director's decision is both informed and disinterested and not such that no person of ordinary, sound judgement would approve". [29] Thus, the corporation's liability is considerably limited.

As with the Washington SPC, PBCs are not required to assess performance against a third-party standard. Benefit reports are only required to be submitted biennially, and there is no requirement to make the report publicly available.[30]

3.1.3. The Social Purpose Corporation (California)

California law offers two options for socially-oriented corporate governance structures: Benefit Corporations, closely following the Model Benefit Corporation Legislation, and Social Purpose Corporations (formerly called Flexible Purpose Corporations).

California's Social Purpose Corporation (hereafter, CSPC) is similar to the Washington SPC. It is a combination of the "Flexible Purpose Corporation" and the "Social Benefit Corporation", two socially-oriented corporate governance structures previously created by the Corporate Flexibility Act of 2011.[31] The California Corporate Code was amended in 2014 to combine both structures,[32] and the CSPC was the result.[33]

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[26] Plerhoples (2015).

[27] Del. Code Ann. tit. 8 § 362(a) (2018), *available at:* http://delcode.delaware.gov/title8/c001/sc15/.

[28] Del. Code Ann. 8 § 362(b).

[29] Del. Code Ann. tit. 8 § 365.

[30] Del. Code Ann. tit. § 366.

[31] See CA's Flexible Purpose Corporation Renamed to Social Purpose Corporation, available at: https://www.innov8social.com/2015/01/cas-flexible-purpose-corporation. See also, California Corporate

The CSPC uses the California corporate form at its foundation, albeit in a much more flexible structure.[34] The CSPC's articles of incorporation are to specify at least one "special purpose" that it will pursue, although the types of "social good" purposes that the CSPC will pursue in these broad limits are entirely in the hands of the founders. Moreover, this "specific purpose" may be limited in duration.[35] A CSPC may also freely pursue charitable purposes like traditional non-profit organisations, along with pursuing the interests of non-shareholder stakeholder interests to the broadest degree. Stakeholders include employers, customers, suppliers, creditors, the community, and the environment.

Shareholders have protection against the loss of economic value in CSPC conversions by way of converting a CSPC into a non-profit organisation by unanimity. Moreover, shareholders can convert a CSPC into an ordinary for-profit organisation (and *vice versa*) with the approval of at least two-thirds of each class of shares,[36] and dissenters may opt to have their shares purchased by the corporation for the fair market value of the day before the first announcement of the terms of the proposed transaction.[37]

CSPC directors can pursue purposes beyond, and even in conflict with, shareholder value maximisation. Prior to the 2014 amendments, directors of FPCs *were permitted* - but not required - to consider non-shareholder (stakeholder) interests.[38] However, in contrast, the current statute requires the same directors to take those interests into account in decision-making.[39]

The CSPC statute requires an annual report to be shared with shareholders, and with the public *via* the Internet.[40] Similar to the Washington SPCs, there is no specific guideline as to what is to be included in the report, which allows corporations to omit the goals that have not been achieved.[41] Furthermore, there is no requirement of a third-party standard in the preparation of the annual report.

Flexibility Act of 2011, available at: http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CORP&division=1.5.&title=1.&part=&chapter=&article.

[32] See the research of SDCL (San Diego Corporate Law) available the https://sdcorporatelaw.com/business-newsletter/california-social-purpose-corporations/.

[33] Cal. Corp. Code §§ 2500 et seq.

[34] Cal. Corp. Code § 2602(b)(2).

[35] Cal. Corp. Code § 2603(a)(4).

[36] Cal. Corp. Code § 3302(b).

[37] Cal. Corp. Code § 3305.

[38] Brakman Reiser (2012).

[39] Cal. Corp. Code § 3501(c).

[40] Cal. Corp. Code § 3500(a).

[41] Mirzanian (2015).

3.1.4. B Lab Certification and Benefit Corporations

B Lab is a non-profit organisation aiming to build a global community of certified Benefit Corporations ("B Corps"). B Corps are formed by corporations, across the globe, which voluntarily apply for compliance with standards of social and environmental performance, public transparency, and legal accountability.

B Lab employs two methods for achieving its mission. First, it has drafted Model legislation for the formation of benefit corporations, which has been highly influential on all legislation adopted in the US. Second, it certifies qualifying corporations as "Certified B Corporations". Certification is a multi-step process. It starts with the candidate company self-assessing its impact on stakeholders, and is followed by an independent audit of the company by B Lab.

B Lab's model legislation requires companies to create "a general public benefit"[42] and encourages (but does not require) that companies create one or more additional "specific public benefits" including, but not limited to: (1) providing low-income individuals or communities with beneficial goods or services; (2) economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) preserving the environment; (4) improving human health, and (5) promoting the arts, sciences, or the advancement of knowledge, and increasing the flow of capital to entities with a public benefit purpose.[43]

Benefit corporations are required to produce, file with the state, and make publicly available an annual benefit report, describing how they have pursued their stated goals, and measuring levels of success in generating public benefits. The assessment must also refer to a third-party standard that is developed independently from the benefit corporation, which is comprehensive, credible, and transparent.[44] However, the company can perform the assessment without a third-party audit or certification.[45]

Shareholders, the director, or a 5% owner of an entity of which the benefit corporation is a subsidiary, or other persons specified in the articles or by-laws, can bring action against the company, or its directors or officers for: (1) failure to provide the promised general or specific public benefit; or (2) violation of a duty or standard of conduct under the model legislation. However, the defendants will not be liable for monetary damages.[46]

[42] Model Benefit Corp. Legis. § 201.

[43] Model Benefit Corp. Legis. § 201(b).

[44] Model Benefit Corp. Legis. § 102(a).

[45] Model Benefit Corp. Legis. § 401(c).

[46] Model Benefit Corp. Legis., § 305(a)(2), 303(c)(2), 302(e).

As of April 2018, 33 states and the District of Columbia have passed benefit corporation legislation.[47]

3.1.5. Final Remarks: a Comparison Between U.S. Socially-Oriented Corporate Governance Systems

The various models for socially-oriented corporate governance adopted across the US all create an enabling environment for businesses that want the option to pursue goals other than profit maximisation. Nevertheless, there are important differences between the approaches.

B Lab's Model Benefit Corporation legislation is at one end of the spectrum: the aim is to maximise transparency and enforceability of a corporation's contribution to its stated public benefit. To this end, a corporation is required to produce an annual report, make it publicly available, and assess its contribution towards its public benefit against a third-party standard. It offers the greatest amount of transparency, with the greatest prospect for accountability for a corporation's public benefit. This comes at the expense of the flexibility for the corporation, with additional time, expense, and managerial burdens. There is also the issue that the impact on the environment and society, among other public benefits, tends to be measurable in the long-term, rather than the short-term, which potentially conflicts with the idea of having quantifiable measures in an annual report.[48]

The Delaware PBC is at the other end of the spectrum: the aim is to provide a corporation with options while not exposing it to increased liability. To this end, annual reports are required only biennially, and there is no requirement to make them publicly available. There is no requirement to use a third-party standard to address the corporation's promotion of the public benefit or the best interests of those affected by the corporation's conduct. The corporation's board of directors' decision-making is guided only in that it is required to balance different interests. Notably, the extent to which the corporation's liability is limited has concerned some observers: the considerable limitation of liability of the PBC, in conjunction with Delaware's deferential common law business-judgment rule, may be so broad that a PBC's board would not be liable for abusive financial decisions.[49]

The Washington SPC lies somewhere in between the Benefit Corporation and the Delaware PBC on the spectrum. The drafters sought to balance the transparency of corporate efforts in the promotion of a social purpose with corporate flexibility. Thus, a

[47] See *Benefit Corporation – State by State Status of Legislation*, available at: http://benefitcorp.net/policymakers/state-by-state-status.

[48] Loewenstein (2013).

[49] Brownridge (2015). Under Delaware's common law business-judgment rule (*see* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)), courts are deferential to the board's authority as the corporation's central and final decision-maker. The business-judgment rule prevents the board from being liable for breaching its financial duties if acting under "any rational business purpose".

corporation is required to produce an annual report discussing its efforts with regard to its social purposes and make the report publicly available; however, no assessment against a third-party standard is required. To ensure flexibility, there are no restrictions or mandatory considerations for corporate decision-making.

The California SPC similarly lies between the Benefit Corporation and the Delaware PBC on the spectrum, although it is perhaps closer to the Benefit Corporation than to the Washington SPC. Directors of CSPCs must consider the corporations stated social purposes, whereas, for directors of the Washington SPCs, it is optional. Also, although the CSPC requires that an annual report be rendered public, there is no strict framing as to its content, nor the requirement of a third-party standard in its preparation. There is concern that the lack of requirement of a third-party standard potentially allows shareholders to omit non-attained goals, and that the overall level of flexibility renders the structure of the CSPC as a tool to attract investors and customers, rather than a genuine reflection of dedication to social impact.[50]

Each model provides a different definition and scope of social purpose or public benefit, respectively. The model Benefit Corporation legislation makes a general public benefit mandatory and makes a specific public benefit optional. The general public benefit is defined by the legislation, while the specific public benefit is up to the corporation to define, if desired. Washington's SPC follows this approach. The model Benefit Corporation legislation defines "general public benefit" more broadly than how the Washington SPC legislation defines "general social purpose," and includes assessment against a third-party standard as part of the definition, whereas the Washington and the California SPCs' definition of "general social purpose" is comparatively more narrow (although still very broad), and is also rendered tailorable by the corporation.[51] The Delaware PBC, on the other hand, treats "public benefit" singularly - there is no distinction between general or specific public benefit. "Public benefit" is left entirely to the corporation to define.

Each model takes a different approach to guiding corporate decision-making. The Delaware PBC's directors' decision-making is guided only in that it is required to balance the interests of stockholders, the interests of those affected by the corporation's conduct, and the stated public benefit.[52] The model Benefit Corporation legislation requires directors to consider the effects of their actions or inactions on shareholders, employees and the workforce as a whole, to include suppliers, customers, local communities as well as the communities where the facilities and the suppliers are located, the local and global environment, the benefit corporation's long-term interests, and the ability of the benefit corporation to accomplish its general and specific public benefit purposes.[53] The

[50] Mirzanian (2015), at page 271.

[51] Cal. Corp. Code § 2602.

[52] Del. Code Ann. tit. 8 § 362(b).

[53] Model Benefit Corp. Legis., § 301(a).

California SPC requires directors to consider the corporation's social purposes in decision-making;[54] however, it does not go so far as the Benefit Corporation legislation in guiding decision-making. The Washington SPC is more akin to the Delaware PBC in this regard: directors are permitted, but not required, to consider the corporation's social purposes, to the extent that it is required by the corporation's articles of incorporation.[55] In short, much latitude is given to the Washington SPC to create corporate decision-making guidelines for itself, if it so chooses.

It is important to note that businesses incorporated in any state, and under any of the models discussed in the report, can participate in the B Lab certification process and receive B Lab's Benefit Corporation certification if they so desire. While the PBC and SPC corporate governance models do not require third-party auditing, they do not specifically prohibit it, either.

In conclusion, the Washington SPC attempts to strike a balance between, on the one hand, the Model Benefit Corporation Legislation, which provides transparency and encourages accountability for businesses in pursing their social goals, although it constrains corporate decision-making in the process; and, on the other hand, the Delaware PBC, which maximises flexibility for business, minimises the risk of liability and the burden placed on businesses, but also does little to facilitate transparency or the enforceability of a corporation's contribution to its stated public benefit. The Washington SPC legislation attempts to provide flexibility for businesses, particularly with regard to corporate decision-making, while still assuring a level of transparency.

3.2. The European Union Framework for Social Enterprises and Hybrid Companies

The European Union legal framework is the global forefront in terms of the social economy and sustainable ways of doing business.

Within the many initiatives at European Union level, the cornerstone is the European Union strategy concerning Corporate Social Responsibility (CSR): the Green Paper "Promoting a European Framework for Corporate Social Responsibility" presented by the Commission in July 2001, firstly aimed at launching a debate about the concept of corporate social responsibility and identifying how to build a partnership for the development of a European framework for the promotion of CSR. Ten years later, the Communication of the European Commission concerning Corporate Social Responsibility (CSR), in 2011, provided a "renewed EU strategy 2011-14 for Corporate Social

[54] Cal. Corp. Code § 3501(c).

[55] Wash. Rev. Code § 23B.25-6(1) and 7(1).

Responsibility". The Communication, besides offering an interesting overview of CSR approaches across the European Union, addresses the European institutions, Member States, and Social Partners as well as business and consumer associations, individual enterprises and other concerned parties, encouraging the development and the implementation of a common strategy to promote CSR among Europe.

Of the same year is the Communication on the Social Business Initiative (SBI) [COM(2011) 682 final], which has laid the foundations for the EU policy on social enterprises (see *infra* Paragraph 3.2.1.).

Between the many EU actions in this sector, two documents seems to be of particular relevance:

(i) **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**, which imposes the disclosure of non-financial information to both public-interest entities, and to those public-interest entities which are the parent undertakings of large groups, in each case having an average number of employees over and above 500, in the case of a group on a consolidated basis. The disclosed non-financial information will "provide investors and other stakeholders with a more complete picture of their development, performance and position and of the impact of their activity". Certain large companies are now required, under the Directive, to consider the impact of their business activities on civil society and to give a review of policies, principal risks and outcomes, including those on environmental matters.

Even if a similar duty of disclosure applies to companies and other subjects above certain dimensions, the Directive does not prevent Member States from extending a similar provision through domestic law as well as, or, in its absence, simply through a corporate by-law provision.

(ii) The recent **Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee Of The Regions. Action Plan: Financing Sustainable Growth (Brussels, 8.3.2018 COM(2018) 97 final)**. This Action Plan on sustainable finance is part of broader efforts to connect finance with the specific needs of the European and global economy for the benefit of the planet and society. Specifically, this Action Plan aims to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth, manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues, and foster transparency and long-termism in financial and economic activity.

Both these actions seem to be in line with the HCBM holistic approach, which aims at developing and enhancing an entire *business ecosystem*, which should include financial instruments, as well as disclosure and other mechanisms of stakeholders involvement.

Finally, along these lines, the report of the European Political Strategy Centre entitled "*Sustainability Now! A European Vision for Sustainability*", issued in July 2016 focuses on the EU's internal dimension, in order to analyse the EU Global Strategy on sustainability, which aims to integrate the UN Sustainable Development Goals into a coherent EU Foreign and Security Policy (see *supra* Paragraph 2).

3.2.1. The European Framework for Social Enterprises

From the 2011 Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on social enterprises, the European Commission has launched the EU policy on social entrepreneurship. A social enterprise is defined by the Communication 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. 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 open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities" (p. 2).

To be considered a social enterprise under the EU legal framework, it is then necessary that:

(i) 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;[56]

(ii) the profits are mainly re-invested with a view to achieving this social objective;

(iii) and the method of organisation or ownership system reflects their mission, using democratic or participatory principles or focusing on social justice.

The Communication recognised social enterprises as an instrument to foster (social) innovation, and set the stage for the development of "horizontal policies in the context of the social economy and targeted programmes to support social enterprises and social innovation". In particular, the Commission proposes an action plan in general support of social innovation and to enable social enterprises to use their full potential, containing measures such as improving access to funding, increasing the visibility of social entrepreneurship, and improving the legal environment for social enterprises.

In April 2013, as a follow-up to the 2011 Communication on the Social Business

[56] Those are 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, child care, 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 marginalisation) but whose activity may be outside the realm of the provision of social goods or services (pp. 2-4).

Initiative, the European Commission has launched a study on the state, size, and scope of social enterprises in Europe. The study ended up with a very interesting document that can give an idea of the scale of the phenomenon, which consists of a map of social enterprises and their eco-systems in 29 European countries (see its Executive Summary below, **Annex n. 2**). Specifically, the study analyses *(i)* the scale and characteristics of social enterprise activity in each country; *(ii)* the national policy and legal framework for social enterprise; *(iii)* the support measures targeting social enterprise; *(iv)* labelling and certification schemes where these exist; and *(v)* social (impact) investment markets.[57]

From the study emerged that, despite their diversity, social enterprises mainly operate in three main areas, namely:

- work integration: the training and integration of people with disabilities and unemployed people;
- personal social services: health, well-being and medical care, professional training, education, health services, childcare services, services for elderly people, or aid for disadvantaged people;
- local development of disadvantaged areas: social enterprises in remote rural areas, neighbourhood development/rehabilitation schemes in urban areas, development aid and development cooperation with third countries.

Other fields include recycling, environmental protection, sports, the arts, culture or historical preservation, science, research and innovation, consumer protection, and amateur sports.[58]

This being the framework at the European Union level, the following paragraphs will focus on selected EU Member States, and on specific innovative experiences.[59]

3.2.2. Belgium: The Société à Finalité Sociale (SFS)

As the European Commission study has indicated, "the national 'social enterprise families' are incredibly diverse across Europe, encompassing a range of organisational

[57] The research is based on a review of national policy documents, academic and grey literature on social enterprise, but also on semi-structured interviews with a range of stakeholders such as social enterprises, policy makers, social enterprise networks, support providers, investors and intermediaries. Within this context, the European Commission has developed several Country reports, available at http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=socentcntryrepts&mode=advancedSubmit&langI&langId=en.

[58] These information have been gathered from the European Commission webpage, specifically dedicated to Social Enterprises, available at the following link: http://ec.europa.eu/growth/sectors/social-economy/enterprises_en.

[59] E.g., Spanish social enterprises are still at an embryonic state comparing to other EU jurisdictions or even to the USA. See Mas-Machuca et al. (2017).

and legal forms and statuses".[60] Between the many European countries that have introduced a legal framework for organisations ascribable to the EU Commission definition of "social enterprises", the Belgium experience deserves an analysis.

The *Société à Finalité Sociale* (SFS) – the social purpose company – had already been introduced in 1995.

The model, provided for by Articles 661-669 of the Belgium Company Code, allows commercial companies to pursue goals other than that of profit. Similarly, a not-for-profit association can legally convert itself into an SFS without affecting its legal personality.

To be defined as an SFS, a company should exclusively pursue a "social goal": profit-making goals in favour of its members are not allowed. The members "may obtain a limited profit from the assets of the company (determined by reference to a specific official rate) or no profit from the assets. Profits and reserves must be allocated in accordance with the social goal of the company, just like net assets in the case of the winding up of the company (with the exception of the refunding to members of the amount contributed by them to the capital)".[61] Employees have the option of becoming members.

Finally, reporting systems are legally required: directors and managers have to draw up an annual report on the manner in which the company has taken steps to realise the social goal.

3.2.3. The Italian Experience of "Società Benefit"

It is not rare that the Member State legal framework proves to be more advanced than its EU counterpart. This is the case with Italy, which is the first European country to have adopted a legal regime for the "Società Benefit", a hybrid company inspired by the US Benefit Corporations Model and Washington's Social Purpose Corporation (see *supra* Paragraph 3.1).

As in many continental European jurisdictions, until 2016 Italian companies could be used only for profit goals (Article 2247 of the Italian Civil Code), which is why, in order to do business that aims to balance profit with social/environmental goals, a new specific legal provision introducing the Italian *Società Benefit (SB)* was made necessary.

The *Società Benefit*, is regulated by the Stability Act of 2016, Law n. 208/2015, at Article 1, paragraphs 376-382. It is a for-profit company, which aims at generating a "general public benefit", intended as a material positive impact on the civil society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits. Any company model under the Italian Civil Code

[60] European Commission, *A map of social enterprises and their eco-systems in Europe. Executive Summary*, attached to this Report (Annex 2), at page 4.

[61] UNIDROIT (2010), at page 18.

can be transformed into SB.

The public benefit has to be defined in the corporate by-laws and the corporate directors have now to *balance* the profit goal with the pursuit of the general public benefit. However, even if directors are potentially liable in the case of wrongful balance, the regulation on *Società Benefit* is complemented with ordinary Civil Law provisions on corporate governance structure and enforcement mechanisms for director misconduct: similar rules have been created in a profit-centric way, and do not meet the specificities of an hybrid corporation.

Since SBs are based on the US experiences that have been already deeply analysed above (*supra* Paragraph 3.1), I will here focus only on the main differences between the (slightly different) models of benefit corporation and the Human-Centered Enterprise.

The first main distinction is that, while the HCBM aims at creating an entire business ecosystem, the Italian *Società Benefit* (and the US models of benefit corporations) focus only on corporate governance and disclosure mechanisms. For instance, neither the US states, nor Italy has introduced any fiscal benefit for the benefit corporation to date; similarly, none procurement policies are considered by benefit corporation regulations, and none specific forms of financing.

Secondly, the Human-Centered Enterprise (HCE) pursues the "social/public" benefit goal in a more effective way than benefit corporations do: on the one hand, social and environmental goals are described in the HCE's by-laws in a precise way, while vague concepts such as "happiness" or "general positive impact on the local community/workers *etc*.", which occur too often in the by-laws of Italian benefit corporations, would not be accepted; on the other hand, social and environmental concerns are not interests to be taken into account while managing a for-profit business, but they are proper corporate goals on a par with profit. Consistently, the enforcement mechanisms for director misconduct will be effectively envisaged in the specificities of the HCEs, without reflecting traditional instruments targeted on for-profit companies.

Finally, the HCMB provides a way for stakeholders' involvement within the corporate governance, while similar mechanisms are not legally required for benefit corporations (neither in Italy nor in the U.S.A.).

In spite of the absence of any tax benefits 173 *Società Benefit* existed in March 2018.

France: Towards a Political Engagement with a More Sustainable Way of Doing Business

In France, an intern-ministerial task force has recently published a Report, entitled *L'entreprise, object d'intéret collectif*.

The Report, published on 9 March 2018, aims at allowing willing companies to assign to their businesses a broader, more varied object; it wants to develop a corporate model that is more mindful of the public interest and of the people's expectations.

The Report develops several policy recommendations. Between these recommendations, the following seems of particular interest in the context of the present research.

- Recommendation n. 1 suggests modifying the French Civil Code to include, in the definition of a company's essential components (namely, a lawful object and a grounding in a common shareholder interest), a rule that corporations should be managed in their own interest, *considering the social and environmental aspects of its activities*. A similar expression seems to recall the one of Section 172 of the UK Companies Act.[62]

- Recommendation n. 2 recommends requiring the board of directors to consider social and environmental aspects of the company's activities, notably by using the company's "fundamental purpose" as a strategic guide to business.

- Recommendation n. 11, in order to give a legal grounding to mission-based undertakings, proposes to enable companies to state a *fundamental purpose* ("*raison d'être*") in their by-laws.

- Recommendation n. 12, finally, gives statutory recognition to a mission-based undertaking which should be available to companies of any legal form, provided that they meet four conditions:

(i) a fundamental purpose is stated in their articles of constitution;

(ii) an "impact committee" exists, comprising, where necessary, stakeholders;

(iii) there is third-party monitoring and the company reports publicly on its compliance with its stated fundamental purpose;

(iv) and, for companies with a staff of over 500, publication of a declaration on non-financial performance (this provision is in line with the EU Directive on non-financial statements examined above (see *infra* Paragraph 3.3.1.).

3.3. The United Kingdom: The Community Interest Company and Section 172 of the Companies Act

The Companies (Audit, Investigations and Community Enterprise) Act of 2004 introduced the Community Interest Company (CIC), a legal model of "social enterprise", meant as "a business with primarily social objectives whose surpluses are principally reinvested for

[62] Section 172 (1) (d) of the UK Companies Act requires directors of a company to have regard also to "the impact of the company's operations on the community and the environment". See *infra* Paragraph 3.3.

that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners".[63]

The regulation is the result of the work of the Social Enterprise Unit established in 2002 within the then Department of Trade and Industry. The programme was meant to develop a legal environment enabling entrepreneurs to do business in a sustainable way.

CICs are regulated by the Community Interest Company Regulations of 2005, as amended in 2009, but they also have to respect the general rules of company law, as regulated by the Companies Act of 2006.

These companies (which are normally organised as limited liability companies) aim to meet the economic needs of producing good and services with the primary purpose of improving the benefits for civil society and the social community in which it operates and/or of its stakeholders (employees, etc).

To be defined as such, a Community Interest Company should respect the following requirements:

(i) "passing" the community interest test: a "reasonable" person should judge the CIC's business as generating a benefit *for the community*;

(ii) the corporate profits can only be: (a) retained within the company to fund its activities; and (b) used to benefit the community. However, CICs can also carry out collateral normal business activities. Similarly, dividends to investors can only be paid up to a certain amount;

(iii) be certified as such by an independent Regulator of Community Interest Companies, who is also in charge of supervising the future activity of the CIC.[64]

The UK legal framework deserves analysis in this context also with regard to **Section 172 of the UK's Companies Act 2006,** entitled the "Duty to promote the success of the company", which requires on a director of *any company* to "act in a 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". In doing so, directors should consider a series of factors listed in the section,[65] which refer to the promotion of social, environmental and governance

[63] UNIDROIT (2010), at page 19.

[64] See Regulator of Community Interest Companies, *Annual report 2016-2017*. The report gives an overview of community interest companies in the UK.

[65] Section 172 of the UK Companies Act (Duty to promote the success of the company): "(1)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. (2) Where or to the extent that the purposes of the

objectives.

The section – which, from a first reading, would seem to be particularly innovative – has been heavily criticised as being a "codification of directors' duties". It must be said, however, that: no enforcement mechanisms have been provided; and that putting theinterests of different stakeholders (e.g., employees and the environment) at the same level could actually generate conflicts of interest. Finally, the provision does not provide any connection between boards of directors and stakeholders (not even with employees).[66]

3.4. Latin America: A Brief Overview on the BCorp Movement

South America is the subject of a wave of innovations in terms of social entrepreneurships. The BLab movement is extremely active and is able to operate in a more co-ordinated way across jurisdictions than in other countries: the BCorp movement in Latin America is indeed becoming an effective framework for entrepreneurs, a network that offers solutions to business willing to operate in a sustainable way.

Such a movement is also pressing for the adoption of *ad hoc* legal frameworks at country level, promoting the introduction of "Sociedades B.I.C", a legal organisation inspired by the USA and Italian benefit corporations (*supra* Paragraphs 3.1.4 and 3.2.3) and the UK Community Interest Company (*supra* Paragraph 3.3).

In Argentina, for instance, a draft law proposed by the Executive Power on 9 November 2016 (see Annex 3) provides for a business model similar to that of benefit corporations, in which directors have to consider the effects of their business on civil society and on the environment in which they operate. The proposed law is, however, more detailed than, for example, the Italian *Società Benefit*, since it specifically regulates important corporate governance aspects such as enforcement mechanisms, members' right of withdrawal, and thresholds for profit distribution. It also requires companies to prepare an annual report describing the actions carried out to comply with the self-imposed social and/or environmental objectives, which will be audited by an independent registered professional specialised in the subject. The law does not seek to introduce a new corporate type, nor any tax exemption or benefit.

A new regulation, similar to the Argentinian one, has been proposed in **Brazil** as well. The Brazilian Group of experts in BCorp has has already finalised the third version of the draft law. The most suitable draft is the one which considers Benefit Corporations

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. (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company".

[66] For a sharp critique analysis on Section 172 UK Companies Act 2006, see Sagas (2017).

not as a new type of corporation, but as a legal qualification for the existing types of companies, conditional to changes in the corporate by-laws to indicate the purpose of social and environmental impact on the corporate purpose, adapts the governance of the company/corporation to assess decision-making in relation to stakeholders, the community and the environment, through the creation of an impact director and/or a multidisciplinary impact committee, and, the publication of an annual impact report.

In June 2017, **Chilean** deputies (Maya Fernández and Felipe Kast) presented a bill that regulates the creation and operation of Beneficial Companies and Collective Interest. This project does not regulate the management of the assets of the company nor the distribution of its profits, but regulates the enforceability of compliance with the purpose adopted in the corporate by-laws and the report that the companies must perform annually. See the draft law attached to the present documents.

The draft law proposed in **Colombia** on 6 September 2016 (Bill No. 135-2016) is of particular interest where it allows the B.I.C. to be organised as a listed company, operating on the stock market.

Finally, a similar movement is active also in **Peru** and in **Uruguay** (proposed legislation by members of the HoR of Uruguay dated September 15, 2017 - see Annex 4).

3.5. Asia: An Overview

This paragraph provides an overview of the "social enterprises" and the social economy in some selected Asian countries, namely: South Korea, China, Malaysia, the Philippines and Thailand.

Even if the Asian historical background is quite heterogeneous in terms of the geo-political situation, two main groups can be distinguished: North Asia and South Asia.

(I) **North Asia** – composed of China, Japan and South Korea – has a culture deeply rooted in Confucian philosophy whose values still structure society to a great extent.

The three North Asian countries analysed are marked by a co-operative and associative tradition whose origins are very old, and which have remained for a long time under the strict control of the administrative and political power (whether it was communist ideology in China or anti-communist in Japan). Only recently has this public interventionism faded in Japan or Korea, and has diminished in China, with the consequence that autonomous co-operatives and associations have been able to emerge and develop, as progressively recognised by law. South Korea is, to date, the only Asian country which provides an *ad hoc* legal framework for social enterprises, which is progressively inspiring other Asian countries.

(II) The economy of **South Asia** – which includes the Philippines, Cambodia and Indonesia – developed later than in other Asian countries, and is still predominantly rural. Here, local and international NGOs provide an essential contribution, organising activities that seek to provide an answer to poverty and exclusion. Mainly through the analysis of these economies, it was possible to perceive some of the specific features of Asian social enterprise and the social economy. In particular, there are two organisational forms common to all South Asian jurisdictions:

a. **Non-profit Co-operatives**, meant as collective self-employment responses to unmet needs based upon the co-operative tradition. These are widespread in all South Asia, developed mainly as agricultural co-operatives or social co-operatives (Indonesia);

b. **Community Development Enterprises**, intended as multi-stakeholders partnerships (NPO, FPO, public) promoting participatory local development.

Beyond their differences (mainly due to different historical roots), it is possible to identify some common denominators in Asian countries, whose relative impact varies according to the national context:[67]

1. the growing role of not-for-profit organisations in providing social services (privatisation);
2. the consequent trend of not-for-profit organisations to adopt a market-oriented approach and to participate in public procurement tenders and compete for those contracts;
3. the growth of the corporate social responsibility movement across Asia;
4. a growing awareness among both civil society and the academic world of a more sustainable way of doing business.

Finally, with the exception of South Korea, a uniform notion of "social enterprise", "social entrepreneurship" and "community business" does not seem to exist, and there still seems to be as many definitions as there are Asian countries. However, in spite of the absence of a common legal framework for social enterprises, the Asian Institute for Social Entrepreneurship (ISEA) was created in 2001 to set up a learning and action network for social enterprises to catalyse knowledge creation, capacity development and movement-building for social entrepreneurship in Asia.

3.5.1. South Korea: A Legal Framework for Social Enterprises

With the 2007 Social Enterprise Promotion Act (SEPA), as further amended, South Korea became the first Asian country to enact a specific legal framework to support social enterprises (see Annex 5). As stated in Article 1, the purpose of this regulation is to

[67] Defourny and Kim (2011).

"contribute to social integration and the improvement of citizens' quality of life by expanding social services, which are not sufficiently supplied in our society, and creating new jobs through support for the establishment and operation of social enterprises and the promotion of social enterprises".[68]

The Act is part of the Korean Labour Laws and the Minister of Employment and Labour is responsible for implementing a plan for the promotion of social enterprises every five years after the deliberation by the Employment Policy Council.

Social enterprises have been introduced with the primary aim of providing new job opportunities, but also "as an attempt to establish a more formalised civic society"[69], by employing disadvantages people (at least 50% of the total employees), providing for social services to disadvantaged groups (at least 50% of the total users of the service) and, more generically, by generating a positive impact on the local community.

Legal entities that can be certified as social enterprises are: non-profit organisations carrying out business, associations regulated by Civil Law, and corporations as regulated by the Commercial Act. In 2014, social enterprises were mainly organised through companies (50.7% of the total), followed by Organisations under the Support for Non-Profit Organisations Act (21,7 %), Associations under Civil Law (18.8%), Foundations under Social Welfare and Services Act (5.8 %), Co-operatives under Farmers and Consumer Co-operative Act (2.2%).[70]

To be certified as social enterprise (by the Minister of Employment and Labour), the following requirements should be satisfied (Articles 7 and 8):

(i) **Social goals:** the main purpose of the enterprise should be to realise a social objective, such as improving local residents' quality of life, *etc*., by providing vulnerable groups with social services or jobs or contributing to local communities, as defined by an *ad hoc* Presidential Decree.

(ii) **Stakeholders participation:** a social enterprise should have a decision-making structure in which interested persons, such as service beneficiaries and workers, *etc*., can participate. The law does not, however, specify mechanisms to ensure such participatory governance.

(iii) **Profits:** revenues from business activities of social enterprises should not exceed certain standards defined by law.

(iv) **Dividends:** if the social enterprise is organised as a company under Commercial Law, whenever it has distributable profits, it should spend at least the two-thirds of the profits of each fiscal year on social objectives.

[68] For a brief overview of the social enterprises history and framework in South Korea, see Bertotti et al. (2014).

[69] Defourny and Kim (2011)

[70] Bertotti et al. (2014).

An organisation which meets the requirements listed above can then be qualified as a social enterprise under the South Korean law; no legal person other than social enterprises can use the name of social enterprise or any other similar names (Article 19).

The **benefits** offered to companies fulfilling these conditions are varied: they include a favourable tax regime, subsidised jobs, exemptions from social security contributions, the possibility of borrowing at a favourable rate and easier access to public markets. The Minister of Employment and Labour also supports social enterprises with professional consultation on management techniques, taxation, labour affairs, accounting and others. State or local autonomous governments can further support social enterprises, by the letting of state-owned or public land, and by reducing the fiscal pressure or even providing tax exemptions.

In 2010, in addition to the amendments of the SEPA, two important events stressed the interest of public policies towards social enterprises.

The first one concerns the involvement of new ministries, namely, the Ministry of the Interior or the Ministry of Agriculture. The social enterprise certification scheme, which, since 2007, has been controlled by the Ministry of Employment and Labour, in 2010 was partially extended to other ministries through interministerial contracts awarded under the programme of "pre-social enterprise job creation". These contracts follow under the specific competences of each Ministry, e.g., the Ministry of Education encourages initiatives in the field of school support, etc.. This has extended the reach of the social enterprises' impact to sectors of the economy other than the labour market (e.g., education).

The second trend is the growing involvement of local communities through different support initiatives for social enterprises. In the context of the 2010 regional elections, many local authorities have also adopted measures which have led to the definition of regional-type social enterprises (e.g., the Seoul social enterprise), inspired by the SEPA model. This involvement of the regional authorities is financially supported by the decentralisation of certain budgets.

Finally, it should be observed how the South Korean example has inspired other Asian countries such as **Thailand**, which, in 2010, adopted the Thai Social Enterprise Office (TSEO). The TSEO was established under the Thai Health Promotion Foundation Act, as the executive authority to deliver the Social Enterprises Master Plan (2010–14). The Office's priority is to stimulate co-operation among social enterprises and develop their networks in Thailand.

3.5.2. China

Unlike South Korea, China does not have a structured legal framework for social enterprises. The expression "social enterprise" itself seems to have been introduced only through the translation of the OECD draft report in 2004, and it has been developed mainly due to the British influence on the Chinese economy. Due to the similarities of the Chinese translation of "social enterprises" and "corporate social responsibility", the two concepts have often been considered to be synonymous.[71]

Among the different Chinese organizational models, there are mainly two models that seem to be somehow characterised by a balance between profitability and social sustainability: *(i)* Farmers' Specialised Co-operatives; and the *(ii)* Social Welfare Enterprises.

In general, China has a massive Co-operatives sector (around 160 million families involved),[72] especially focused in agriculture, and even private co-operatives operate under the strict control of the public authorities, in contrast to the European and USA systems.

Within the existing co-operatives types, the **Farmers' Specialised Cooperative** (FSC) seems to be the closest Chinese example to the HCBM. Enacted in 2006, FSCs have then grown rapidly, and, by June 2010, the number of officially registered FSCs had exceeded 0.3 million, while 25 million farmer households (which consist of 10% of China's total farm households) have become members of FSCs.

It is a mutual-aid economic organisation, which is voluntarily adopted for the production and management of agricultural products (the purchase of agricultural production materials, sale, processing, transport and storage of agricultural products, as well as the technologies and information relating to agricultural production and business operations), in favour of its members. According to law, however, an FSC can invest in enterprises and other companies, and take limited responsibility for the enterprises invested in, although it cannot be listed on the capital market.

A farmers' professional co-operative shall observe the following principles:

a) At least the 80% of its members must be farmers. Also, if the members are less than 20, only one of them can be an enterprise, a public institution or a social organisation. If the number of members exceeds 20, the 5% of them may be enterprises, public institutions and social organisations;

b) It must aim to provide services to its members and seek the common interests of all its members;

[71] Wang and Zhu (2009).

[72] Defourny and Kim (2011).

c) It must ensure the equal treatment of its members and the free withdrawal from membership;

d) It must be managed in a democratic way;

e) The surplus is to be returned to the members according to the volume (amount) of transactions with the farmers' professional co-operative.

Being an FSC can be rewarding in terms of dedicated legal benefits, such as fiscal support, preferential tax treatment/regimes, and support in finance, science, technology and talent, as well as through industrial policies.

Another interesting example in China can be found in **Social Welfare Enterprises**, businesses set up for the employment of people with physical or mental disabilities (at least the majority).

In 2008, there were still 23,000 social welfare enterprises across China, employing nearly 620,000 people with disabilities, since the 1990s, those models have started to decrease rapidly, mainly because of the China's market-oriented operational model.[73]

Finally, in 2016 the BCorp movement has reached China: since then, eight companies have been certified as BCorps.[74]

3.5.3. Malaysia and the Philippines

Despite the absence of a specific legal setting for social enterprises, more and more entrepreneurs in Malaysia are defining their business as "social". Social businesses are carried out through existing legal entities, from associations to limited liability companies. However, a common definition of social enterprise does not exist yet, and entrepreneurs rely on components of the social enterprise that they consider important to qualify as such.[75] Generically, they are understood to be entities that accomplish a social mission using an economic model, like a combination of elements of both NGOs and for-profit enterprises, and Malaysian social enterprises are strongly influenced by the British Model of the Community Interest Company (see *infra* Paragraph 3.3).

Like Malaysia, a legal framework for social enterprises does not exist in the Philippines, either.

However, the cultural environment in the Philippines has been sensitive to social entrepreneurship since the last century. In 1999, the Philippine Social Enterprise Network (PhilSEN) was created to discuss the practices and experiences of social enterprises, operating mainly as a capacity-building supporter for social entrepreneurs.

[73] Data from Wang and Zhu (2009).

[74] On BCorp and Blab see what have been discussed *supra*, at Paragraph 3.1.5.

[75] Between the many, see the example of Arkitrek.

Two bills that could have a direct impact on social enterprise have been under discussion in recent years: the Social Value Bill and the Social Enterprise Poverty Reduction Bill (PRESENT). However, these bills still do not seem to have been passed. PhilSEN is currently lobbying for the PRESENT Bill in both the Senate and Congress in order to promote social enterprises "as vehicles for poverty reduction, spearheading social enterprise education in the country and is developing benchmarks and standards for social enterprises".

3.6. Australia

Australia does not have a separate legal framework for social enterprises, nor there is a legal definition of what a social enterprise is. Although, widespread consensus describes social enterprises as organisations that have the following characteristics:

(i) an economic, social, cultural or environmental mission that is consistent with a public or community benefit;

(ii) they trade to achieve their mission;

(iii) they derive a substantial portion of their income from their trading activity; and

(iv) they re-invest the majority of their profits or surpluses into fulfilling their missions.[76]

Besides the absence of a proper legal framework, there are also several legal constraints for a social enterprise to operate in Australia. Firstly, Australian company law does not permit for-profit companies to pursue social goals *at the expense of making profit*: to do so, may be a breach of director fiduciary duties (e.g., the duty to act in good faith in the best interests of the company). The current for-profit governance structures in Australia do not give social enterprises enough flexibility to pursue their social goals in circumstances in which profit may be compromised.

Secondly, organisations have to choose either to be a for-profit structure in order to access equity funding (without the tax and financial benefits of a not-for-profit structure or the access to grants and donations), or to be a not-for-profit structure in order to be eligible for donations and grants and gain tax concessions (but without the ability to raise equity funding or distribute profits to members). The benefits of different funding avenues are therefore limited by the chosen legal framework. This limitation may be even more problematical from a dynamic efficiency perspective, whereby (as an example) a young social enterprise outgrows the not-for-profit structure and is then required to undertake a

[76] This is a result of a research report produced in collaboration between the Centre for Social Impact, Swineburne University of Technology, and Social Traders titled "Finding Australia's Social Enterprise Sector 2016" (2016 FASES Report).

significant corporate restructuring in order to operate for profit in the future.

For all these reasons, within the five most popular organisations – private companies;[77] public companies;[78] companies limited by guarantee;[79] incorporated associations;[80] co-operatives; and indigenous corporations – I will here focus only on co-operatives and indigenous corporations, which seem to be the most relevant examples to the project, since they are closer to the idea of the Human-Centered Enterprise.

3.6.1. Co-operatives

Co-operatives are organisations with separate legal personality, requiring at least five members that all have equal voting rights. Co-operatives operate on the principles of democracy, sharing and delegating to benefit all members: their main beneficiary is, indeed, their membership. There is no unitary regulation applicable to the entire Australian Commonwealth, and indeed the relevant head of constitutional power is limited to "corporations " (Section 51xx, "corporations power"). The way that co-operative law has developed since is such that there is a national uniform law in each state. New South Wales (NSW) is the "lead jurisdiction", and it has therefore been used as the leading example for the analysis of co-operatives.

The relevant NSW regulations are Co-operatives (Adoption of National Law) Act 2012 No. 29 (NSW), and in particular its Appendix 1, so-called "Co-operatives National Law" (CNL); and Co-operatives National Regulations (NSW) (CNR).

[77] A private company (company limited by shares) is a privately owned company with between one and 50 shareholders/members. A proprietary company operates for profit, and lodges financial reports to the Australian Securities and Investments Commission (ASIC). The level of financial reporting depends on the size of the company – small companies (i.e. those controlling less than $25 million of consolidated revenue) are exempt from some financial reporting requirements. A private company has limited liability and separate legal personality. It is however prohibited from engaging in fundraising activities that would generally require the issue of prospectuses – a private company cannot offer shares to the public.

[78] A public company (company limited by shares) is a for-profit, limited liability business structure with a greater ability to raise capital from the public. The company also has separate legal personality. Public companies must keep a registered office open to the public and appoint an auditor. The financial reporting requirements of public companies to ASIC are generally significant. Public companies are able to raise capital from the public – generally.

[79] A company limited by guarantee (CLG) is a type of public company in Australia. CLGs do not have any shares and therefore do not have the ability to raise capital through equity funding. They are 'limited by guarantee' because, in the instance that the company is wound up, the members guarantee the payment of a specified, limited amount in contribution to the property of the company. CLGs have limited liability and separate legal personality. Although there is no restriction on the distribution of profits to members, this business structure is typically used by Australian not-for-profit entities, with the consequence that the profits are typically all re-invested into the company. CLGs have financial reporting obligations to ASIC which are generally significant.

[80]An incorporated association is a registered legal entity that is generally established for a specific recreational, cultural or charitable purpose, e.g. a sporting club. All profits must be reinvested into the association. Incorporated associations have separate legal personality. Each Australian state and territory has a separate set of laws governing incorporated associations.

In general, co-operatives are for-profit businesses that also have to pursue goals other than profit maximisation. While focusing on member needs, co-operatives are indeed legally-bound to work for the sustainable development of their communities, albeit through policies accepted by *their members* (Section 10.7 CNL).

Furthermore, co-operative surpluses should be allocated for one or all of the following purposes (Section 10.3 CNL): *(i)* developing the co-operative, possibly by setting up reserves, part of which would, at least, be indivisible; *(ii)* benefiting members in proportion to their transactions with the co-operative; and *(iii)* supporting other activities as (again) approved by the membership.

They are enabled to retain part of the profit, and, indeed, "Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of the capital is usually the common property of the co-operative. They usually receive limited compensation (if any) on capital subscribed as a condition of membership" (Section 10.3 CNL).

The CNL distinguishes two types of co-operatives (Section 17):

a) Distributing Co-operatives, which are not prohibited from giving returns or distributions on surplus or share capital (see Section 18 for the details);

b) Non-Distributing Co-operatives, which are prohibited from giving returns or distributions on surplus or share capital to members, other than the nominal value of shares (if any) at winding up (see Section 19 for the details).

Finally, all co-operatives must respect the following additional principles (quoting by Section 10 of the CNL):

- Voluntary and open membership: Co-operatives are voluntary organisations, 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;
- Democratic member control: Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (1 member, 1 vote) and co-operatives at other levels are organised in a democratic way;
- Autonomy and independence: co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.
- Education, training and information: co-operatives provide education and training for their members, elected representatives, managers and employees so that they

can contribute effectively to the development of their co-operatives. They inform the general public, particularly young people and opinion leaders, about the nature and benefits of co-operation.

- Co-operation among co-operatives: co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

The law allows a co-operative to be organised through any existing model, by setting its own governance rules, as long as it is in compliance with the CNL.

In conclusion, NSW co-operatives in general are "indirectly" operating in the interest of the stakeholders, having to adopt a certain concern for the community (Section 10.7 CNL), which are, however, identified and accepted by the co-operative members. Consistently, stakeholders are not involved within the governance of the co-operative: they have no voice in the appointment proceedings of directors, whose fiduciary duties are only in respect of the co-operative members.

3.6.2. Indigenous Corporations

Indigenous corporations are particularly interesting within the present research, since they are surely the Australian organisation closest to what the Human-Centered Business Model is trying to achieve in developing countries and emerging markets: it takes a disadvantaged or marginalised community and creates a corporate structure that suits its needs and accounts for its limitations, for example, by reducing reporting requirements accounts for limited technology infrastructure in rural and remote indigenous communities, or increasing training support accounts for the lower educational levels in indigenous communities, *etc*.

More in details, indigenous corporations are a type of limited liability company that are only available for Aboriginal and Torres Strait Islander (ATSI) organisations, which however are not limited to this type of legal structure. Indigenous Corporations are regulated by the Office of the Registrar of Indigenous Corporations (ORIC) rather than the Australian Securities and Investments Commission (ASIC). ORIC is a specialist regulator that has additional powers beyond pure regulation.

To create an Indigenous Corporation, there must be at least 5 members, who are at least 15 years old, must be ATSIs, the majority of directors must be ATSIs, and there must be no less than 3 and no more than 12 directors on the board. Indigenous Corporations are able to take into account the Indigenous customs and traditions in their constitution (referred to as the 'rule book'). They are limited liability organisation, meaning that the members will not be liable for the debts of the corporation.

Simplified and cheaper processes for registering, reporting, *etc*., are specifically provided for these corporations. In details, there are no fees charged for registering an Indigenous

Corporation, and/or lodging forms and documents; also the reporting requirements to ORIC are generally low. ORIC provides face to face training in remote areas, dispute resolution services, telephone advice, assistance with examining books and records to identify financial and corporate governance issues, etc. ORIC also provides access to free legal advice through an in-house 'LawHelp' service.

Indigenous Corporations are, by default, for-profit entities, but can register for not-for-profit status and operate accordingly. The directors of Indigenous Corporations are, however, still subject to the same fiduciary duties to their members only, like other public and private company directors. Also, similarly to the co-operatives model, the members of an indigenous corporation are the desired beneficiaries underlying the social purpose.

3.6.3. Proposal for the Introduction of Benefit Corporations

In 2016, the Australia and New Zealand branch of B Lab formed a working group comprised of academics, lawyers, business leaders, and governance experts to draft amendments to the Corporations Act 2001 to set up a regime for Benefit Corporations in Australia. On 27 February 2017, B Lab submitted a draft set of provisions and an accompanying explanatory memorandum to the Australian Department of Treasury as part of a submission on the subject of social impact investing (see Annex 6).

The following are the main features of the proposed amendments:

(i) A benefit company must have a purpose of creating general public benefit in its constitution and may have a purpose of creating one or more specific public benefits in its constitution (Section 190C). Section 125A(1) defines what a positive social impact is; it requires at least one purpose of creating general public benefit; Section 125A(2) is then a safeguard provision intended to protect actions that may pursue profit but, from time to time, be contrary to or beyond the public benefit purposes.

(ii) The directors or other officers of a benefit company must consider *(i)* the likely consequences of any decision or act in the long term; *(ii)* the interests of the company's employees; *(iii)* the need to foster the company's business relationships with suppliers, customers and others; *(iv)* the impact of the company's operations on the community and the environment;*(v)* the desirability of the company maintaining a reputation for high standards of business conduct; *(vi)* the interests of the members of the company; and *(vii)* the ability of the company to create its general public benefit and any specific public benefit purpose in its constitution. Directors need to consider all these matters equally, unless the benefit company has stated in its constitution that they must give priority to certain matters related to the accomplishment of its general public benefit purpose or any specific public benefit purpose in its constitution (Section 2.3).

*(iii)*Only a private company (limited by shares), a public company (limited by shares),

or a public company (limited by guarantee) are eligible to be Benefit Corporations. All of them can distribute profits to their members, and so can a Benefit Corporation.

3.6.4. Social Enterprise Activity in Australia: The 2016 FASE Report

A research report produced in collaboration between the Centre for Social Impact, Swineburne University of Technology, and Social Traders entitled "Finding Australia's Social Enterprise Sector 2016", provides an overview of the activity of social enterprises in Australia, which could be useful to understand whether there is a "market" for "human-centred enterprises" in Australia. The main outcomes of the report can be summarised as follows.

A. Number and size:

- there are at least 20,000 social enterprises operating in Australia, with 38% in operation for more than 10 years, and 33% of them in operation for a period of between 2 and 5 years;
- 75% of social enterprises are small organisations, 23% are medium-sized organisations, and 3.6% are large organisations;
- the annual turnover of social enterprises varies from $AUD 0 to $AUD 199 million. The 6th highest reported annual turnover in 2016 was $AUD 50 million.

B. Location and geographical reach:

- Australian social enterprises operate in urban, regional, rural and remote areas. 48.2% of social enterprises only operate in one location.
- 75.4% of social enterprises say that they operate in a local market. Just over 40% of social enterprises have regional reach, about 30% have national reach, and less than 20% have international reach.

C. Social goals pursued:

- the most common social goals pursued by Australian social enterprises as of 2016 are income equality/poverty alleviation, creating meaningful employment opportunities for a specific group of individuals, or developing new solutions to social, cultural, economic or environmental problems. These social purposes have evolved over time, as, in 2010, the most common social goal was reported to be creating opportunities for community involvement.

D. Beneficiaries of social enterprises:

- The most common beneficiaries were the wider community or public (61%), followed by the members (less than 25%), and generally serving the beneficiaries of a related not-for-profit entity (less than 15%).

- The largest beneficiaries of the work of social enterprises are people with disabilities (34.9%), young people (33.3%) and disadvantaged women (27.5%).
- Other beneficiaries of social enterprise activity include people with alcohol, drug, or substance use issues, Aboriginal and Torres Strait Islanders, a particular geographic community, the elderly, families, the homeless, migrants, refugees, or asylum-seekers, LGBTI individuals, disadvantaged men, individuals with mental illness, prisoners and ex-offenders, remote or rural communities, the unemployed, animals, and the environment.
- 36% of social enterprises reported in 2016 to have expanded their social goals to include new groups of beneficiaries.

E. Goods and services offered and industries:

- 68% of social enterprises are providing services (rather than goods) for a fee.
- The top 2 industries in which Australian social enterprises operated as of 2016 were retail trading (24.5%) and health and social assistance (22.2%). In 2010, the top 2 industries were education and training (41.6%) and arts and recreational services (31.7%).

F. Corporate governance structure:

- The most popular business structures adopted by social enterprises are incorporated associations (32.8%), companies limited by guarantee (31.3%), and private companies (18%)

G. Profit distribution:

- 81% of social enterprises re-invest all of their income into their business, and less than 15% re-invest half of their income into their business. The high proportion of social enterprises that re-invest all of their profits back into the business may reflect their choice of a not-for-profit legal structure (which makes it mandatory for all profits to remain within the business).
- 86.2% of social enterprises use their profits to invest in improving and expanding their operations, about 22% donate their income to external organisations, about 18% return their income to a parent or auspicing organisation, and about 6% distribute their profits to members.
- The number of unpaid workers/volunteers in social enterprises is generally declining in Australia. Salaries and wages account for 48.98% of costs.

H. Sources of income:

- 81% of income is earned from financial inputs (i.e., the sale of goods and services to consumers and to the government).

I. Impact evaluation/monitoring:

- 65% of social enterprises reported that they had measured their social impact.

3.7. Israel

Within the Israeli legal framework, there are three main legal structures that can be employed by businesses that want to pursue goals other than profit maximisation: Non-Profit Organisations (NPO); Social Benefit Companies (PBC); and Co-operatives.

A traditional company (both private limited liability companies and partnerships) must strive for profit maximisation, although it may pursue any other legal goal, consequently considering stakeholders' (e.g. workers, creditors, the public) interests as part of its business considerations, and it can also donate a reasonable amount of money to charity, for a "worthy cause", outside business considerations.

Within this context, a recent legislative proposal aims at amending the law of companies and partnerships, in order to accommodate SEs further.

3.7.1. Non-Profit Organisations and Social Benefit Companies

NPOs have played a central role in the development of Israeli society and its economy as they functioned as the main service providers (education, welfare, health) prior to the establishment of the state. Some of these NPOs were nationalised and integrated into government ministries, while others maintained their NPO status, although, in both cases, the result was an abundance of NPO characteristics in influential institutions.

NPOs are mainly not-for-profit activities, regulated by the Amutot (Non-Profit Organisations) Law, 5740-1980, which can, however, exercise business activity and be structured as a company unless the principal objective is not profit maximisation, but promoting the social goals; crossing the (often narrow) line between the business activity and the social goals is considered illegal. Coherently, profit distribution is prohibited and NPO membership cannot be transferred or sold. Even if NPOs are able to found and organise themselves as companies, the ambiguous line that distinguishes between profit and social goals may inhibit them from doing so, for fear of losing their NPO status and the connected benefits.

From a governance perspective, a "Certificate of Proper Management" must be obtained. Issued by the Registrar of Amutot (NPO) after an examination of compliance with the various NPO Law provisions, obtaining the certification is a pre-condition for receiving tax benefits. Indeed, tax exemption on profit made from business activity can be obtained if the profit is directly linked to the social purpose.

A key component to receiving the certification is a non-financial annual report detailing the actions taken to promote the NPO's objectives, a detailed breakdown of the

organisational structure, the corporations whose officeholders are also officeholders in the NPO, *etc*. For instance, a NPO will not be entitled to receive a Certificate of Proper Management in the event of the unreasonable salary expenses.

PBC are the organisations mostly utilised by public and national institutions such as museums, schools, colleges, synagogues, research and policy-making institutes, *etc*. It is regulated by the Companies Law, 5760-1999, but is also partially subordinated to the same regulator (the Registrar of Amutot (Non-Profit Organisations)).

PBC is defined as a company that has only social goals and that cannot distribute any profit. It differs from NPOs since: (i) PBCs are companies by definition, while NPOs can choose to be organised as a company, but do not have to; (ii) the social goals must be chosen from a predetermined list provided by the legislator (see Schedule II of the Israeli Company Law). The possible social goals are: environmental protection; health and saving lives; religion, heritage or memorialisation; animal rights; human rights; education, professional training, culture or art; science, research or higher education; sports; immigration of Jews from the Diaspora, absorption and settlements; charity or welfare; community welfare or benefit or communal, national or social activity; the rule of law, governance or public administration; founding investment funds or organisation intended to encourage or support one or more of the aforementioned goals.

Similarly to NPOs, PBCs must provide proper reporting on the promotion of social goals, in exchange for tax benefits. The higher flexibility of PBCs can make them more attractive than NPOs. Also, shareholders may transfer the ownership of their PBC participation, but court permission is required.

3.7.2. Co-operatives

There are two main categories of co-operatives in Israel: consumer and manufacturing. The Co-operative Societies Ordinance of 1933 provides a list of the goals that a co-operative can pursue, aiming at "Fostering savings, self-help and mutual support between people with shared economic interests, so as to better their conditions of living, business or method of production". The most popular social goals among co-operatives appear to be the commitment to the co-operative model itself, alongside community development, economic democracy, and combating the high cost of living.

Another key requirement of co-operatives is the democratic component. Profit distribution among members is permitted, although only after allocating a certain amount to a reserve fund that is to be invested back into the co-operative.

Even if there is no mention of directors' fiduciary duties in the Cooperative Societies Ordinance of 1933, jurisprudence has interpreted these to mean the same duties applicable in a company, namely, duty of care and fiduciary duties, enforced by the members of the co-operative against the Executive Committee.

Tax benefits are granted only to *agricultural* co-operatives.

3.7.3. Legislation Proposal on Social Enterprises

In the summer of 2017, a joint initiative of IVN (the Israel Venture Network, a venture philanthropy network that has invested in over 30 social businesses), and various parliament members from differing political and Arab parties, brought forth a legislation proposal (Legislation Proposal 4088/20/P) to create a tailor-made legal structure for Social Enterprises. The proposal has passed the first stage of the Preliminary Reading and is now before the Parliamentary (Knesset) Committee, which can decide to prepare the bill for its First Reading, or remove it from the agenda. The explanatory note of the proposal states its purpose of creating a legal structure which is suitable for the needs of an SE, highlighting the double bottom line – social and economic – rather than the triple (environmental). The justification provided for the need of such a structure is based upon the special needs of SE such as: employment expenses of disadvantaged communities, lower output due to the nature of the employees rate of production, small target market, and funding difficulties. In addition, the requirement of receiving the Certificate of Proper Management is noted as a major bureaucratic obstacle for SEs operating within a NPO or SBC. It is also noted that there is no widely agreed-upon definition for social enterprise although the United States and UK models are briefly mentioned.

The proposal is not to pass a new law altogether, but rather to amend the Companies Law and Partnership Ordinance so as to include specific provisions on SEs, forming a social enterprise company and a social enterprise partnership. The choice of partnerships is specifically justified by saying that most investment funds are incorporated as private equity partnerships, and the intention is to enable the establishment of funds that are geared specifically towards SEs.

As foreseen in the proposed amendments to Company Law, Social Enterprises will be required to identify social goals, excluding the mere activity of donation to other entities, within the company by-laws. Directors should, consequently, prioritise the social goal over profit maximisation.

Members, however, are not free to decide between any possible social goal, as it should be identified within a legal list, which mainly coincides with that of social benefit companies. It must be noticed, though, that these are all broadly-defined social goals.

If the company wishes to change the goal, a 75% majority vote and the approval of the Registrar of Companies are required. SEC (Social Enterprise Company???) will be subordinated to the Registrar of Companies who will keep a book of all SECs, which will be made accessible to the public.

With regard to profit distribution, the company will be permitted to put a cap on profit/bonus distribution of shares, up to 50%. This cap would only apply after the initial investment has been returned. Alternatively, changing the cap on profit distribution would

be possible only with the 90% majority (no quorum) and the approval of the Registrar, or with the permission of the court.

A SEC should then submit an annual "social impact report" on the activity and progress it has made in pursuing the social goals, together with the financial report, both of which are to be made public.

Finally, a SEC can only merge with another SEC with the approval of the Registrar. A PBC can transform into a SEC with a majority vote of 90% of shareholders and with the approval of the Registrar or the court.

The court has the authority to order the liquidation of an SEC if it has engaged in illegal activities or it has acted contrary to the goals determined in the by-laws (presumably through derivate action, though it is not specifically stated).

The assets of a liquidated company are transferred to the shareholders of the company. However, if the company has established a distribution cap, the shareholders only receive assets up to the value of their initial investment, and the remaining assets are transferred to an NPO or Public Benefit Company that pursues similar social goals.

The company may donate assets or funds in compliance with promoting the social goals of the company only upon approval of the directorate.

Finally, it should be pointed out that a similar proposal has been made to amend the Partnership Ordinance.

3.7.4. Final Remarks on the Israeli Trend Towards Sustainable Ways of Doing Business

In conclusion, much of the attention of social enterprises in Israel has been geared towards the employment of disadvantaged communities, such as Ethiopian Jews, Ultra-Orthodox Jews, Negev Bedouin, and Israeli and Palestinian Arabs, especially for the involvement of women among the workforce, and programmes committed to peace-making efforts between Israeli Jews and Palestinian Arabs.

In mapping the Israeli SE activity, we found that there is an abundance of facilitation in the form of social impact funds, accelerators and hubs, as well as the the Forum for Social Enterprises in Israel, which strives to aggregate the relevant information on social business in Israel, which, however, provides minimal, if any, legal guidance. Guidestar Israel (a joint government project led by the Ministry of Justice), on the other hand, provides information about more than 42,000 registered NPOs, and Public Benefit Corporations in Israel, and includes legal information.

A certain fund, entitled the Israel Venture Network (IVN), stands out, as their mission statement includes "promoting regulations and legislation related to Israel's emerging social business sector. Indeed, it was the IVN that initiated the activity related to the

development of the first legislation proposal on social enterprises that was brought before the Israeli Parliament (Knesset) in 2017.

The portfolios of impact investment funds reveal that the main the activity of social enterprises lies in employment of disadvantaged communities, namely, Youth at Risk, Ultra-Orthodox, and persons with disabilities. The companies are otherwise traditional, operating in not specifically socially-geared companies such as food, retail and low and hi-tech industries.[81] These programmes are also sometimes called WISE (Work Integration Social Enterprises).

This focus is also reflected in academic writing: a survey conducted in 2009, on some 200 socially-driven ventures incorporated as NPOs, companies and co-operatives, reveals that about half of the enterprises were NPOs, 15% were private companies, while 30% co-operatives (mainly food oriented). Indeed, they catered to the following groups: Youth in Distress (27%); women (single mothers, women with low-education, mostly from the periphery (12%), and persons with disabilities (25%). Many of them lacked business and managerial experience and their performance record was less than perfect.[82]

A later study (2011) conducted on social enterprises incorporated as NPOs and companies, again focused on the afore-mentioned WISE initiatives,[83] found that the most popular market is the food and beverages industry. However, the study concluded the market-driven social ventures remain a small phenomenon in Israel, and tied this finding to the fact a such an enterprise does not enjoy any formal public support and internalises the extra costs pertaining to the corporate structure. Undeniably, in order to minimise risks, some entrepreneurs still prefer to establish a social enterprise within NPOs, as it enables them to receive funds from philanthropic sources.[84]

In November 2012, the Prime Minister's office held a round table discussion on the topic of social enterprises. The definition provided for the discussion was "a business activity within an NPO or a PBC, that strives mainly to achieve these social goals alongside profit"; or alternatively," a company that aims to achieve social goals alongside profit maximization, and has included a profit distribution limitation for private investors up to 50% after the initial investment are returned". It was decided to launch a pilot of granting benefits to businesses (in NPOs, PBC or limited company) that employ disadvantaged populations (persons with disabilities, youth at risk, and ex-prisoners).[85]

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[81] See Dualis portfolio, report available at http://ivn.org.il/wp-content/uploads/2017/12/IVN-2017-light.pdf;http://www.zionut2000.org.il/.

[82] Gidron (2010).

[83] Feit (2011).

[84] Gidron (2010).

[85] *Recommendations of The Secondary Committee Of Social Enterprises Regarding the Definition of Disadvantaged Communities*, Prime Minister's Office (27.2.2012); *CEO instructions for social businesses assistance plan (pilot) 4.31*, Ministry of Economy (first published 13.05.2014, last updated 19.09.2017): http://economy.gov.il/legislation/ceoinstructions/instructions/04_31_19_09_2017.pdf.

In conclusion, as is reflected in the existing enterprises, academic research and government policy, the main focus of SE activity lies, at present, in the employment of target populations in otherwise traditional companies.

3.8. Turkey

There is no specific law on something similar to the Human-Centered Business Model currently available in Turkey. Many entrepreneurs who try to fit social and environmental goals within their business agenda have adopted one of the available legal structures under Turkish law.[86]

The majority of these organisations appear as for-profit corporations regulated under the Turkish Commercial Code, followed by an important number of non-profit organisations such as associations and foundations. While all these organisations allow (in theory) the implementation of social goals within their articles or by-laws, they do not provide any specific instruments to incentivise or encourage the pursuit of such goals. To the contrary, the regulations on non-profit organisations render the practice of such activities more difficult with over-regulation and over-inspection in practice.

Corporations and non-profit entities enact human centred practices mostly with the influence of external factors such as civil society and international companies with branches in Turkey, which encourage local entrepreneurs to have more social goals and to pair up with their foreign competitors. However, even such external dynamics remain limited due to a lack of information on the Turkish market, which discourages foreign social impact incentives. While the media has been a considerable actor in informing the public and pioneering the works on impact entrepreneurship in Turkey, the public also remains sceptical as to the implementation of a human centred business model.

Research in the field of social businesses in Turkey underlines the importance of the co-operation of impact entrepreneurs between themselves in leading common social goals.

From the consumers' perspective, a sociologic survey, led by Seçil Deren van Het Hof[87] between October 2007 and February 2009 on six main regions of Turkey – namely, Istanbul, Ankara, Izmir (the three most populated cities), and Antalya, Samsun, Diyarbakır (for their immigration characteristics) – has mapped a method to sort out causation links

[86] Turkey is a civil law country. Accordingly, Turkish law is organized in a hierarchical system under the Constitution of the Republic of Turkey (Constitution), the supreme law of the country, followed by Codes, which put in place the main provisions on the functions of different ministries and government institutions. Then the Regulations issued by the appropriate Ministries set up procedures and principles on the application of Codes, under which Decrees regulate procedures and principles in connection with Regulations. Doctrinal considerations have more weight in the interpretation of law, than the court precedents.

[87] Deren van Het Hof (2009).

between the terms that are related to corporate social responsibility (CSR). The research's empirical data results show that most participants who had an idea about CSR were between the ages of 25-34 (30.5%), and were situated in the middle-lower income status (around 35.3%). Turkish society perceives that CSR activities benefit companies the most (48.4%), followed by disadvantaged groups (34.9%) and their activity sector (22.3%), while it does little good for society (18.1%). Turkish consumers give primary importance to the purchase of goods that are not produced in a way which is harmful to human health and the environment (53.3%) followed by the actual quality of the product (45.3%), and the involvement in community related responsibility projects by such purchases (21.6%), while efforts to ensure a quality life standard to employees outside their workplace (6.4%), or providing a better workplace for employees (14.6%) shows that internal social responsibility was still not seen as a priority in the eyes of consumers at the time of the survey.

Although the public did not seem to prioritise a "human-centred" approach back then, the vast majority of the persons surveyed became aware of CSR through the media, which has progressed considerably in covering sustainability-related concerns. In this respect, according to a recent survey, there has been a considerable amount of press coverage on corporate sustainability.[88]

3.8.1. Corporate Social Responsibility

The concept of Corporate Social Responsibility (CSR) was introduced late into Turkey for two main reasons: the absence of pressure from a relatively weak civil society, on the one hand; and the prevalence of family and group company models, which impeded the development of transparency measures, on the other hand. The CSR movement started, instead, with the pressure of international companies of western origin on the Turkish Capital Markets Board to provide more regulation on the matter. Although the Capital Markets Board has implemented some rules, concepts such as sustainability reporting are currently not enforced by law.

According to the national review report produced by the European Union entitled "Corporate Social Responsibility for All Project",[89] the young generations are more willing to work in socially responsible companies, which invites Turkish companies to act in accordance with Turkish branches of international companies which apply CSR rules.

[88] Specifically 250 news articles between the years 2013-2015, which were classified in five different sources: (1) news published about training, conference, seminar, and panel; (2) news on statements of private corporate bodies giving information about their own work; (3) media news and platforms informing about sustainability, including news regarding the BIST sustainability index; (4) news on the concern of the public about sustainability; and (5) reports on the different fields of sustainability. TURKEY, SUSTAINABILITY REPORTING, National Review Report, Türkiye İşveren Sendikaları Konfederasyonu [Turkish Confederation of Employer Associations], February 2016, available at: http://tisk.org.tr/en/wp-content/uploads/2016/04/CSR.pdf, at page 25.

[89] TURKEY, SUSTAINABILITY REPORTING, National Review Report, *supra*.

The general public awareness has long constituted a major hurdle in the development of the relatively new culture of impact entrepreneurship in Turkey. From a business perspective, social purposes were perceived as a closely practiced activity, with entrepreneurs not generating or sharing information related to such activities. [90]

3.8.2. Impact Entrepreneurship and B Corp Certified Companies

In Turkey, impact entrepreneurs have yet to implement social or environmental goals within a previously existing legal structure, where they encounter economic and legal issues. A 2013 survey indicated that impact entrepreneurs are most troubled by a lack of cash flow (55%), followed by an overall lack of access to finance (53%) and legal issues briefly mentioned in the paragraphs above (32%).[91]

Advanced social impact markets were first supported by philanthropists made up of international investors, followed by government foundation funding and rulemaking. That being said, recent research shows that innovation in Turkey is a currently unco-ordinated field, characterised by a lack of market infrastructure for impact entrepreneurships. Debt and equity funding to social organisations remains limited due to a lack of interest on the part of mainstream financial institutions and the investor community in Turkey. Venture capital prefers to invest in more mature industrial corporations rather than smaller impact entrepreneurships that ask for a much smaller investment than what the venture capital firms are ready to lend. International incentives are also lacking in Turkey due to the lack of an established network with local entrepreneurs, leaving the country as an unknown territory for foreign investors. [92]

Limited access to information and data for new investors constitutes another major hurdle in the recognition of impact enterprises. Interviews with potential investors revealed that asking for data, even from governmental institutions, draws suspicion in Turkey. The system encourages most entrepreneurs to act alone and keep their knowledge to themselves, which makes them less aware of new concepts of doing business and means they are less in touch with the social challenges in society.[93]

Finally, a deep-rooted scepticism for social entrepreneurship, due to activism being historically condemned and associated with political groups in the country, further hinders such information sharing. Investors discuss the political polarisation in Turkey, the scepticism that arises from such polarisation, and the historical habit of attributing social purpose activities with undesired political movements, all of which constitute major

[90] Müftügil Yalçın (2015).

[91] TURKEY, SUSTAINABILITY REPORTING, National Review Report, *supra*, at page 36.

[92] König (2014).

[93] *Supra.*

difficulties for the evolution of social entrepreneurship.[94]

With regard to the BCorp movement, there are currently three companies in Turkey which are B Corp certified: Mikado Danışmanlık Hizmetleri Ltd. Şti; Taze & Kuru Sanayi ve Gıda A.Ş.; S360 Sürdürülebilirlik ve İletişim Hizmetleri A.Ş. Information on the different corporations is publicly available in the Turkish Trade Registry Gazette. [95]

[94] Yalçın (2015), at page 32.

[95] B Lab is a non-profit certification organisation aiming to build a global community of Certified Benefit Corporations ("B Corps") formed by corporations which would voluntarily apply for compliance with standards of social and environmental performance, public transparency, and legal accountability. See what discussed *supra* Paragraph 3.1.5.

4 – FINAL REMARKS

The inventory of the existing models of "hybrid forms" of doing business in a more sustainable way (Paragraph 3), together with the growing international awareness (Paragraph 2) testifies how policy- and law-makers around the globe are becoming more and more conscious of the impact of business on the environment and on civil society.

Over the last decade, a cultural shift has indeed started to take place in the debate about the role of business in society. As a result, many businesses have sought to operate in more socially responsible and sustainable ways, consumers have started to make purchasing decisions based upon good business practices, and governments have begun to enact laws that both enable and foster an environment in which businesses can play a more positive role in society.[96] As part of this effort, many legal systems have enacted legislation to create corporate governance structures that enable businesses to make decisions and carry out operations in more socially-oriented ways.

However, some things are still missing:

(i) There is a lack of common definitions: the concepts of social enterprises or of benefit corporations differ among jurisdictions;

(ii) Moreover, hybrid companies introduce greater complexity into the corporate structure to attain the benefits of for-profit and not-for-profit structures. A similar complexity cannot be faced in the traditional corporate governance structures developed in a "profit-centric" perspective;

(iii) Similarly, hybrid companies increase the burden of reporting requirements (in line with this need see the Directive 2014/95/EU on the disclosure of non-financial statements, *supra* Paragraph 3.2);

(iv) And, finally, they require mechanisms of capital lock-in.

Within this context, the Human-Centered Business Model Project acknowledges the existing initiatives, and goes beyond them, to develop an alternative, sustainable business ecosystem, which respects the profit motive, within a framework of social and environmental sustainability. The project proposes to address the entire business ecosystem through an agreed set of guiding principles, which would ultimately inform a legal and institutional framework that would lay down specific guidelines for enterprise governance, financial instruments, investment policies, procurement, and other matters.

Specifically, the second Pillar on *Legal Framework and Corporate Governance* works for the creation of corporate governance structures that will embed principles of economic, social and environmental sustainability in the Human-Centered Enterprise by-laws, which will then have to pursue environmental and social sustainability *on a par with* profit

[96] Kassoy et al. (2016).

sustainability. These principles (as defined by the Pillar One group) are seen as the minimum common denominator for all enterprises that wish to participate in the project.

The HCBM project could help in developing knowledge of different ways of doing business and in improving a system of legal recognition, which would assist organisations in informing potential customers of their social purposes. Especially for those young businesses seeking to gain market access and build up a customer base, creating legitimacy around their business operations and goals is key to attracting and retaining customers.

The inventory has shown that adopting a modular approach, which differs between small/young businesses and large businesses, is necessary. Similarly, simplified mechanisms of corporate incorporation for small/young business should be developed: the Australian Indigenous corporation could be a good example in this sense (see Paragraph 3.6.2). A similar approach is also necessary to balance the need to report on the social and financial outcomes, yet reduce the administrative burden of social enterprises that are usually small- to medium-sized enterprises with limited funds.

Moreover, a system of legal recognition could assist social enterprises in communicating to potential investors and grantors or donators their social purposes. This would improve a social enterprise's ability to secure access to finance or grants that have a social purpose requirement for eligibility, lower interest rates and/or generally more favourable terms.

Finally, the HCBM will have in itself all the necessary mechanisms to ensure compliance and enforcement with the goals stated by the entity, thereby also protecting those who have invested in the company because of its "human-centred nature".

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The collected information have then been analysed and compared by the author.

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LITERATURE REVIEW

The literature review is a list of references functional to the research on the HCBM Legal Framework. It includes scientific articles, papers and books, additional to those included in the References above. A short summary for each source is provided.

ALLEN - CARLETTI - GRINSTEIN (2018), *International Evidence on Firm Level Decisions in Response to the Crisis. Shareholders vs. Other Stakeholders*, Finance Working Paper N° 545/2018: the paper analyses the relationship between changes in GDP and unemployment during the 2008 financial crisis and the connected companies decisions in France, Germany, Japan, the UK, and the US. The analysis shows significant differences between US and non-US firms. Especially the authors argued that US firms are more prone to cut labor costs and reduce leverage compared to German and Japanese firms, in order to achieve larger profits.

ANDRÉ (2015), *Benefit corporation at a crossroads As lawyers weigh in companies weigh their options*, Business Horizons 58, 243-252: this short essay gives an idea of why a company should become a benefit corporation.

AYUSO - ARGANDON (2007), *Responsible corporate governance. Towards a stakeholder board of directors*, IESE Business School – University of Navarra, Working Paper n. 701 (July 2007): this interesting paper questions how to organize board composition in order to ensure a responsible corporate governance both from a CSR and a good governance perspective. The authors adopt a stakeholder approach to corporate governance: they analyse the arguments given by different theoretical approaches for linking specific board composition with financial performance and CSR. They also discuss the empirical research conducted. Finally, the authors propose a model for selecting board members based both on ethical and pragmatic arguments.

BARNETT - WICKS - KOTHA - JONES (1999), *Does Stakeholder Orientation Matter. The Relationship between Stakeholder Management Models and Firm Financial Performance*, The Academy of Management Journal, 42 (5), 488-506: this empirical study analyse the effect of stakeholder management on corporate performance. Its results provide support for a strategic stakeholder management model but no support for an intrinsic stakeholder commitment model.

BARNETT (2014), *Why Stakeholders Ignore Firm Misconduct. A Cognitive View*, Journal of Management 40 (3), 676-702: This article develops a cognitive view of the process by which stakeholders allocate their limited attention, which outlines individual and situational factors that produce variation in a stakeholder's likelihood of noticing that an act of misconduct has occurred, in how the stakeholder will assess misconduct if he or she does notice it, and in the stakeholder's decision to punish a firm if he or she judges it to have engaged in

misconduct. A similar process suggests that as stakeholder attention varies across each step of this process, misconduct often will not result in punishment. In the author opinion, a similar analysis should limit on the ability to deter firm misconduct through social control.

BLUMBERG (1973), ***Reflections on Proposals for Corporate Reform through Change in the Composition of the Board of Directors. Special Interest Or Public Directors*****, Boston University Law Review, 547-573:** the paper suggests a reform of corporate composition of the board of directors by the inclusion of "special interest" or "public" directors, within the United States. It mainly focuses on employee representation within the board of directors.

CABRELLI (2016), ***Distinct Social Enterprise in the UK The Case of the CIC*****, University of Edinburgh School of Law - Research Paper Series:** this paper provides an outline of the community interest company in the UK, by mainly focusing on its "asset- lock/maximum dividend and interest payment cap" characteristic.

CAMILLERI (2017), ***Corporate Sustainability and Responsibility: Creating Value for Business, Society and the Environment*****, Asian Journal of Sustainability and Social Responsibility:** the paper operates a literature review to then suggests that there is a link between corporate social performance and financial performance. It also reports on how CSR is continuously evolving to reflect contemporary societal realities. The paper finally suggests that responsible business practices create economic and societal value by re-aligning their corporate objectives with stakeholder management and environmental responsibility.

CLARK - FEINER - VIEHS (2015), ***From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance*****:** this report investigates over 200 of academic studies and sources on sustainability to assess the economic evidence for business case for corporate sustainability, integrating sustainability into investment decisions, and implementing active ownership policies into investors' portfolios. The authors conclude that *(i)* companies with strong sustainability scores show better operational performance and are less risky; *(ii)* investment strategies that incorporate ESG issues outperform comparable non-ESG strategies; and *(iii)* active ownership creates value for companies and investors. They believe that it is in the best economic interest for corporate managers and investors to incorporate sustainability considerations into decision-making processes.

CLARK - VRANKA (2013), ***The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public Benefit Corporation. White Paper*****:** the paper gives an overview of the legislation establishing the benefit corporation across several USA jurisdictions (California, Hawaii, Illinois, Louisiana,

Massachusetts, Maryland, New Jersey, New York, Pennsylvania, South Carolina, Vermont, and Virginia).

COPP (2009), *Corporate Social Responsibility And The Companies Act 2006*: this short article clarify the concept of "enlightened shareholder value", within the UK Companies Act. Such a concept is considered as a form of corporate social responsibility, in place of a director's traditional common law duty of loyalty.

CUMMINGS (2012), *Benefit corporations. How to enforce a mandate to promote the public interest,* 112 Colum L Rev 578-627: the paper focuses on the enforcement of the general public interest pursued by the USA benefit corporations. The author argues that to be effective, accountability for performance of social goals should emphasize adaptive learning rather than fixed procedures or outcomes, and should emphasize accountability to self, professional peers, and "clients", rather than accountability to judges, "generalist" auditors from government agencies or no-profits, or the market.

ELHAUGE (2005), *Sacrificing Corporate Profits in the Public Interest*, 80 New York University Law Review 733: This is a critique of the canonical law and economics view, which holds that corporate managers do and should have a duty to profit-maximize because such conduct is socially efficient given that general legal sanctions do or can redress any harm that corporate or non-corporate businesses inflict on others.

FERRELL - LIANG - RENNEBOOG (2016), *Socially Responsible Firms*, ECGI Working Paper n. 432: the authors engage in an empirical research to conclude that well-governed firms (which suffer less from agency concerns) engage more in corporate social responsibility. Also, they conclude that a positive relation exists between CSR and value, and also that CSR attenuates the negative relationship between managerial involvement and value.

FERRON VILCHEZ, DARNALL, ARAGON (2016), *Stakeholder Influences on the Design of Firms' Environmental Practices*: this paper suggests that stakeholders affect not only the decision to adopt environmental practices, but also managerial decisions about the design of these practices. The authors consider the case of firms' strategic decisions about the design of their environmental practices, and in particular their degree of comprehensiveness and visibility, to then develop a classification of four design strategies: movers and shakers, backroom operators, wannabes, and passivists. The finding of this research could be used to broadly reflect on sustainability and corporate impact on the society as well.

FICI (2016), *Recognition and Legal Forms of Social Enterprise in Europe*, EBLR, 639-667: the paper describes the state of the legislation on social enterprise in Europe, inquiring into its fundamental role in the development of the social economy and its particular logics as distinct from those of the for-profit capitalistic economy. It

finally focuses on the model of the social enterprise in the cooperative form, which the author believe to be preferred to that of the social enterprise in the company form.

FISHER - GOERG - HAMANN (2015), *Cui Bono, Benefit Corporation. An Experiment Inspired by Social Enterprise Legislation in Germany and the US*, Rev. Law Econ. 11(1), 79-110: the paper analyses the social enterprise legislation and the effectiveness of related enforcement mechanisms. The authors then focus on material incentive and tentatively discuss potential policy implications for social enterprise legislation and the stakeholder debate. The paper mainly focuses on the USA and Germany.

FRANÇOIS BROUARD - DBA - FCPA - FC (2014), *Note on financial statements for social enterprises*, February 12: The note aims at providing some context to: *(i)* explain the diversity of financial statements and terminology for social enterprises; *(ii)* to present a 'simplified' version of financial statements for not-for-profit organizations and profit oriented organizations; *(iii)* and to propose a 'universal' list of financial information distinguishing both types of organizations. A "universal" financial statements is very difficult with the diversity of organizations and accounting standards.

FRIEDMAN (1970), *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine, September 13: this article is the foundation of the shareholder interest theory of the corporation.

GERNER – BEUERLE (2014), *The evolving structure of directors duties in Europe*, European Business Organization Law Review 15, 191-233: this article gives a useful overview of the main duties of for-profit corporate directors among Europe.

HAIGH - WALKER - BACQ - KICKUL (2015), *Hybrid Organization*, 57(3) *California management Review* 5-12: this is a mere introduction to a special issue on hybrid organizations of the California Management Review. However, it develops a useful definition of hybrid organizations, placing them in their historical context.

HAMER (1981), *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 Colum. L. Rev., 639- 661: the paper is one of the cornerstone of employee representation on corporate boards of directors within the United States. By developing an overview of the restrictions that federal labor law and state corporation law may impose on a system of employee representation, the author stresses the main theoretical problems behind employees representation on corporate boards of directors.

HILLER - SHACKELFORD - MA (2016), *Firm as Common Pool Resource Unpacking the Rise of Benefit Corporations*: this Article proposes polycentric governance perspective, to analyse why the benefit corporation "movement" is an important part of social entrepreneurship. Through this lens, the Article investigates the

processes and purposes of benefit corporation statutes in the USA, in order to better understand current efforts to modify the nature of the relationship between business and society.

HILLER (2013), *The Benefit Corporation and Corporate Social Responsibility*, 118 Journal of business ethics, 287-301: Considering the history and perception of shareholder primacy in United States law, the author argues that the structure of benefit corporation is an ethical step toward empowering socially committed commercial entities. The article reviews the legal history of the corporation in order to provide context to the relationship of the corporate form to society; it then describes the benefit corporation model and make a comparison between different state statutes.

HIRST (2016), *Social Responsibility Resolutions*, Harvard Law School Discussion Paper n. 2016-06, then published on Journal of Corporation Law (2017): this paper presents evidence that institutions with similar investors and identical fiduciary duties vote very differently on social responsibility resolutions, suggesting that some institutional votes distort the interests of their investors. Other evidence presented suggests that institutional votes on social responsibility resolutions vary significantly from the preferences of their own investors.

HOPT (2016), *Directors' Duties and Shareholders Rights in the European Union*, 1 Riv. delle soc., 13-32: similarly to GERNER – BEUERLE (2014), this article develops an overview of directors' duties and connected shareholders rights in for-profit corporation across EU jurisdictions.

INTERNATIONAL COUNCIL ON HUMAN RIGHTS (2002), *Beyond Voluntarism - HRs and the developing international legal obligations of companies*: this report develops a complete overview of the international rules for the protection of human rights by corporations' harm, existing at the time of its publication. It goes beyond the international human rights standards that are drafted in order to regulate the behaviour of states, and to evaluate to what extent they create legal obligations on private actors, like companies.

JACKSON AT AL. (2014), ***Grey areas: irresponsible corporations and reputational dynamic*, Socio-Economic Review 12, 153–218:** the document includes articles of several authors that took part to the 2013 Annual Symposium of the Oxford University Centre of Corporate Reputation: a roundtable was convened to discuss the reputational dynamics surrounding corporations engaged in ethical 'grey areas', where actions are likely to be deemed as being socially irresponsible and often later result in public scandal. The presenters wrote up their comments in the form of short essays which are collected together in this document. The essays bring to different conclusion that have been summarised as follow: "The introductory piece by Jackson and Brammer challenges the conventional wisdom that irresponsible behaviour by corporations is associated with strong reputational

penalties. In various ways, the Discussion Forum contributors explore why this link may be weak or highly contingent, focusing on dynamics at different levels of analysis. Karpoff identifies grey areas of firm behaviour characterized by market failures around both negative and positive externalities, and reviews evidence showing prospects and limits of reputation in this context. The next two contributions by Lange and Zavyalova address problems with the social attribution of irresponsible behaviour at a micro level of analysis. Harrington shows further how microlevel attributions are shaped by wider historical and institutional contexts by presenting evidence on how individual investors responded to the widespread fraud in wake of financial crises in the USA. Partnoy and King stress the role of public and private forms of regulation, stressing the role of macro-level institutions in defining legitimate behaviour and framing expectations about what is responsible or irresponsible. Applying these various concepts, Deephouse reconstructs the history of Apple's encounters with grey areas and the reputational consequences thereof."

KAPP, *The social costs of private enterprise*, Harvard University Press, 1950

KIM-KIM-QIAN (2015), *Effects of Corporate Social Responsibility on Corporate Financial Performance. A Competitive-Action Perspective*, Journal of Management 20(2), 1-22: the paper adopts a "competitive-action perspective" to provide a view of the relationship between corporate social responsibility and firm financial performance. The authors used data for 113 publicly listed U.S. firms in the software industry between 2000 and 2005, and they found out that socially responsible activities enhance firm financial performance when the firm's competitive-action level is high, whereas socially irresponsible activities actually improve firm financial performance when the competitive-action level is low.

MAN (2017), *A Succinct Survey of Corporate Social Responsibility: Definition, Theory and Repercussions*, Academy of Management Journal: This paper review the most prominent and influential researches on corporate social responsibility in the last five decades.

MCDONNELL (2017), *Benefit Corporations and Public Markets First Experiments and Next Steps*, 40 Seattle University Law Review 717-742: The Article firstly analysis the leading benefits and costs for a benefit corporation that chooses to go public, and considers early experiments in publicly traded social enterprises. It then focuses on the specific role of stock exchanges and similar institutions as ways to help facilitate the governance mechanisms of benefit corporations.

MCWILLIAMS - SIEGEL (2000) *Corporate social responsibility and financial performance. Correlation or misspecification*, 21(5) Strategic Management Journal 603-609: this paper demonstrates a particular flaw in existing econometric studies of relationship between social and financial performance. The author argue that the existing studies estimate the effect of by regressing firm performance on

corporate social performance, and several control variables. However, this model is misspecified because it does not control for investment in R&D, which has been shown to be an important determinant of firm performance. This misspecification results upwardly biased estimates of the financial impact of CSR. They argue that when the model is properly specified, CSR has a neutral impact on financial performances.

OECD (2001), *Codes of Corporate Conduct: Expanded Review of their Contents*, OECD Working Papers on International Investment, 2001/06, OECD Publishing, Paris – the report was developed as part of a joint project undertaken by the Trade Committee and the Committee on International Investment and Multinational Enterprises. It is also part of an OECD publication (*Corporate Responsibility: Private Initiatives and Public Goals which was published*, May 2001). The report is based on an inventory of 246 codes of corporate conduct, voluntary adopted by firms based in the OECD, which differ in terms of size, sector and regional affiliation. The main findings of the investigation are: *(i)* environmental management and labour standards dominate other issues in code texts, but consumer protection and bribery and corruption also receive extensive attention; *(ii*) codes addressing labour and environmental issues differ considerably in how they approach these two issues. Especially in the so-called "single issue" codes (codes devoted exclusively to one issue), the overall level of commitment is often quite high, although the specifics of the commitment vary; *(iii)* in the environmental codes, commitments often include being open to community concerns, engaging in a process of continual improvement, training employees and encouraging dialog within the firm; *(iv)* among codes mentioning labour, the most common commitments are creating a reasonable working environment, refusal to discriminate or harass, compliance with law, avoidance of child labour, and conditions of worker compensation; *(v)* many codes have been influenced by external reference standards (other codes and international agreements and recommendations).

ONG (2001), *The Impact of Environmental Law on Corporate Governance. International and Comparative Perspectives*, 12 Eur. J. Int'L Law 685-726: This article examines whether internationally agreed environmental principles and nationally applicable environmental liability regimes justify progressive change within corporate governance law. Even if the paper focuses only on environmental law, it is still interesting as a reflection on the inclusion of considerations other than profit within the context of alternative corporate governance theories and their practical implications for company directors.

PORTER – KRAMER (2006), *Competitive Advantage and Corporate Social Responsibility*, Harvard Business Review: the paper analyses the impact of corporate social responsibility policies on the business performances. The considerations on social

influences on competitiveness and on the social impact of the value chain are particularly interesting.

RAWHOUSER - CUMMING - CRANE (2015), ***Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*****, 57(3) California management Review 13-35**: this article explores the emergence of legislation to support a new category for social hybrids, focusing on Benefit Corporation legislation in the United States. It presents quantitative analysis of state-level factors that make a state suitable for a social hybrid category followed by qualitative analysis of the arguments marshaled for the creation of the Benefit Corporation legal form.

SJÅFJELL - RICHARDSON, ***Company Law and Sustainability. Legal Barriers and Opportunities*****, Cambridge University Press, 2015**

SjåFJELL (2011), ***If Not Now, When European Company Law in a Sustainable Development Perspective*****, Nordic & European Company Law Research Paper Series n. 10-40:** The essay firstly analyses the current situation in relation to the corporations' impact on the environment and the society, and the related corporate governance debates. To then highlight the need for a new type of responsible corporate governance, and a different role for company law within the European framework in that respect.

SjåFJELL (2013), ***Duties of the Board and Corporate Social Responsibility*****, Nordic & European Company Law Research Paper Series n. 10-40:** the essay focuses on the corporate board of directors role within corporate social responsibility practices in a comparative perspective.

SjåFJELL (2013), ***Sustainable Companies Possibilities and Barriers in Norwegian Company Law*****, University of Oslo Faculty of Law Legal Studies Research Paper Series n. 2013-20:** the paper analyses the corporate impact on the environment within the framework of Norwegian Company Law.

SjåFJELL (2016), ***Achieving Corporate Sustainability. What is the role of the shareholder?*****, University of Oslo Faculty of Law Legal Studies Research Paper Series n. 2016-10:** the essay focuses on the shareholders role within corporate social responsibility practices in a comparative perspective.

WANG - DOU - JIA (2016), ***Meta-Analytic Review of Corporate Social Responsibility and Corporate Financial Performance. The Moderating Effect of Contextual Factors*****, Business & Society 55(8) 1083–1121:** This study aims to review systematically and quantify the CSR–CFP link in a meta-analytic framework. It is based on 119 effect sizes from 42 studies. In conclusion it estimates that the overall effect size of the CSR– CFP relationship is positive and significant, thus endorsing the argument that CSR does enhance financial performance.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2239

Chapter 215, Laws of 2012

62nd Legislature
2012 Regular Session

SOCIAL PURPOSE CORPORATIONS

EFFECTIVE DATE: 06/07/12

Passed by the House February 13, 2012
Yeas 62 Nays 31

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 2, 2012
Yeas 34 Nays 14

BRAD OWEN

President of the Senate

Approved March 30, 2012, 11:30 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2239** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 30, 2012

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 2239

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By House Judiciary (originally sponsored by Representatives Pedersen, Goodman, Rodne, and Hudgins; by request of Washington State Bar Association)

READ FIRST TIME 01/25/12.

AN ACT Relating to social purpose corporations; amending RCW 23B.01.400 and 23B.04.010; and adding a new chapter to Title 23B RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) Any corporation may elect to be governed as a social purpose corporation by one of the following means:

(a) One or more persons may act as incorporator or incorporators of a social purpose corporation by delivering articles of incorporation that conform to the requirements of this chapter to the secretary of state for filing; or

(b) Any corporation which is not a social purpose corporation may elect to become a social purpose corporation by complying with section 14 of this act.

(2) Any social purpose corporation may elect to cease to be governed as a social purpose corporation by complying with section 15 of this act.

NEW SECTION. **Sec. 2.** (1) Except as otherwise expressly stated in this chapter, the provisions of this title and all powers, rights, and obligations thereunder shall apply to social purpose corporations

organized under this chapter, and references in this title to the term "corporation" shall be read to include social purpose corporations organized under this chapter.

(2) Subject to any limitations contained in the articles of incorporation, a social purpose corporation may engage in any lawful business under RCW 23B.03.010.

NEW SECTION. **Sec. 3.** Every corporation governed by this chapter must be organized to carry out its business purpose under RCW 23B.03.010 in a manner intended to promote positive short-term or long-term effects of, or minimize adverse short-term or long-term effects of, the corporation's activities upon any or all of (1) the corporation's employees, suppliers, or customers; (2) the local, state, national, or world community; or (3) the environment.

NEW SECTION. **Sec. 4.** In addition to the general social purpose set forth in section 3 of this act, every corporation governed by this chapter may have one or more specific social purposes for which the corporation is organized.

NEW SECTION. **Sec. 5.** (1) In addition to the matters required to be set forth in the articles of incorporation pursuant to RCW 23B.02.020 (1) and (2), the articles of incorporation of a social purpose corporation must set forth:

(a) A corporate name for the social purpose corporation that contains the words "social purpose corporation" or "SPC" as an abbreviation of those words;

(b) A statement that the corporation is organized as a social purpose corporation governed by this chapter;

(c) A statement setting forth the general social purpose or purposes for which the corporation is organized pursuant to section 3 of this act;

(d) If the corporation has designated one or more specific social purpose or purposes pursuant to section 4 of this act, a statement setting forth such specific social purpose or purposes; and

(e) A provision that states the following: "The mission of this social purpose corporation is not necessarily compatible with and may

be contrary to maximizing profits and earnings for shareholders, or maximizing shareholder value in any sale, merger, acquisition, or other similar actions of the corporation."

(2) In addition to the matters that must be set forth in the articles of incorporation in accordance with subsection (1) of this section and the provisions that may be set forth in the articles of incorporation pursuant to RCW 23B.02.020 (5) and (6), the articles of incorporation of a social purpose corporation may contain the following provisions:

(a) A provision requiring the corporation's directors or officers to consider the impacts of any corporate action or proposed corporate action upon one or more of the social purposes of the corporation;

(b) A provision requiring the corporation to furnish to the shareholders an assessment of the overall performance of the corporation with respect to its social purpose or purposes, prepared in accordance with a third-party standard;

(c) A provision requiring, for any or all corporate actions, the vote of a larger proportion or of all of the shares of any class or series, or the vote or quorum for taking action of a larger proportion or of all of the directors, than is otherwise required by this title or this chapter;

(d) A provision requiring the approval of the shareholders for any corporate action, even though not otherwise required by this title; and

(e) A provision limiting the duration of the corporation's existence to a specified date.

(3) Prior to the issuance of shares, the corporation shall furnish a prospective shareholder with a copy of the articles of incorporation in the form of a record.

(4) Prior to the transfer of shares, the transferor shareholder shall give notice of the transfer to the corporation. Within a reasonable time after receiving notice, the corporation shall provide the prospective transferee with a copy of the articles of incorporation in the form of a record.

NEW SECTION. **Sec. 6.** (1) A director of a social purpose corporation shall discharge the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, with the care an ordinarily prudent person in a

like position would exercise under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the corporation in accordance with RCW 23B.08.300.

(2) Unless the articles of incorporation provide otherwise, in discharging his or her duties as a director, the director of a social purpose corporation may consider and give weight to one or more of the social purposes of the corporation as the director deems relevant.

(3) Any action taken as a director of a social purpose corporation, or any failure to take any action, that the director reasonably believes is intended to promote one or more of the social purposes of the corporation shall be deemed to be in the best interests of the corporation.

(4) A director of a social purpose corporation is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.

(5) Nothing in this chapter creates any liability or grants any right in or for any person or any cause of action by or for any person, and a director shall not be responsible to any party other than the corporation and its shareholders.

(6) Nothing in this chapter alters the general standards for any director of a corporation that is not a social purpose corporation.

NEW SECTION. **Sec. 7.** (1) An officer of a social purpose corporation with discretionary authority shall discharge the officer's duties under that authority in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the officer reasonably believes to be in the best interests of the corporation in accordance with RCW 23B.08.420.

(2) Unless the articles of incorporation provide otherwise, in discharging his or her duties as an officer, the officer of a social purpose corporation may consider and give weight to one or more of the social purposes of the corporation as the officer deems relevant.

(3) Any action taken as an officer of a social purpose corporation, or any failure to take any action, that the officer reasonably believes is intended to promote one or more of the social purposes of the

corporation shall be deemed to be in the best interests of the corporation.

(4) An officer of a social purpose corporation is not liable for any action taken as an officer, or any failure to take any action, if the officer performed the duties of the officer's office in compliance with this section.

(5) Nothing in this chapter creates any liability or grants any right in or for any person or any cause of action by or for any person, and an officer shall not be responsible to any party other than the corporation and its shareholders.

(6) Nothing in this chapter alters the general standards for any officer of a corporation that is not a social purpose corporation.

NEW SECTION. **Sec. 8.** (1) Shares issued by a social purpose corporation may but need not be represented by certificates.

(2) If shares are represented by certificates, in addition to the information required on certificates by RCW 23B.06.250 (2) and (3), each share certificate must state on its face the following language in a conspicuous manner:

> "This entity is a social purpose corporation organized under Title 23B RCW of the Washington business corporation act. The articles of incorporation of this corporation state one or more social purposes of this corporation. The corporation will furnish the shareholder this information without charge on request in writing."

(3) If shares are not represented by certificates, within a reasonable time after the issue or transfer of such shares, the corporation shall send the shareholder a record containing the information required pursuant to RCW 23B.06.260(2) and the language required on certificates by subsection (2) of this section.

NEW SECTION. **Sec. 9.** (1) No proceeding may be instituted or maintained in the right of any social purpose corporation under this title by any party other than a shareholder of the social purpose corporation.

(2) A person may not commence a proceeding in the right of a social purpose corporation unless the person was a shareholder of the

corporation when the transaction complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(3) Any proceeding instituted or maintained in the right of a social purpose corporation must comply with the procedure set forth in RCW 23B.07.400.

NEW SECTION. **Sec. 10.** If a proposed amendment to a social purpose corporation's articles of incorporation would materially change one or more of the social purposes of the corporation, in addition to approval in accordance with RCW 23B.10.030, the amendment to be adopted must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the proposed amendment, and by two-thirds of the holders of the outstanding shares of each class or series, voting as separate voting groups, and of each other voting group entitled under the articles of incorporation to vote separately on the proposed amendment. The articles of incorporation may require a greater vote than that provided for in this section.

NEW SECTION. **Sec. 11.** (1) In addition to approval in accordance with RCW 23B.11.030, a plan of merger or share exchange pursuant to which a social purpose corporation would not be the surviving corporation must be approved by two-thirds of the voting group comprising all the votes of the corporation entitled to be cast on the plan, and by two-thirds of the holders of the outstanding shares of each class or series, voting as separate voting groups, and of each other voting group entitled under the articles of incorporation to vote separately on the proposed plan. The articles of incorporation may require a greater vote than that provided for in this subsection.

(2) The additional approval described in subsection (1) of this section is not required if the surviving corporation of the plan of merger or share exchange is a social purpose corporation governed by this chapter and includes a specific social purpose or purposes that do not materially differ from the disappearing corporation's specific social purpose or purposes, if any.

NEW SECTION. **Sec. 12.** (1) In addition to approval in accordance with RCW 23B.12.020, a proposed transaction in which the social purpose

corporation is to sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and by two-thirds of the holders of the outstanding shares of each class or series, voting as separate voting groups, and of each other voting group entitled under the articles of incorporation to vote separately on the proposed transaction. The articles of incorporation may require a greater vote than that provided for in this section.

(2) The additional approval described in subsection (1) of this section is not required if the acquirer of such property is a social purpose corporation governed by this chapter and includes a specific social purpose or purposes that do not materially differ from the disposing corporation's specific social purpose or purposes, if any.

NEW SECTION. **Sec. 13.** In addition to the corporate actions set forth in RCW 23B.13.020(1), a shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(1) An election by a corporation to become a social purpose corporation, which has become effective, to which the corporation is a party if shareholder approval was required for the election by section 14 of this act or the articles of incorporation;

(2) An election to cease to be a social purpose corporation, which has become effective, to which the corporation is a party if shareholder approval was required for the election by section 15 of this act or the articles of incorporation, and the shareholder was entitled to vote on the election; and

(3) An amendment of the social purpose corporation's articles of incorporation that would materially change one or more of the social purposes of the corporation.

NEW SECTION. **Sec. 14.** (1) Any corporation that is not a social purpose corporation may elect to become a social purpose corporation if, pursuant to the proposed election, each of the following conditions are met:

(a) Each share of the same class or series of the electing corporation shall, unless all shareholders of the class or series

consent, be treated equally with respect to any cash, rights, securities, or other property to be received by, or any obligations or restrictions to be imposed on, the holder of that share;

(b) The board of directors of the electing corporation must recommend the election to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the proposed election; and

(c) In addition to any other voting conditions imposed by the board of directors under subsection (2) of this section, the election must be approved by an affirmative vote of at least two-thirds of the voting group comprising all the votes of the electing corporation's shareholders entitled to be cast on the corporate action, and by two-thirds of the holders of the outstanding shares of each class or series, voting as separate voting groups, and each other voting group entitled under the articles of incorporation to vote separately on the corporate action.

(2) The board of directors of a corporation electing to become a social purpose corporation may condition its submission of the proposed election on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled to vote as a separate group on the proposed election.

(3) To elect to become a social purpose corporation, an electing corporation must amend its articles of incorporation to include the matters required to be set forth in the articles of incorporation pursuant to section 5(1) of this act.

(4) After an election to become a social purpose corporation is approved, and at any time prior to filing the articles of amendment to amend the electing corporation's articles of incorporation in compliance with subsection (3) of this section, the planned election may be abandoned by the electing corporation, subject to any contractual rights, without further shareholder approval, in the manner determined by the board of directors.

(5) The election to become a social purpose corporation shall be effective upon the later of the filing of the articles of amendment

with the secretary of state or the effective date or time set forth in the articles of amendment.

(6) Upon the effective time of the election to become a social purpose corporation, the electing corporation shall thereafter be a social purpose corporation and shall be subject to all of the provisions of this chapter and the existence of the social purpose corporation shall be deemed to have commenced on the date the electing corporation was incorporated.

(7) The election to become a social purpose corporation shall not be deemed to affect any obligations or liabilities of the electing corporation incurred prior to its election to become a social purpose corporation or the personal liability of any person incurred prior to such election.

NEW SECTION. **Sec. 15.** (1) Any social purpose corporation may elect to cease to be a social purpose corporation if, pursuant to the proposed election, each of the following conditions are met:

(a) Each share of the same class or series of the electing social purpose corporation shall, unless all shareholders of the class or series consent, be treated equally with respect to any cash, rights, securities, or other property to be received by, or any obligations or restrictions to be imposed on, the holder of that share;

(b) The board of directors of the electing social purpose corporation must recommend the election to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the proposed election; and

(c) In addition to any other voting conditions imposed by the board of directors under subsection (2) of this section, the election must be approved by an affirmative vote of at least two-thirds of the voting group comprising all the votes of the electing social purpose corporation's shareholders entitled to be cast on the corporate action, and by two-thirds of the holders of the outstanding shares of each class or series, voting as separate voting groups, and each other voting group entitled under the articles of incorporation to vote separately on the corporate action.

(2) The board of directors of a social purpose corporation electing to cease to be a social purpose corporation may condition its submission of the proposed election on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled to vote as a separate group on the proposed election.

(3) To elect to cease to be a social purpose corporation, an electing social purpose corporation must amend its articles of incorporation to remove the matters required to be set forth in the articles of incorporation pursuant to section 5(1) (a) and (b) of this act.

(4) After an election to cease to be a social purpose corporation is approved, and at any time prior to the filing of the articles of amendment to amend the electing social purpose corporation's articles of incorporation in compliance with subsection (3) of this section, the planned election may be abandoned by the electing social purpose corporation, subject to any contractual rights, without further shareholder approval, in the manner determined by the board of directors.

(5) The election to cease to be a social purpose corporation shall be effective upon the later of the filing of the articles of amendment with the secretary of state or the effective date or time set forth in the articles of amendment.

(6) Upon the effective time of the election to cease to be a social purpose corporation, the electing social purpose corporation shall thereafter be a corporation which is not a social purpose corporation and shall be subject to all of the provisions of this title applicable to corporations generally and the existence of the corporation shall be deemed to have commenced on the date the electing social purpose corporation was incorporated.

(7) The election to cease to be a social purpose corporation shall not be deemed to affect any obligations or liabilities of the electing social purpose corporation incurred prior to its election to cease to be a social purpose corporation or the personal liability of any person incurred prior to such election.

NEW SECTION. **Sec. 16.** (1) The board of directors of a social purpose corporation shall cause a social purpose report to be furnished

to the shareholders by making such report publicly accessible, free of charge, at the corporation's principal internet web site address, not later than four months after the close of the corporation's fiscal year, and such report shall remain available on that web site through the end of the corporation's fiscal year.

(2) The social purpose report shall include a narrative discussion concerning the social purpose or purposes of the corporation, including the corporation's efforts intended to promote its social purpose or purposes. The narrative discussion may include the following information:

(a) Identification and discussion of the short-term and long-term objectives of the corporation relating to its social purpose or purposes;

(b) Identification and discussion of the material actions taken by the corporation during the fiscal year to achieve its social purpose or purposes;

(c) Identification of material actions that the corporation expects to take in the future with respect to achievement of its social purpose or purposes; and

(d) A description of the financial, operating, or other measures used by the corporation during the fiscal year for evaluating its performance in achieving its social purpose or purposes.

(3) The requirements of subsection (1) of this section shall be satisfied if a social purpose corporation with an outstanding class of securities registered under section 12 of the securities exchange act of 1934 both complies with section 240.14a-16 of Title 17 of the code of federal regulations, as amended from time to time, with respect to the obligation of a corporation to furnish an annual report to shareholders pursuant to section 240.14a-3(b) of Title 17 of the code of federal regulations, and includes the information required by subsection (2) of this section in the annual report.

(4) The failure to furnish to shareholders a social purpose report required by subsection (1) of this section does not affect the validity of any corporate action.

(5) The superior court of the county in which the social purpose corporation's registered office is located may, after notice to the corporation, summarily order a social purpose report to be furnished to

shareholders on application of any shareholder of a social purpose corporation if a social purpose report was not furnished to shareholders for at least two consecutive fiscal years.

Sec. 17. RCW 23B.01.400 and 2009 c 189 s 1 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this title.

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so prepared that a reasonable person against whom the record is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporate action" means any resolution, act, policy, contract, transaction, plan, adoption or amendment of articles of incorporation or bylaws, or other matter approved by or submitted for approval to a corporation's incorporators, board of directors or a committee thereof, or shareholders.

(5) "Corporation" or "domestic corporation" means a corporation for profit, <u>including a social purpose corporation,</u> which is not a foreign corporation, incorporated under or subject to the provisions of this title.

(6) "Deliver" includes (a) mailing, (b) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders, transmission by facsimile equipment, and (c) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders under RCW 23B.01.410 or chapter 23B.07, 23B.08, 23B.11, 23B.13, 23B.14, or 23B.16 RCW delivery by electronic transmission.

(7) "Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a distribution in partial or complete

liquidation, or upon voluntary or involuntary dissolution; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(8) "Effective date of notice" has the meaning provided in RCW 23B.01.410.

(9) "Electronic transmission" means an electronic communication (a) not directly involving the physical transfer of a record in a tangible medium and (b) that may be retained, retrieved, and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by such a sender and recipient.

(10) "Electronically transmitted" means the initiation of an electronic transmission.

(11) "Employee" includes an officer but not a director. A director may accept duties that make the director also an employee.

(12) "Entity" includes a corporation and foreign corporation, not-for-profit corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, two or more persons having a joint or common economic interest, the state, United States, and a foreign governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) "Execute," "executes," or "executed" means (a) signed with respect to a written record or (b) electronically transmitted along with sufficient information to determine the sender's identity with respect to an electronic transmission, or (c) with respect to a record to be filed with the secretary of state, in compliance with the standards for filing with the office of the secretary of state as prescribed by the secretary of state.

(14) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this state.

(15) "Foreign limited partnership" means a partnership formed under laws other than of this state and having as partners one or more general partners and one or more limited partners.

(16) "General social purpose" means the general social purpose for which a social purpose corporation is organized as set forth in the articles of incorporation of the corporation in accordance with section 5(1)(c) of this act.

(17) "Governmental subdivision" includes authority, county, district, and municipality.

((~~(17)~~)) (18) "Includes" denotes a partial definition.

((~~(18)~~)) (19) "Individual" includes the estate of an incompetent or deceased individual.

((~~(19)~~)) (20) "Limited partnership" or "domestic limited partnership" means a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners.

((~~(20)~~)) (21) "Means" denotes an exhaustive definition.

((~~(21)~~)) (22) "Notice" has the meaning provided in RCW 23B.01.410.

((~~(22)~~)) (23) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

((~~(23)~~)) (24) "Principal office" means the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

((~~(24)~~)) (25) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

((~~(25)~~)) (26) "Public company" means a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to section 12 or 15 of the securities exchange act of 1934, or section 8 of the investment company act of 1940, or any successor statute.

((~~(26)~~)) (27) "Record" means information inscribed on a tangible medium or contained in an electronic transmission.

((~~(27)~~)) (28) "Record date" means the date established under chapter 23B.07 RCW on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this title. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

((~~(28)~~)) (29) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under RCW 23B.08.400(3) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

((~~(29)~~)) (30) "Shares" means the units into which the proprietary interests in a corporation are divided.

((~~(30)~~)) (31) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

((~~(31)~~)) (32) "Social purpose" includes any general social purpose and any specific social purpose.

(33) "Social purpose corporation" means a corporation that has elected to be governed as a social purpose corporation under chapter 23B.--- RCW (the new chapter created in section 19 of this act).

(34) "Specific social purpose" means the specific social purpose or purposes for which a social purpose corporation is organized as set forth in the articles of incorporation of the corporation in accordance with section 5(2)(a) of this act.

(35) "State," when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory and insular possession, and their agencies and governmental subdivisions, of the United States.

((~~(32)~~)) (36) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

((~~(33)~~)) (37) "Tangible medium" means a writing, copy of a writing, or facsimile, or a physical reproduction, each on paper or on other tangible material.

((~~(34)~~)) (38) "United States" includes a district, authority, bureau, commission, department, and any other agency of the United States.

((~~(35)~~)) (39) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this title are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this title to vote generally on the matter are for that purpose a single voting group.

((~~(36)~~)) (40) "Writing" does not include an electronic transmission.

((~~(37)~~)) (41) "Written" means embodied in a tangible medium.

Sec. 18. RCW 23B.04.010 and 1998 c 102 s 1 are each amended to read as follows:

(1) A corporate name:

(a) Must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.";

(b) Must not contain language stating or implying that the corporation is organized for a purpose other than those permitted by RCW 23B.03.010 and its articles of incorporation;

(c) Must not contain any of the following words or phrases:

"Bank," "banking," "banker," "trust," "cooperative," or any combination of the words "industrial" and "loan," or any combination of any two or more of the words "building," "savings," "loan," "home," "association," and "society," or any other words or phrases prohibited by any statute of this state; and

(d) Except as authorized by subsections (2) and (3) of this section, must be distinguishable upon the records of the secretary of state from:

(i) The corporate name of a corporation incorporated or authorized to transact business in this state;

(ii) A corporate name reserved or registered under chapter 23B.04 RCW;

(iii) The fictitious name adopted under RCW 23B.15.060 by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(iv) The corporate name or reserved name of a not-for-profit corporation incorporated or authorized to conduct affairs in this state under chapter 24.03 RCW;

(v) The name or reserved name of a mutual corporation or miscellaneous corporation incorporated or authorized to do business under chapter 24.06 RCW;

(vi) The name or reserved name of a foreign or domestic limited partnership formed or registered under chapter 25.10 RCW;

(vii) The name or reserved name of a limited liability company organized or registered under chapter 25.15 RCW; ((~~and~~))

(viii) The name or reserved name of a limited liability partnership registered under chapter 25.04 RCW; and

(ix) The name or reserved name of a social purpose corporation registered under chapter 23B.--- RCW (the new chapter created in section 19 of this act).

(2) A corporation may apply to the secretary of state for authorization to use a name that is not distinguishable upon the

records from one or more of the names described in subsection (1) of this section. The secretary of state shall authorize use of the name applied for if:

(a) The other corporation, company, holder, limited liability partnership, or limited partnership consents to the use in writing and files with the secretary of state documents necessary to change its name or the name reserved or registered to a name that is distinguishable upon the records of the secretary of state from the name of the applying corporation; or

(b) The applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(3) A corporation may use the name, including the fictitious name, of another domestic or foreign corporation, limited liability company, limited partnership, or limited liability partnership, that is used in this state if the other entity is formed or authorized to transact business in this state, and the proposed user corporation:

(a) Has merged with the other corporation, limited liability company, or limited partnership; or

(b) Has been formed by reorganization of the other corporation.

(4) This title does not control the use of assumed business names or "trade names."

(5) A name shall not be considered distinguishable upon the records of the secretary of state by virtue of:

(a) A variation in any of the following designations for the same name: "Corporation," "incorporated," "company," "limited," "partnership," "limited partnership," "limited liability company," ((~~or~~)) "limited liability partnership," or "social purpose corporation," or the abbreviations "corp.," "inc.," "co.," "ltd.," "LP," "L.P.," "LLP," "L.L.P.," "LLC," ((~~or~~)) "L.L.C." "SPC," or "S.P.C.";

(b) The addition or deletion of an article or conjunction such as "the" or "and" from the same name;

(c) Punctuation, capitalization, or special characters or symbols in the same name; or

(d) Use of abbreviation or the plural form of a word in the same name.

NEW SECTION. **Sec. 19.** Sections 1 through 16 of this act constitute a new chapter in Title 23B RCW.

Passed by the House February 13, 2012.
Passed by the Senate March 2, 2012.
Approved by the Governor March 30, 2012.
Filed in Office of Secretary of State March 30, 2012.

European Commission

A map of social enterprises and their eco-systems in Europe

Executive Summary

Employment, Social Affairs and Inclusion

A map of social enterprises and their eco-systems in Europe

European Commission

Contract Number: VC/2013/0339 under the Multiple Framework Contract for the provision of evaluation and evaluation related services to DG Employment, Social Affairs & Inclusion including support for impact assessment activities" (VT 2008/087) Lot 1

Executive Summary

December 2014

A map of social enterprises and their eco-systems in Europe

European Commission

A report submitted by ICF Consulting Services

Date: December 2014

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Abstract

Despite a growing interest in social enterprise and increasing levels of activity, there is limited understanding about the current state, size, and scope of social enterprises in Europe. To fill this gap, the European Commission launched the present study in April 2013 as a follow-up to its 2011 Communication on the Social Business Initiative (SBI). This first-of- its-kind study maps social enterprise activity and eco-systems in 29 countries using a common definition and approach. Specifically, the Study maps (i) the scale and characteristics of social enterprise activity in each country; (ii) the national policy and legal framework for social enterprise; (iii) support measures targeting social enterprise; (iv) labelling and certification schemes where these exist; and (v) social (impact) investment markets. The Study also provides insights on the factors constraining the development of social enterprise and potential actions that could be undertaken at an EU level to complement and support national initiatives. It is based on: (i) in depth review of national policy documents, academic and grey literature on social enterprise; and (ii) semi-structured interviews with a range of stakeholders such as social enterprises, policy makers, social enterprise networks, support providers, investors and intermediaries.

Contents

Executive Summary

Mapping social enterprise activity and eco-system features in Europe

Recent years have seen a burgeoning interest in social enterprise across Europe, strongly driven by a growing recognition of the role social enterprise can play in tackling societal and environmental challenges and fostering inclusive growth. Impetus has come also from the 2009 global economic crisis which has resulted in widespread public discontentment with the functioning of the global economic system and fuelled interest in more inclusive and pluralistic economic systems. Subsequent implementation of austerity measures - against a backdrop of new and growing social needs - have created both challenges and opportunities for social enterprise in Europe.

Yet, despite interest in and the emergence of examples of inspirational and 'disruptive' social enterprise, relatively little is known about the scale and characteristics of the emerging social enterprise 'sector' of Europe as a whole. Studies have come forward to detail the possible forms and range of 'the national families of social enterprises' and to distinguish these developing enterprise forms from both the social and mainstream economy[1], but the diversity of national economic structures, welfare and cultural traditions and legal frameworks has meant that measuring and comparing social enterprise activity across Europe remains a challenge. There exists both a lack of availability and consistency of statistical information on social enterprises across Europe.

The European Commission launched this Mapping Study in April 2013 as a follow-up to Action 5 of the Social Business Initiative (SBI)[2] to help fill this gap in knowledge. **This Study maps the broad contours of social enterprise activity and eco-systems in 29 European countries (EU 28 and Switzerland) using a common 'operational definition' and research methodology.**

The Study outputs comprise a Synthesis Report including an Executive Summary (the present document) and 29 Country Reports. The Synthesis Report brings together the findings of the individual Country Reports to provide a high level European 'map' or snapshot of social enterprise activity and select features of their eco-systems that are of particular policy interest to the European Commission, namely: national policy and legal frameworks for social enterprise; business development services and support schemes specifically designed for social enterprises; networks and mutual support mechanisms; social impact investment markets; impact measurement and reporting systems; and marks, labels and certification schemes.

By definition, this mapping exercise does not provide an assessment of social enterprise eco-systems or policies but, rather, a description of current characteristics and trends to support future research and policy making. Recognising the current conceptual and methodological limitations in measuring and mapping social enterprise activity, the Study adopts a pragmatic approach to generate a 'first map' based on existing academic and grey material and interviews with over 350 stakeholders across Europe.

The substantial diversity in economic and welfare contexts, legal frameworks and cultures associated with the emergence of social enterprise in nations and regions means that **this initial mapping of drivers, characteristics and eco-system features should be followed by more targeted and specific research as individual policy initiatives are formulated and developed**.

Developing an 'operational definition' of social enterprise

In order to measure and map social enterprise activity and eco-systems, it is important to first understand just what social enterprise is. The Study developed an operational definition that could be used to (a) distinguish social enterprises from mainstream enterprises and traditional social economy entities; and (b) map social enterprise diffusion and activity – in a consistent and coherent manner -

[1] See especially the work of EMES, http://www.emes.net/what-we-do/

[2] COM (2011) 682 final - Social Business Initiative: Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation.

across 29 countries with different economic and welfare contexts, traditions and social enterprise development pathways.

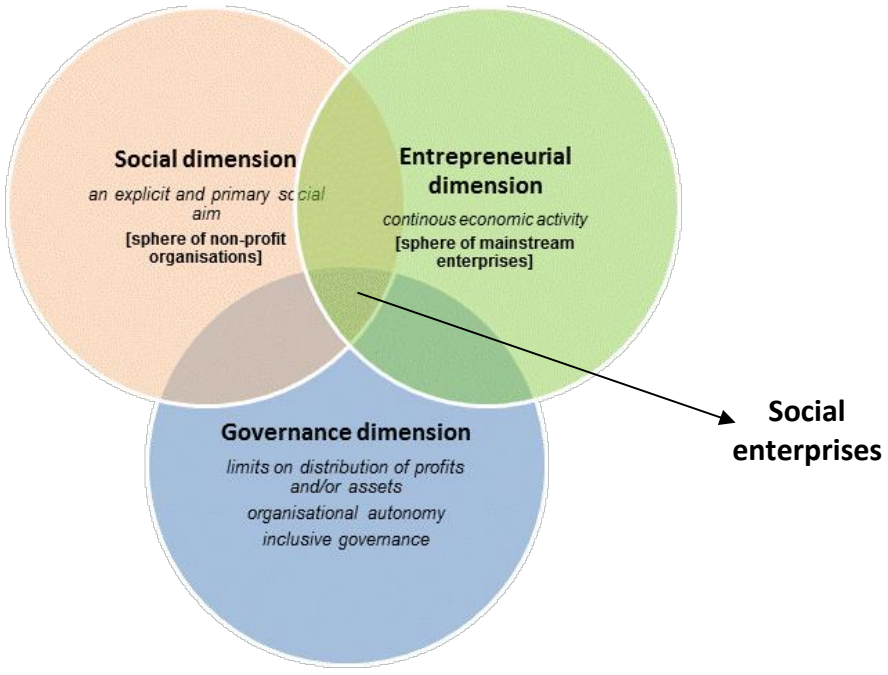
The Study did not develop a new definition of social enterprise; rather it 'operationalised' the existing and widely accepted notion of social enterprise as articulated in the European Commission's SBI communication. The SBI definition incorporates the three key dimensions of a social enterprise that have been developed and refined over the last decade or so through a body of European academic and policy literature:

- An *entrepreneurial dimension*, i.e. engagement in continuous economic activity, which distinguishes social enterprises from traditional non-profit organisations/ social economy entities (pursuing a social aim and generating some form of self-financing, but not necessarily engaged in regular trading activity);
- A *social dimension*, i.e. a primary and explicit social purpose, which distinguishes social enterprises from mainstream (for-profit) enterprises; and,
- A *governance dimension*, i.e. the existence of mechanisms to 'lock in' the social goals of the organisation. The governance dimension, thus, distinguishes social enterprises even more sharply from mainstream enterprises and traditional non-profit organisations/ social economy entities.

Each of the above dimensions were operationalised by developing a set of core criteria – reflecting the minimum *a priori* conditions that an organisation must meet in order to be categorised as a social enterprise under the EU definition (Figure 1). The following core criteria were established:

- *The organisation must engage in economic activity:* this means that it must engage in a continuous activity of production and/or exchange of goods and/or services;
- *It must pursue an explicit and primary social aim:* a social aim is one that benefits society;
- *It must have limits on distribution of profits and/or assets:* the purpose of such limits is to prioritise the social aim over profit making;
- *It must be independent* i.e. organisational autonomy from the State and other traditional for-profit organisations; and,
- *It must have inclusive governance* i.e. characterised by participatory and/ or democratic decision-making processes.

Figure 1: The three dimensions of a social enterprise



Application of the EU level 'operational definition' to national contexts

The mapping Study finds that there is both a growing interest and convergence in views across Europe as regards the defining characteristics of a social enterprise; however, important differences remain, especially with respect to the interpretation and relevance of the 'governance dimension' of a social enterprise

Organisations fulfilling the 'EU operational definition' of social enterprise can be found in all 29 countries – either as part of, or alongside, national concepts, interpretations and definitions of 'families' of social enterprise.

The EU operational definition however, represents the 'ideal 'type of social enterprise – 'national families of social enterprise' generally share most, but not often all, of the criteria specified in the operational definition. For example, concerning the governance dimension especially:

- Of the twenty nine countries studied, twenty have a national definition[3] of social enterprise, but in six of these countries the definition does not require social enterprises to have 'inclusive governance' models. Similarly, in several of the remaining nine countries that do not have a national definition, inclusive governance is not seen as a defining characteristic of social enterprise;
- In most countries of Study, the criterion relating to 'independence' is understood/ interpreted as "managerial autonomy" and/or "autonomy from the State". Only in Italy and Portugal, do national definitions emphasise autonomy from the State and other traditional for-profit organisations.

Furthermore, in a few countries (Finland, Lithuania, Poland, Slovakia and Sweden), the notion of social enterprise as articulated in national laws and/or policy documents, narrowly focuses on work integration social enterprises (WISEs). This restricted definition excludes enterprises pursuing societal missions such as provision of social and educational services, environment, well-being for all, or solidarity with developing countries.

Whilst social enterprises are growing in visibility, including within legal frameworks, many continue to operate 'under the radar'

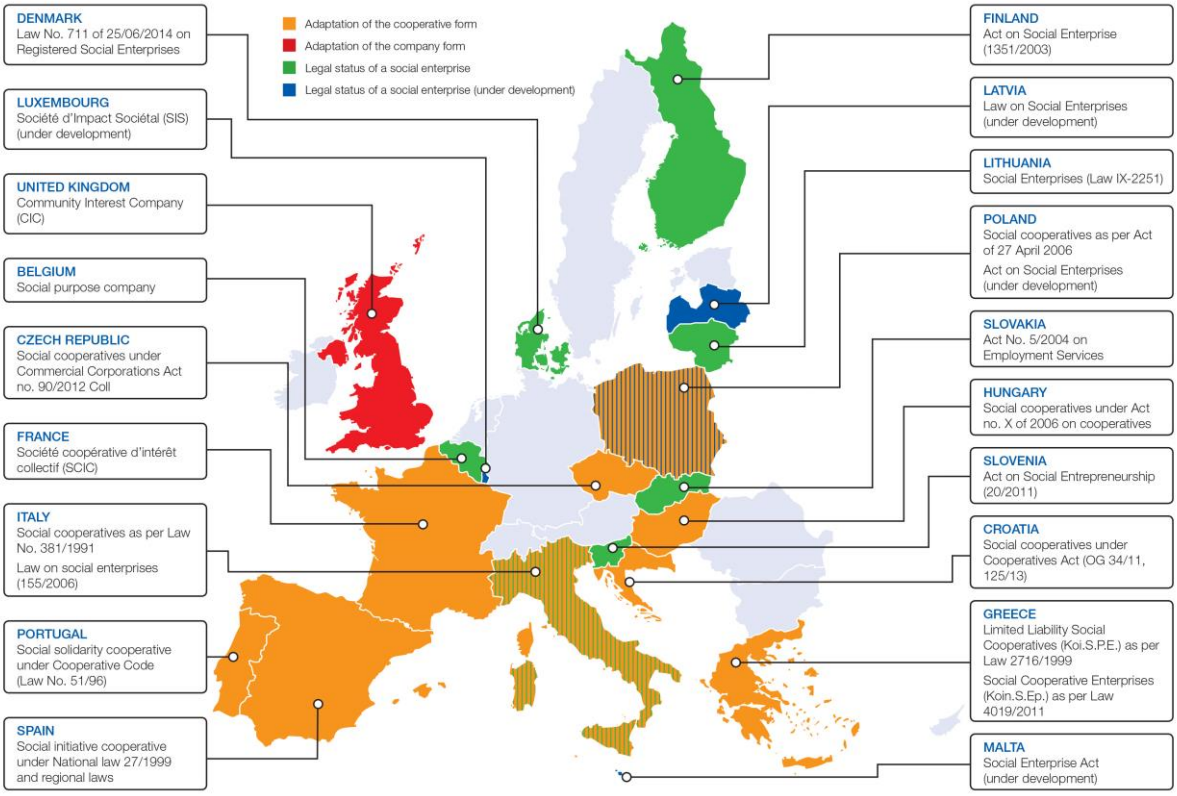
A number of countries have institutionalised the concept of social enterprise either by creating tailor-made legal forms for social enterprise and/or a transversal legal status (Figure 2). Additionally, specific social enterprise marks or certification schemes can be found in four countries (Finland, Germany, Poland and the UK) to provide visibility and a distinct identity to social enterprises.

Although growing in number, legally or institutionally recognised forms of social enterprise (where these exist) do not capture the 'de-facto' universe of social enterprise. De-facto European social enterprises are often 'hidden' among existing legal forms, most notably amongst:

- Associations and foundations with commercial activities;
- Cooperatives serving general or collective interests;
- Mainstream enterprises pursuing an explicit and primary social aim.

[3] National definitions refer to (i) official definitions (or criteria defining social enterprise) as articulated in policy documents or national legislation (that is transversal in nature and does not refer to a specific legal form) or (ii) an unofficial definition which is widely accepted by various social enterprise stakeholders.

Figure 2 Countries with specific legal forms or statutes for social enterprise



Notes: (i) Social enterprise laws in Finland, Lithuania and Slovakia narrowly refer to work integration social enterprises; (ii) Italy is the only European country with both a law on social cooperatives (legal form) as well as a law on social enterprises (legal status); (iii) Poland has a specific legal form for social enterprises (social cooperatives) and a draft law proposes the creation of a social enterprise legal status.

The national 'social enterprise families' are incredibly diverse across Europe, encompassing a range of organisational and legal forms and statuses

Social enterprises adopt a variety of legal forms and statuses: (i) existing legal forms such as associations, foundations, cooperatives, share companies; (ii) new legal forms exclusively designed for social enterprises by adapting or 'tailoring' existing legal forms e.g. social cooperatives in Italy, Societe Cooperative d'Interet Collectifs (SCICs) in France, Community Interest Companies in the UK; (iii) legal status that can be obtained by selected or all existing legal forms, which comply with a number of legally defined criteria (e.g. social enterprise legal status in Italy or the Social Purpose Company in Belgium); iv) new types of legal forms that allow traditional non-profit organisations to undertake economic activity such as e.g. Non-profit Institute in Slovenia.

Scale and characteristics of social enterprise activity in Europe

Reported levels of social enterprise activity adopt a variety of definitions and research methods but do suggest recent growth in numbers - although absolute numbers of social enterprise are very small relative to mainstream enterprises

It remains highly challenging to measure and aggregate social enterprise activity across Europe given that much of it takes place 'under the radar'. Moreover, national estimates of the number and characteristics of social enterprise – in the few cases where they exist - revealed a diversity of definitions and methods of data collection and estimation that makes aggregation problematic. Estimates of numbers of organisations that meet all of the criteria set by the EU operational definition used in this Study are even more difficult to establish.

The mapping suggests that the level of social enterprise activity (based on the estimated number of organisations that meet all of the criteria set by the EU operational definition), relative to the number of 'mainstream enterprises', is small, perhaps in the order of less than 1 per cent of the national business population. However, the on-going withdrawal of public agencies from supplying social services of general-interest, increasing pressures on traditional non-profit organisations to diversify their income sources and rising interest in social innovation among mainstream enterprises suggest a strong growth dynamic in social enterprise across Europe.

European social enterprises are undertaking a growing breadth of activity beyond work integration and social services of general interest

There is a lack of standard and consistently used classifications of social enterprise activity within and across countries. **It is problematic to obtain a statistically robust picture of what European social enterprises do.** However, a broad typology of activities can be drawn on the basis of existing, if discrete, sectoral classifications:

- Social and economic integration of the disadvantaged and excluded (such as work integration and sheltered employment);
- Social services of general interest (such as long term care for the elderly and for people with disabilities; education and child care; employment and training services; social housing; health care and medical services.);
- Other public services such as community transport, maintenance of public spaces, etc.
- Strengthening democracy, civil rights and digital participation;
- Environmental activities such as reducing emissions and waste, renewable energy;
- Practising solidarity with developing countries (such as promoting fair trade).

Whilst seeing an expanding array of activities by social enterprises, **in certain countries the legal definition of social enterprise reduces the allowable range of activity**. One example would be understandings of activities contained within legal definitions of 'public benefit' which are held by de-facto social enterprises in a number of countries such as Austria, Bulgaria, the Czech Republic, Germany and Switzerland.

Notwithstanding such issues, the most visible (but not necessarily dominant) activity of social enterprise in Europe can be identified as **work integration of disadvantaged groups** (by WISE). In a number of countries, WISE activities do constitute the dominant form of social enterprise (for example, Czech Republic, Hungary, Latvia, Poland, Slovakia, Slovenia) with strongly identifiable organisational forms in these activities such as Italy's "type B" or "working integration" social cooperatives, French enterprises for the reintegration of economic activity, Finnish social enterprises (as per Act 1351/2003) and Poland's social cooperatives. The delivery of work integration activities is, however, achieved through the provision of a very wide range of goods and services.

Beyond work integration itself, the majority of social enterprise services are to be found across the full spectrum of social welfare services or **social services of general interest (long term care for the elderly and for people with disabilities; early education and childcare; employment and training services; social housing; social integration of disadvantaged such as ex-offenders, migrants, drug addicts, etc.; and health care and medical services)**. Childcare services, for example, are the major social enterprise activity in Ireland (one third) whereas in Denmark a survey showed that forty one per cent of enterprises deliver health and social care and forty per cent of Italian social enterprises operate in social care and civic protection. A related, and overlapping, set of activities are those which are sometimes termed **community or proximity services**. These often include forms of social care, but also the broader concepts of community development and regeneration.

There are further common extensions of economic activity that meet collective needs in additional areas: **land-based industries and the environment** (for example, agriculture, horticulture, food processing, through to environmental services and environmental protection) in countries like the Czech Republic, Malta, and Romania; serving **community interest** needs in countries like the UK, Germany and the Netherlands (for example, housing, transportation, and energy) and **cultural, sport and recreational activities** (for example, arts, crafts, music, and increasingly tourism) in Croatia, Estonia, Finland, Greece, Hungary, Malta and Sweden.

Finally, there are a few European countries where **social enterprise reflects much more closely the full extent of activities possible within any economy** (for example, in Belgium, Germany, the Netherlands and the UK). Within these countries, social innovation is driving new forms of provision and this even goes as far as new activities such as business services, creative and digital/internet-based services and the provision of sustainable consumer products and services.

Overall, as European social enterprise has developed, the main activity fields of work integration and welfare service provision are being expanded to sectors of general-interest other than welfare, such as the provision of educational, cultural, environmental and public utility services. Nevertheless, as identified by the EU SELUSI project[4], there exist important and substantial cross-country differences in the nature of activities undertaken by social enterprises.

Social enterprises exploit a range of sources and in most countries, but the majority of their revenue comes from the public sector

While for-profit enterprises usually base their business models on revenues generated through trading activity, **social enterprises typically adopt a 'hybrid' business model i.e. they derive their revenues from a combination of:**

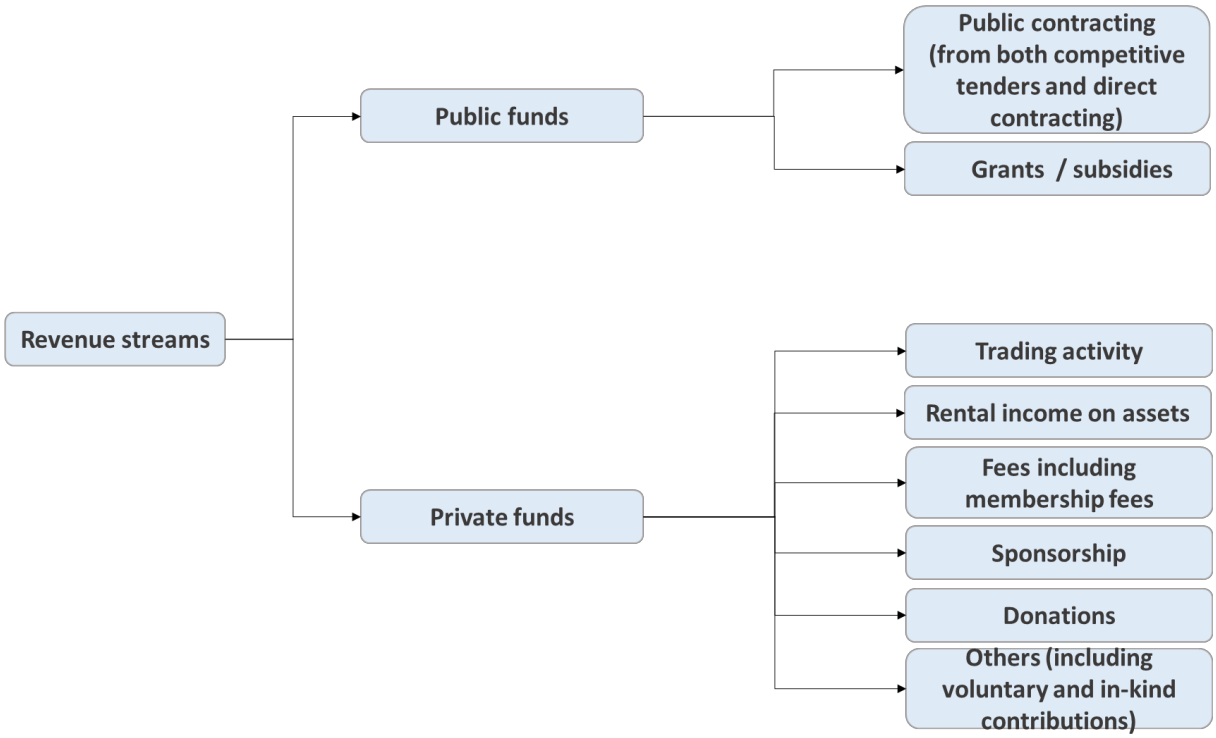
- **Market sources** e.g. the sale of goods and services to the public or private sector; and
- **Non-market sources** e.g. government subsidies and grants, private donations, non-monetary or in-kind contributions such as voluntary work etc.

Social enterprises thus, rely on a mix of revenue streams. The main revenue streams can be described as follows (Figure 3):

- **Revenue derived from public contracts:** Social enterprise contract with public authorities and agencies to receive fees for defined services (quasi-markets). The structure of these payments can be quite different, varying from direct payment by public authorities to social security systems, voucher systems, or indirect payment through third-party intermediaries;
- **Direct grants / subsidies**: provided to social enterprises by public authorities e.g. grants for specific project based activity, employment subsidies are often made available to WISE as 'compensation' for employing people with impaired work ability and for the resulting productivity shortfall;
- **Market based revenue derived from private sources:** through the sale of goods and services to other businesses and final consumers;
- **Membership fees, donations and sponsorship;** and
- **Other forms of revenue** include income from renting assets (such as property), penalty payments, prize money or income from endowed assets, and non-monetary forms such as in-kind donations (e.g. old IT equipment, food or building material). Volunteering time, especially, has remained an important source of in-kind revenue.

[4] http://www.selusi.eu/index.php?page=business-platform

Figure 3: Revenue streams for social enterprises



Adapted from Spiess-Knafl (2012) Finanzierung von Sozialunternehmen - Eine empirische und theoretische Analyse.

Where mapping data allows (and it is incomplete for many countries), it suggests that **income derived from market sources varies by country and by organisational form**:

- In countries like the Czech Republic, Finland, France, Italy and the UK, social enterprises derive a majority of their revenue from market sources and particularly from the sale of goods and services to public authorities. In several other countries for which data are available (e.g. Austria and Poland), the entrepreneurial dimension was found to be less strong with social enterprises deriving less than 50 percent of their revenue from market sources;
- There also appears to be a strong correlation between the organisational/ legal form adopted by a social enterprise and the level of revenue generated from market sources. Institutionally recognised forms of social enterprise and WISEs (note that the two categories are not mutually exclusive) typically are more market orientated than de-facto social enterprises that have originated from the more traditional non-profit sector (i.e. associations, foundations, voluntary and community organisations).

Country Reports show that public sector funding dominates the revenue streams of social enterprises, reflecting in large part their missions and activity focus such as work integration, and provision of social and welfare services. For example, an estimated 45 per cent of social enterprises in Italy have public bodies as their main clients. In the UK, 52 per cent of social enterprises derive some income from the public sector and 23 per cent describe it is as their main or only source of income.

A notable dynamic by which social enterprise are generating earned income is the increasing contracting out of services in healthcare, social care, education, criminal justice, leisure and a host of other areas by public authorities across Europe as a means of securing best value for money and offering greater choice and personalisation to the users of these services.

High reliance of social enterprises on the public sector has, however, raised concerns about the long term sustainability of their business models in the face of austerity measures being implemented across Europe, although evidence suggests the importance of the specificity of national

context, activity and enterprise business model in shaping impacts. In Italy, for example, such cuts are currently challenging social cooperatives whereas, in the UK, such cuts have further encouraged social enterprises to successfully identify new market opportunities.

The main drivers of creation of social enterprise activity and the varied modes of creation of European social enterprise

Systematic evidence on the type and prevalence of modes of creation of European social enterprise is lacking. However, evidence from country reports suggests that public sector contracting and active labour market policies of the Government play an important role in stimulating the creation and development of social enterprise. Looking across Europe, a potential typology of modes of creation can be put forward – with the balance of modes in any one country strongly determined by the pre-existing political economy and shaped by the national framework conditions and ecosystem for social enterprise.. Individual modes can be grouped based on their drivers: 'citizen-led'; 'marketisation of traditional non-profit organisations such as charities, associations, foundations, voluntary and community organisations'; and 'public sector restructuring'.

Citizen-led

- *Citizen-driven mission organisation:* whereby groups of citizens have set up organisations, often with few resources at their disposal, to address new needs and societal challenges and/or integrate disadvantaged people through work. This is by and large the predominant mode of creation of social enterprises.
- *Social start-up:* a social entrepreneur sees the opportunity to trade a new good or service to meet a social aim or need. Generally, these social enterprises are viewed as more individual-based and commercial in outlook from the start (but nevertheless with a social mission), and associated with a narrower 'Anglo-Saxon' understanding of social entrepreneurship.

Traditional non-profit organisations such as charities, associations, foundations, voluntary and community organisations **embark on marketisation and commercialisation**

- *An existing organisation transforms itself into a 'social enterprise'*: an existing voluntary organisation, charity, association or foundation begins to generate traded income and reaches a traded income threshold as a proportion of all income whereby the organisation is understood by stakeholders to be, or becomes, a social enterprise.
- *An existing organisation sets up a trading arm which is the social enterprise*: in many instances legal, regulatory or risk appetite precludes an existing voluntary organisation, charity, association or foundation from undertaking economic activity or only doing so to a certain limit. To overcome this restriction a trading arm is created - and which reinvests a certain level of profits in to its parent organisation. This mode of creation is relatively popular in new member countries of central Europe.

Public Sector Restructuring

- *Public sector spin-out (opportunity entrepreneurship):* management/staff recognise the greater potential for innovation and new investment sources through autonomy and independence, leading to a spin-out of the service. This process may actively be supported by the 'parent' institution or policy makers more broadly through specialist advisor programmes, investment and finance support and initial service procurement agreements;
- *Public sector spin-out (necessity entrepreneurship):* drivers such as shifting views on the role of the state in provision, new forms of procurement and provider, social innovation and/or funding cuts lead to an enforced 'decommissioning' of an internal public service and an enforced (but possibly supported) 'spin out';

The country reports also point to the emergent growing expectation of, and activity by, businesses to contribute to the social and public good as part of the enterprise's business model. Initially understood as corporate social responsibility or responses to regulatory requirement, there is growing evidence of the continued expansion of this dynamic through other activity forms (such as social investment or impact investing), alongside developing arguments for new business models that connect 'corporate

and societal value creation' within shareholder companies and the concept of "Profit-with-Purpose businesses". Corporate citizenship examples are currently rare, but put forward in this Study to acknowledge possible new dynamics in modes of creation of the 'national families of social enterprise'. It is suggested that these dynamics are leading certain mainstream businesses towards social enterprise forms.

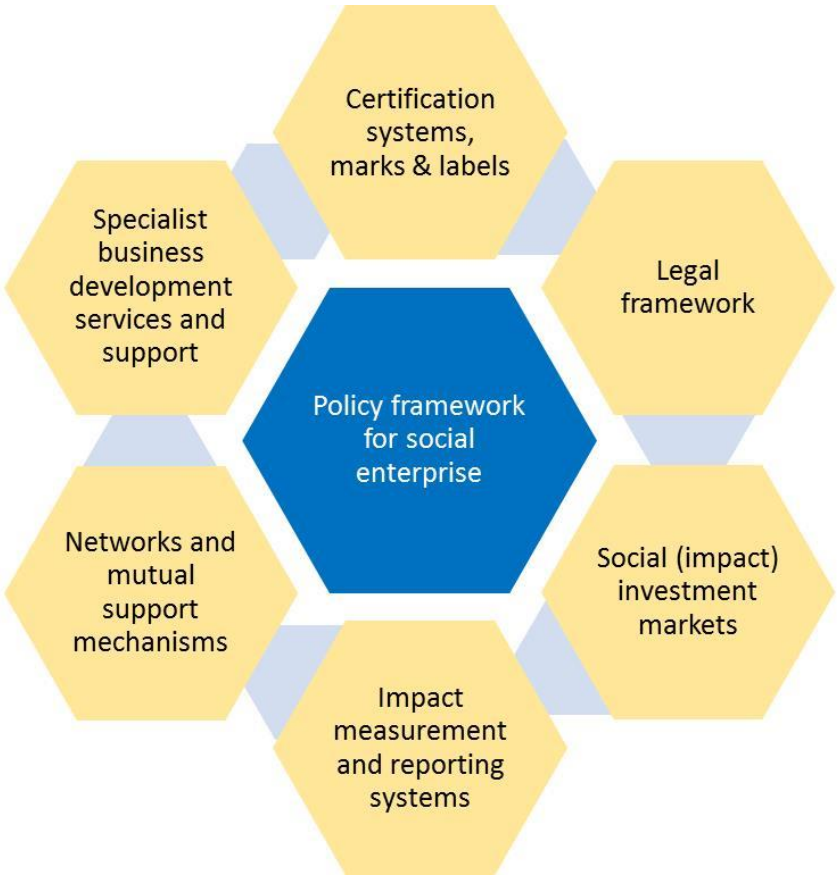
The evidence does not permit any strong ranking of importance of the modes of creation of European social enterprise listed above. In terms of existing scale, associations and foundations far outweigh social enterprise numbers but estimation of the extent to which traditional voluntary organisations, charities, associations and foundations in Europe are undertaking marketisation to the point of their attainment of social enterprise status is virtually impossible without substantial and highly detailed research. The potential comprehensive identification of public sector 'spin outs' is easier given that such modes of creation are far fewer in number and relevant in only a very few countries (for example, evident in the UK and Slovakia).

Eco-systems of support for social enterprise

The features of an 'eco-system for social enterprise' - necessary to overcome barriers to growth – tend to still be in their infancy in most countries but can be seen to be slowly emerging, although formal enabling/ supportive policy frameworks remain scarce

The conceptualisation of a social enterprise eco-system is based on commonly recognised features able to contribute to providing an enabling environment for social enterprise including the potential to address key constraints and obstacles (Figure 4).

Figure 4: Select features of an eco-system for social enterprise

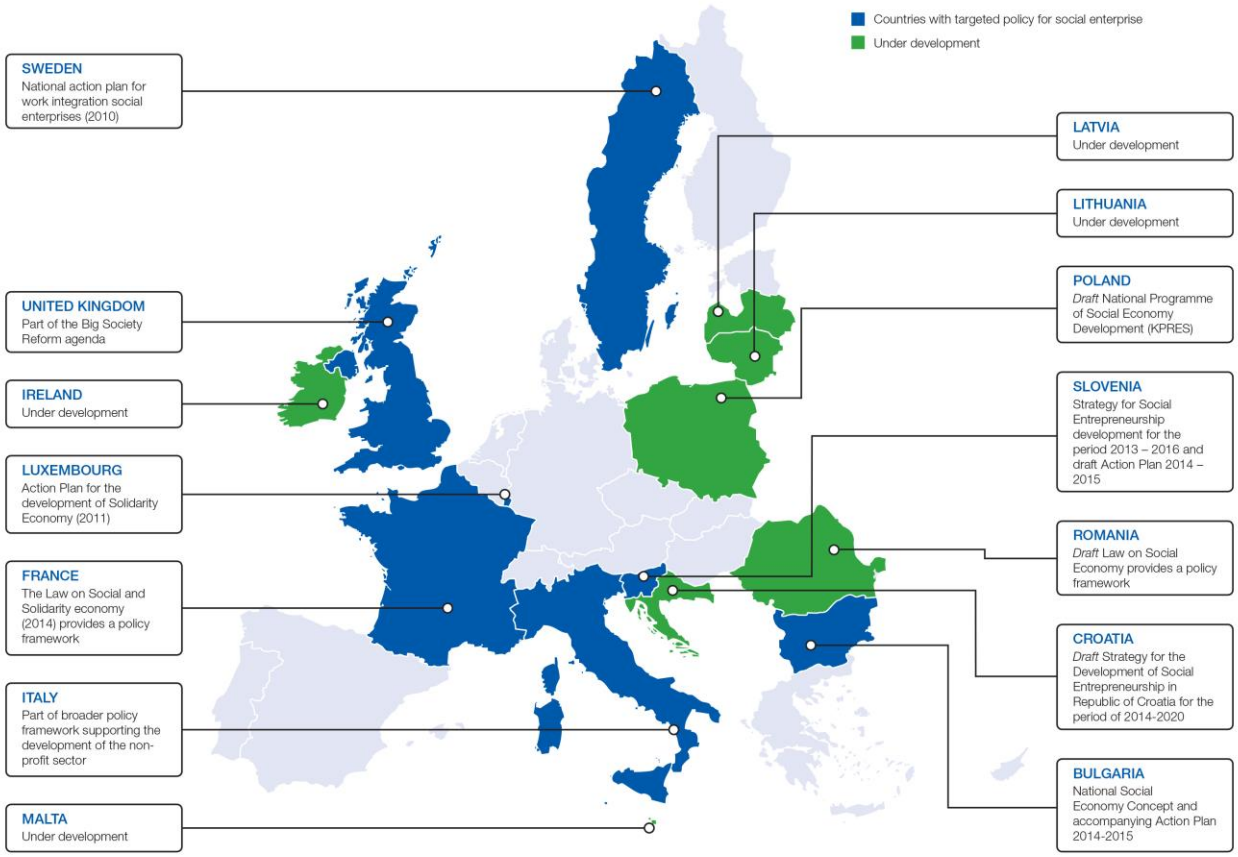


The following sub-sections summarise the presence and development of these features as mapped in the Country Reports. Not all features can be identified in any one country, and the mix and development of these features at national level differs substantially between the 29 countries studied.

National policy frameworks for social enterprise

22 out of 29 European countries studied do not have a specific policy framework for supporting the development of social enterprise (although seven are in the process of developing one) - see Figure 5. Where policies exist, they differ widely in scope, coverage and content. As a mapping project, it was not the remit of this Study to assess the effectiveness of national policies.

Figure 5: Countries with policy frameworks targeting social enterprise



National legal frameworks for social enterprise

16 European countries have some form of legislation that recognises and regulates social enterprise activity. There are three broad approaches to social enterprise legislation (Figure 2 on page 4):

Adaptation of existing legal forms to take account of the specific features of social enterprises. Five countries have created new legal forms for social enterprise by adapting or tailoring existing legal forms. Two main approaches can be observed across Europe:

- In four countries (France, Greece, Italy and Poland) a separate, new legal form for social enterprise has been created by adapting the cooperative legal form. Additionally, five countries recognise social cooperatives (or the social purpose of cooperatives) in their existing legislation covering cooperatives. These are: Croatia, Czech Republic, Hungary, Portugal and Spain.
- The UK has developed a legal form for use by social enterprises (Community Interest Company) that specifically adapts the company form.

Creation of a social enterprise legal status. Seven countries have introduced transversal 'legal statuses' that cut across the boundaries of various legal forms and can be adopted by different types of organisations provided they meet pre-defined criteria. These countries are: Belgium, Denmark, Italy,

Finland, Slovakia, Slovenia and Lithuania. Other countries planning to create social enterprise legal statuses include Latvia, Luxembourg, Malta and Poland. In addition the Czech Government is considering introducing a legal status for social enterprise in 2015.

A legal status can be obtained by select or all existing legal forms provided they comply with pre-defined criteria. An example of the former is the "Social Purpose Company" status in Belgium which can be adopted by any type of enterprise (cooperative or share company) provided it "is not dedicated to the enrichment of its members". An example of the latter is the legal status of a social enterprise in Italy (as per Law No.155/2006). This legal status can be obtained by all eligible organisations which could in theory be traditional cooperatives, social cooperatives, investor-owned firms (i.e. share companies) or associations and foundations.

Recognition of specific types of non-profit organisations that allow for the conduct of economic activity (e.g. non-profit institute in Slovenia; public benefit corporation in the Czech Republic[5]) – although not labelled as such, these organisations are de-facto social enterprises.

Business development services and support schemes specifically designed for social enterprises

A number of countries have initiated a broad variety of business development services and support schemes specifically designed for social enterprises and social economy entities more widely. These include Belgium, Croatia, Denmark, Germany, France, Italy, Luxembourg, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland and the UK. The scope and scale of such publicly funded schemes, however, varies significantly across countries. For example, in Sweden the public support initiatives are narrowly targeted at WISEs, while in countries like Belgium, France, Luxembourg, Portugal and Spain, the support is targeted at the much broader social/ solidarity economy.

There are also a number of European countries that have very limited or no publically funded schemes specially designed for and targeting social enterprises. This is particularly the case in newer Member States, particularly from Eastern Europe - Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania where ad hoc and fragmented initiatives have been funded through Structural Funds. However, there are also a few examples of older Member States where publicly funded schemes targeting social enterprises are very limited or non-existent, including Austria, Finland, Germany, Ireland, and the Netherlands. In a few countries (Finland, Netherlands), it has been a deliberate policy choice to not develop bespoke schemes for social enterprise.

European Structural Funds (ERDF and ESF) have also played a key role in many countries (particularly new Member States such as Bulgaria, Poland, Romania, Hungary, but also older Member States such as Italy and the UK) in raising the visibility and profile of social enterprise through awareness raising activities such as events, workshops, awards/ competitions and pulling together a fragmented community of actors - and also contributed to financing the creation of new social enterprises.

Across Europe, the following **typology of public support measures** has been identified:

- Awareness raising, knowledge sharing, mutual learning;
- Specialist business development services and support;
- Investment readiness support;
- Dedicated financial instruments (e.g. social investment funds);
- Physical infrastructure (e.g. shared working space); and
- Collaborations and access to markets.

[5] Public Benefit Corporation (PBC) – in Czech "obecně prospěšná společnost/o.p.s." (Act No. 248/1995 Sb., on Public Benefit Corporations – The Act as such is abolished, but it is de facto considered as frozen, so that no more PBC may be established according to it, but existing PBCs may either continue and remain regulated by it as under the Old Regulation norms, or change the legal form into the Institute (NR10) or a Foundation (NR8) or a Fund (NR9))

Networks and mutual support mechanisms

Social enterprise networks and/or some form of mutual support structures exist in almost all countries. The experience of Italy, France and the UK shows that these can play an important role in supporting the development of the sector by offering support, guidance and advice, as well as acting as an advocate for the sector. For example, social cooperatives consortia are the most common support structure for social enterprise in Italy and provide training and consultancy support to their members. Another example is the business and employment cooperatives in France, which utilise peer support to assist new entrepreneurs. Similarly, in the UK, several umbrella organisations for social enterprises have been established and have played an important role in both bringing recognition to the sector and in the development of a range of policy.

There are a limited, but growing number of social enterprise incubators, mentoring schemes, specialist infrastructure and investment readiness services across the EU (examples can be found in countries like Belgium, France, Germany, the Netherlands, Slovenia, Hungary, etc.).

Social impact investment markets

The importance of gaining access to finance relates to the particular mode of creation and business model. As business models move towards greater levels of earned (or traded) income, so evidence suggests that, like any other enterprise, social enterprises need external finance to start-up and scale their activities. Similarly, in common with any start-up, new or small business – unless holding property - social enterprises face problems of access to finance due to track record, lender transaction costs and so on. **However, given their specific characteristics (especially around governance), accessing finance from traditional sources can be particularly problematic for social enterprises.** Measures to improve access to finance have included:

Dedicated financial instruments – Given that social investment markets are currently under-developed in most European countries (and at best, nascent in the more 'advanced' countries like France and the UK), governments can play a key role in designing dedicated financial instruments (using public funds to provide loan or investment (equity) facilities). Interesting examples of publicly funded dedicated financial instruments can be found in Belgium, Denmark, France, Germany, Poland and the UK; and,

Social impact investment markets - Social investment (or impact investment as it is more commonly known outside Europe) is the provision of finance to organisations with the explicit expectation of a social – as well as a financial – return and measurement of the achievement of both. The potential balance between the two forms of return (what type and scale of financial return and what type and scale of social impact) implies the possibility of a substantial range of investors, investment products and investees.

Impact measurement and reporting systems

There are **very few countries that have nationally recognised systems or common methodologies for measuring and reporting social impact.** Moreover, where they exist they do not tend to be mandatory to use for social enterprises. The only exception is Italy where social reporting is mandatory for social enterprises ex lege. Table 1 below provides an overview of the systems and methodologies that are in place and/ or that are being developed through pilot schemes.

Table 1: Overview of social impact reporting schemes

Country	Social impact reporting system	Voluntary/ Mandatory
Austria	Common Good Balance Sheet	Voluntary
Belgium	A social purpose company has to produce an annual report (non-standardised) on how it acted on the established social goals of the organisation	Mandatory
Estonia	Social entrepreneurship sector pilot statistical report (EU funded) and impact assessment handbook	Voluntary

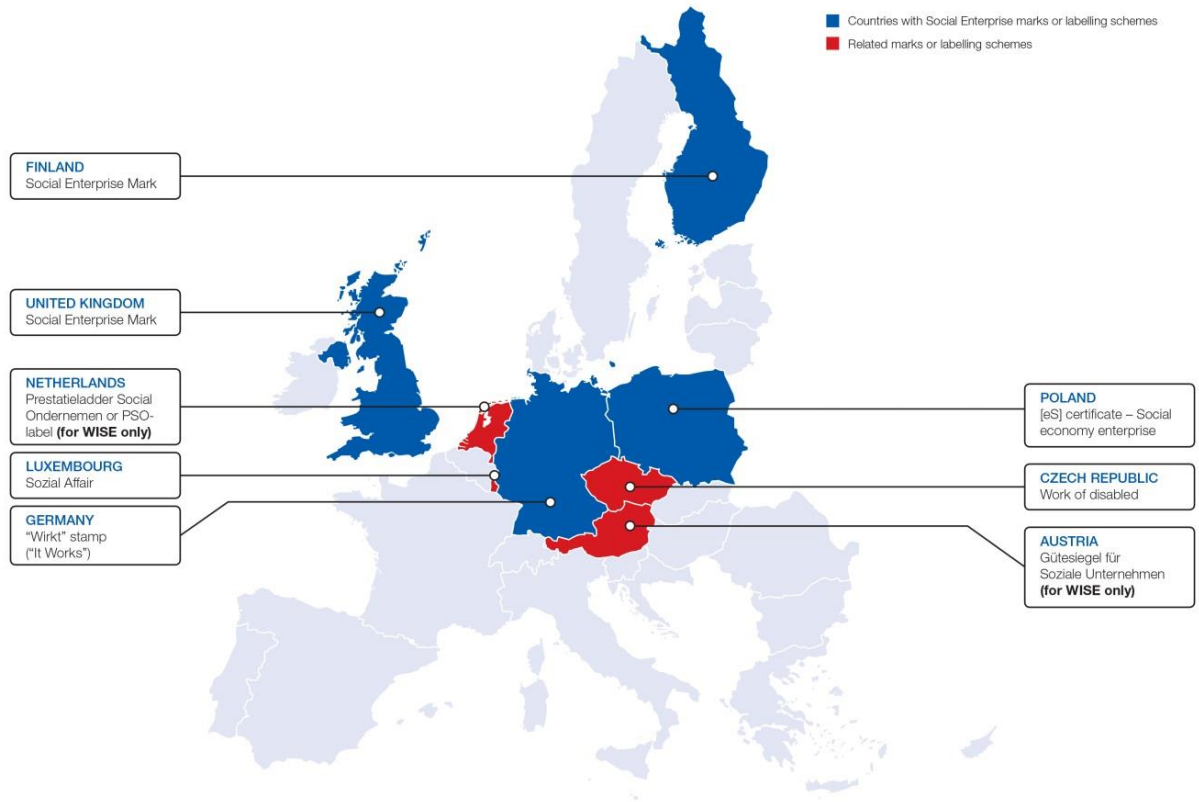
Country	Social impact reporting system	Voluntary/ Mandatory
Germany	Social Reporting Standard	Voluntary
Italy	Bilancio Sociale (social report)	Mandatory for social enterprises ex lege
Poland	Pilot projects aimed at designing impact measurement and reporting tools	Voluntary
United Kingdom	A number of actors have published guidance and toolkits. There are current attempts to further develop and agree common frameworks	Voluntary

At an EU level, the GECES has also set-up a working group to develop a methodology to measure the socio-economic benefits created by social enterprises[6].

Marks, labels and certification schemes

Marks, labels and certification systems for social enterprises are not particularly widespread across Europe, but have been implemented in four European countries (Figure 6). However, only a very small number of social enterprises are currently using these marks and labels.

Figure 6 Countries with marks, labels or certification schemes for social enterprises



Barriers and constraints to the development of social enterprise

Notwithstanding the above developments, social enterprises across Europe continue to face a number of barriers. Although barriers are context driven and country-specific, they typically relate to:

[6] http://ec.europa.eu/internal_market/social_business/expert-group/social_impact/index_en.htm

- ***Poor understanding of the concept of social enterprise:*** Poor understanding of the concept of a 'social enterprise' was cited as a key barrier by the majority of stakeholders across Europe. Recognition of the term 'social enterprise' by policy makers, public servants, the general public, investors, partners and prospective customers was seen as low. There are also issues around perception. For example, in some countries the public associates the term 'social enterprise' with the activities of charities or work integration of disadvantaged and disabled people, and not entrepreneurship. Certain negative stereotypes also affect the broader perceptions of social enterprises. Misunderstandings and lack of awareness negatively affects social enterprises growth and financing prospects and is also a pivotal factor in preventing development of relations with customers.
- ***Lack of specialist business development services*** *and support such as incubators, mentoring and training schemes, investment readiness support etc.* Most social enterprise support needs are similar to those of mainstream businesses, but at the same time social enterprises have specific features (their dual missions, business models, target groups, sectors of activity etc.) that create complex needs which require diversified and, at times, tailored solutions. In most countries, specialist support for social enterprises is largely absent and, where it exists, it is limited and fragmented.
- ***Lack of supportive legislative frameworks:*** The lack of legal recognition of social enterprise in many countries makes it difficult for authorities to design and target specialist support or fiscal incentives for social enterprises;
- ***Access to markets:*** Inadequate use of social clauses, current public procurement practices (large contract sizes, disproportionate pre-qualification requirements, etc.), payment delays all reportedly make it difficult for social enterprises to effectively compete in public procurement markets;
- ***Access to finance:*** Conventional investors and lenders do not typically understand the dual purpose and hybrid business models of social enterprises. However, specialist investors, financial intermediaries and instruments are currently non-existent or under-developed in most European countries. Consequently, social enterprises find it difficult to access finance from external sources;
- ***Absence of common mechanisms for measuring and demonstrating impact*****:** Currently measuring or reporting of social impact by social enterprise in most countries is very limited (except where mandatory). Consequently, information is lacking on the societal impact of these organisations and awareness of 'the difference that social enterprise makes'. Impacts need to be demonstrated for the benefit of funders and investors and to comply with public procurement rules. Development of common social impact measurement systems could result in more transparency, accountability, better recognition of the impact of social enterprises and hence more interest, from private investors and wider public.

The general economic environment is currently viewed mainly as a constraint on the continued development of social enterprise (via cuts in public spending which remains the dominant source of income of social enterprises) with potential opportunities yet to be fully exploited (new areas of activity and diversification of markets and income sources).

The survival and growth of social enterprise is also constrained by internal factors such as lack of viable business models (particularly, in the case of social enterprises with a traditional non-profit provenance), high reliance on the public sector as a source of income, lack of commercial acumen/ entrepreneurial spirit and managerial and professional skills/ competencies necessary for scaling-up activity.

Concluding remarks

Today, social enterprise in Europe is a dynamic, diverse and entrepreneurial movement encapsulating the drive for new business models that combine economic activity with social mission, and the promotion of inclusive growth. This Mapping Study, and its 29 Country Reports, has mapped this

dynamism, identifying the 'national families of social enterprise', their defining features and the policy and business environments within which such social enterprise development is taking place.

The Mapping Study finds that whilst there is both a growing interest and convergence in views across Europe on the defining characteristics of a social enterprise, understanding and approaches to social enterprise when articulated in national legal, institutional and policy systems differs substantially across (and sometimes even within) countries. These differences, together with the lack of systematic national level evidence on the type and scale of activity and of related policy frameworks, makes it extremely difficult to identify common patterns of development across Europe.

There is general consensus from stakeholders and available evidence that the concept of social enterprise will gain in strength in Europe and that current activity will expand, including the continued likelihood of the emergence of ever more new forms of social enterprise. To both learn from and track such developments, monitoring systems tailored to the particularities of national approaches and understanding of social enterprise are required across Europe as the basis of future national and European research and policy development – including identification of the range of features and relationships that could comprise an effective and efficient ecosystem for social enterprise development.

El Poder Ejecutivo Nacional

BUENOS AIRES, - 9 NOV 2016

AL HONORABLE CONGRESO DE LA NACIÓN:

Tengo el agrado de dirigirme a Vuestra Honorabilidad a fin de someter a su consideración un proyecto de ley que tiene como objeto la creación de una nueva forma de organización empresaria: las Sociedades de Interés y Beneficio Colectivo (IBC).

El Gobierno Nacional tiene como principal desafío alcanzar la "Pobreza Cero", para lo cual debe dirigir sus esfuerzos a lograr el crecimiento económico y la creación de empleo, considerando los principales desafíos sociales y ambientales para promover una sociedad integrada y sostenible en el tiempo.

A nivel global, los actuales problemas de sustentabilidad demandan una evolución en la forma de realizar negocios por parte de las empresas privadas. Es conveniente, en ese sentido, establecer las condiciones que permitan a dichas empresas focalizarse en la creación de valor económico a largo plazo, generando al mismo tiempo valor social, es decir, impacto positivo a nivel tanto social como ambiental.

En este sentido, cabe destacar que el Pacto Mundial promovido por la Organización de las Naciones Unidas en el año 1999, prevé propuestas para que las empresas apliquen en su actividad un conjunto de valores fundamentales en materia de derechos humanos, normas laborales, medio ambiente y lucha contra la corrupción, con el fin de que todos los pueblos compartan los beneficios de la globalización, inyectando en el mercado los valores y prácticas fundamentales para resolver las necesidades socioeconómicas.

Existe también una marcada tendencia por

El Poder Ejecutivo Nacional

parte de los emprendedores a volcarse o elegir para sus primeras incursiones en el mundo de los negocios, la ejecución de emprendimientos que no solo tengan como objetivo el lucro, sino también el logro de impacto que trascienda a distintas generaciones.

Ante el desafío de lograr un crecimiento sostenible y equitativo y la necesidad de encontrar soluciones de escala a los problemas que enfrentamos, es muy relevante el rol de las empresas de impacto social, innovadoras y sustentables, ya que generan oportunidades reales de desarrollo económico, particularmente, en distintos sectores excluidos y con problemáticas sin resolver desde hace décadas mediante el sistema económico tradicional.

Dichas empresas deben tener la capacidad de abordar las problemáticas a resolver desde una mirada integral, sin dejar de dirigir sus acciones al logro económico, pero tomando en cuenta el desafío de la sostenibilidad, lo que implica un doble reto; allí se encuentra la gran innovación y las externalidades positivas para la sociedad.

Estas organizaciones, que existen en la actualidad pero que tienen ciertas limitaciones derivadas de la normativa aplicable, buscan resolver problemas sociales y ambientales latentes con una lógica de autofinanciamiento o sostenibilidad. Si bien tienen propósitos sociales y sus decisiones apuntan a perseguir ese impacto positivo en la comunidad, no por ello dejan de lado la búsqueda del beneficio económico para sus socios.

M. P.
167

Es objetivo de esta norma que se pone a consideración del HONORABLE CONGRESO DE LA NACIÓN, promover el desarrollo de un ecosistema de empresas sustentables que tengan entre sus fines el cuidado y preservación del ambiente así como el diseño de soluciones de mercado para problemas sociales que las políticas públicas y el mercado tradicional no han podido resolver, siendo especialmente

relevante el rol de los emprendedores en el proceso de creación de soluciones innovadoras para problemáticas sociales y ambientales.

Actualmente, en la REPÚBLICA ARGENTINA, estas organizaciones ven restringido su desarrollo por distintas limitaciones, entre las cuales se advierte como central la cuestión referida a que las formas legales existentes no permiten reflejar adecuadamente el espíritu de su objeto y accionar.

Es por ello que se propone la creación de esta nueva forma jurídica, las Sociedades de Interés y Beneficio Colectivo (IBC), con el propósito fundamental de proteger a los administradores de las sociedades comerciales que tienen en miras el interés social – entendido éste como la generación de un impacto positivo social y ambiental para la comunidad – frente a acciones o reclamos que pudieran sufrir por decisiones que, si bien pueden generar un beneficio a la comunidad, no persiguen necesariamente la maximización de ganancias de sus accionistas como fin único y último.

En este sentido, el objetivo de esta norma que se promueve es proteger la toma de decisiones que tienen en cuenta otros factores, además del económico, de modo que los administradores de esas sociedades puedan llevar a cabo acciones dirigidas a lograr beneficios para el colectivo, sin que por ello puedan endilgárseles responsabilidades.

Es con ese objetivo que el proyecto propuesto contempla los siguientes aspectos fundamentales:

(a) la ampliación del propósito de la empresa, que bajo la tipología de IBC puede no solo buscar su beneficio económico y el de sus socios, sino también que sus negocios y actividades generen un impacto positivo en la comunidad y el medio ambiente; es decir un triple impacto: económico, social y ambiental;

(b) la obligación de plasmar en su instrumento

FOL 4

El Poder Ejecutivo Nacional

constitutivo en forma precisa y determinada cuál es el impacto social, ambiental, positivo y verificable que se obligan a generar;

(c) dotar al administrador de cierto resguardo, pero a la vez ampliar sus deberes considerando que deberá tomar en cuenta los efectos de sus acciones u omisiones respecto de los socios, los empleados actuales y, en general, la fuerza de trabajo de la empresa, las comunidades con las que se vincule, el ambiente local y global, las expectativas a largo plazo de los socios y de la sociedad;

(d) otorgar derecho de receso a los socios que no estén de acuerdo con el cambio de una sociedad comercial ya existente al sistema IBC;

(e) actuar en un marco de control y transparencia, ya que los administradores deberán confeccionar un Reporte Anual mediante el cual acrediten las acciones llevadas a cabo tendientes al cumplimiento del impacto positivo social y ambiental, el cual será de acceso público y auditado por un profesional independiente matriculado especializado en esos ámbitos.

En atención a lo expuesto, se eleva a Vuestra consideración el presente proyecto de ley, solicitando su pronta sanción.

Dios guarde a Vuestra Honorabilidad.

M. P.
167

MENSAJE N° 139

Ing. FRANCISCO ADOLFO CABRERA
MINISTRO DE PRODUCCIÓN

Lic. MARCOS PEÑA
JEFE DE GABINETE DE MINISTROS

2997

El Poder Ejecutivo Nacional

EL SENADO Y CÁMARA DE DIPUTADOS

DE LA NACIÓN ARGENTINA, REUNIDOS EN CONGRESO,

SANCIONAN CON FUERZA DE

LEY:

ARTÍCULO 1°.- Caracterización - Régimen aplicable. Serán Sociedades de Interés y Beneficio y Colectivo (IBC) las sociedades constituidas conforme a alguno de los tipos previstos en la Ley General de Sociedades Nº 19.550, T.O. 1984 y sus modificatorias, y los que en el futuro se incorporen a dicha normativa y/o se creen en forma independiente a la misma, cuyos socios además de obligarse a realizar aportes para aplicarlos a la producción o intercambio de bienes o servicios, participando de los beneficios y soportando las pérdidas, se obliguen a generar un impacto positivo social y ambiental en la comunidad, en las formas y condiciones que establezca la reglamentación.

Las Sociedades IBC se regirán por las disposiciones de la presente ley, de la Ley General de Sociedades Nº 19.550, T.O. 1984 y sus modificatorias, de la reglamentación de la presente y, en particular, por las normas que le sean aplicables según el tipo social que adopten y la actividad que realicen.

ARTÍCULO 2°.- Denominación. A la denominación que corresponda según el tipo social adoptado se agregará la expresión "de Interés y Beneficio Colectivo", su abreviatura o la sigla I.B.C.

M. P.
167

ARTÍCULO 3°.- Requisitos. Podrán ser Sociedades IBC las sociedades que decidan constituirse como tales, así como también aquellas ya existentes que opten por adoptar el régimen de la presente ley.

A los fines de la adhesión al régimen IBC, las sociedades existentes deberán incorporar a su estatuto o contrato social las previsiones que se detallan en la presente ley e inscribir las modificaciones en el Registro Público respectivo.

El Poder Ejecutivo Nacional

Sin perjuicio del cumplimiento de los requisitos generales exigidos por las normas de aplicación según el tipo social adoptado, tanto las sociedades ya existentes como las que se creen a posteriori de la presente ley, que soliciten adherirse al régimen IBC, deberán incluir en su contrato social:

a) el impacto social, ambiental, positivo y verificable que se obligan a generar, especificado en fórma precisa y determinada; y

b) la exigencia del voto favorable del SETENTA Y CINCO POR CIENTO (75%) de los socios con derecho a voto para toda modificación del objeto y fines sociales, no correspondiendo la pluralidad de voto.

ARTÍCULO 4°.- Administración. En el desempeño de sus funciones, la ejecución de los actos de su competencia y en la toma de decisiones, los administradores deberán tomar en cuenta los efectos de sus acciones u omisiones respecto de: (i) los socios, (ii) los empleados actuales y, en general, la fuerza de trabajo de la sociedad, (iii) las comunidades con las que se vinculen, el ambiente local y global, y (iv) las expectativas a largo plazo de los socios y de la sociedad, de tal forma que se materialicen los fines de la misma. La responsabilidad de los administradores por el cumplimiento de la obligación antedicha solo podrá ser exigible por los socios y la sociedad.

M. P.
167

ARTÍCULO 5°.- Derecho de receso. La adopción, por parte de sociedades ya constituidas y registradas, del régimen previsto en la presente ley, dará derecho de receso a los socios que hayan votado en contra de dicha decisión y a aquellos ausentes que acrediten la calidad de accionistas al tiempo de la asamblea, en los términos del artículo 245 de la Ley General de Sociedades Nº 19.550, T.O. 1984 y sus modificatorias.

ARTÍCULO 6°.- Control y transparencia. Los administradores, además de las obligaciones establecidas en el artículo 62 y siguientes de la Ley General de Sociedades Nº 19.550, T.O. 1984 y sus modificatorias, deberán confeccionar un Reporte Anual mediante el cual

El Poder Ejecutivo Nacional

acrediten las acciones llevadas a cabo tendientes al cumplimiento del impacto positivo social y ambiental, previsto en su estatuto.

El Reporte Anual confeccionado por los administradores deberá ser auditado por un profesional independiente matriculado especializado en los ámbitos en los que se pretende lograr impacto positivo social y ambiental.

Los requisitos de información que deberá contener el Reporte Anual, así como las pautas para la realización de la auditoría y los mecanismos de publicidad serán establecidos mediante reglamentación.

El Reporte Anual deberá ser de acceso público. El mismo deberá ser presentado dentro de un plazo máximo de SEIS (6) meses desde el cierre de cada ejercicio anual, ante el Registro Público del domicilio social.

El Registro Público deberá publicar en su página web los Reportes Anuales presentados por las sociedades IBC.

ARTÍCULO 7°.- Sanciones. El incumplimiento de las obligaciones asumidas por aplicación de la presente Ley, hará perder la condición de sociedad IBC en los términos y condiciones que establezca la reglamentación.

El Registro Público informará, mediante publicación en su página web, sobre aquellas sociedades que hubieran perdido, por la razón que fuere, su condición de IBC.

M. P.
167

ARTÍCULO 8°.- Autoridad de Aplicación. El MINISTERIO DE PRODUCCIÓN será la Autoridad de Aplicación de la presente ley.

ARTÍCULO 9°.- El PODER EJECUTIVO NACIONAL reglamentará la presente ley dentro de los SESENTA (60) días de su publicación en el Boletín Oficial.

ARTÍCULO 10.- Comuníquese al PODER EJECUTIVO NACIONAL.

Ing. FRANCISCO ADOLFO CABRERA
MINISTRO DE PRODUCCIÓN

Lic. MARCOS PEÑA
JEFE DE GABINETE DE MINISTROS

REPÚBLICA ORIENTAL DEL URUGUAY

CÁMARA DE REPRESENTANTES

Secretaría

COMISIÓN DE CONSTITUCIÓN, CÓDIGOS, LEGISLACIÓN GENERAL Y ADMINISTRACIÓN

REPARTIDO Nº 803
OCTUBRE DE 2017

CARPETA Nº 2469 DE 2017

SOCIEDAD DE BENEFICIO E INTERÉS COLECTIVO (BIC)

Creación

— —

XLVIIIa. Legislatura

PROYECTO DE LEY

— —

Artículo 1º. (Régimen aplicable).- Serán Sociedades de Beneficio Interés Colectivo (BIC) las sociedades constituidas conforme alguno de los tipos previstos en la Ley de Sociedades Comerciales Nº 16.060, de 4 de setiembre de 1989 y sus modificativas, y los que en el futuro se incorporen a dichas normativas y/o se creen en forma independiente a la misma, cuyos socios además de obligarse a realizar aportes para aplicarlos a la producción o intercambio de bienes y servicios, con el fin de participar en las ganancias, soportar las pérdidas, se obliguen a generar un impacto positivo social y ambiental en la comunidad, en las formas y condiciones que establezca la presente ley y la reglamentación.

Esta normativa será aplicable a los fideicomisos constituidos bajo la Ley Nº 17.703, de 27 de octubre de 2003, cuyo encargo fiduciario incluya generar un impacto positivo social y ambiental en la comunidad, en las formas y condiciones que establezca la presente ley y la reglamentación. En este caso, serán denominados Fideicomisos de Beneficio e Interés Colectivo (BIC).

Artículo 2º. (Denominación).- A la denominación que corresponda según el tipo social adoptado, o al fideicomiso en su caso, se agregará la expresión "de Beneficio e Interés Colectivo", su abreviatura o la sigla "BIC".

Artículo 3º. (Requisitos).- Podrán ser sociedades o fideicomisos BIC aquellos que decidan constituirse como tales, así como también los ya existentes que opten por adoptar el régimen de la presente ley.

Para adoptar el régimen BIC, las sociedades o fideicomisos deberán incluir en su estatuto o contrato de constitución, la obligación de generar un impacto social y ambiental, positivo y verificable, además de los requisitos exigidos por las normas de aplicación particular.

Las sociedades deberán incluir en su contrato social la exigencia del voto favorable del 75% (setenta y cinco por ciento) de los socios con derecho a voto para toda modificación del objeto y fines sociales, no correspondiendo la pluralidad de votos.

Artículo 4º. (Administración).- En el desempeño de sus funciones, la ejecución de los actos de su competencia y en la toma de decisiones, los administradores y fiduciarios deberán tomar en cuenta los efectos de sus acciones u omisiones respecto de: (i) los socios o beneficiarios, (ii) los empleados actuales y, en general, la fuerza de trabajo contratada, (iii) las comunidades con las que se vinculen, el ambiente local y global y (iv) las expectativas a largo plazo de los socios y de la sociedad, y de los beneficiarios y del fideicomiso, en su caso, de tal forma que se materialicen los fines de la sociedad o del fideicomiso. La responsabilidad de los administradores y fiduciario por el cumplimiento de la obligación antedicha sólo podrá ser exigible por los socios y beneficiarios.

Artículo 5º. (Control y transparencia).- Los administradores y fiduciarios, sin perjuicio de las obligaciones de rendición de cuentas e información impuestas por otras normas, deberán confeccionar un reporte anual mediante el cual acrediten las acciones llevadas a cabo tendientes al cumplimiento del impacto positivo social y ambiental previsto en su contrato constitutivo o estatuto.

Los requisitos de información que deberá contener el reporte anual y los mecanismos de publicidad serán establecidos mediante reglamentación.

El reporte anual deberá ser de acceso público. El mismo deberá ser presentado dentro del un plazo máximo de 6 (seis) meses desde el cierre de cada ejercicio anual, el organismo o autoridad que la reglamentación determine.

Artículo 6º. (Derecho de receso).- La adopción, por parte de sociedades ya constituidas, del régimen previsto en la presente ley, dará derecho de receso a los socios que hayan votado en contra de dicha decisión y a aquellos ausentes que acrediten la calidad de accionistas al tiempo de la asamblea, en los términos previsto por la Ley de Sociedades Comerciales Nº 16.060, de 4 de setiembre de 1989 y sus modificatorias.

Artículo 7º. (Sanciones).- El incumplimiento de las obligaciones asumidas por aplicación de la presente ley, hará perder la condición de BIC en los términos y condiciones que establezca la reglamentación.

Artículo 8º.- El Poder Ejecutivo reglamentará la presente ley dentro de los 60 (sesenta) días de su publicación en el Diario Oficial.

Montevideo, 15 de setiembre de 2017

RODRIGO GOÑI REYES
REPRESENTANTE POR MONTEVIDEO
DANIEL PEÑA FERNÁNDEZ
REPRESENTANTE POR CANELONES
WALTER DE LEÓN
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EXPOSICIÓN DE MOTIVOS

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La Comisión Especial de Innovación, Ciencia y Tecnología, en sesión del día 14 de agosto de 2017, recibió una delegación de representantes del Sistema B Uruguay, integrada por la señora Gisell Della Mea y el señor David Gold, y las doctoras Ivana Calcagno, Soledad Capurro, Patricia Di Bello, Magdalena Pereira y Natalia Hughes.

En la oportunidad, la delegación presentó ante la Comisión el proyecto de ley de regulación de las Empresas de Beneficio e Interés Colectivo, y su exposición de motivos, ambos confeccionados por un equipo multidisciplinario del Sistema B Uruguay, tomando como modelo el que se encuentra a estudio del Congreso argentino, que actualmente cuenta con media sanción.

Previo a la comparecencia de la delegación referida a la Comisión de Innovación, Ciencia y Tecnología, el Diputado Rodrigo Goñi en calidad de Presidente, realizó algunas consideraciones sobre la iniciativa, y a modo de presentación del tema objeto de análisis, expresó: "Desde hace más de un año venimos participando del denominado Sistema B, un movimiento local e internacional que promueve el desarrollo de nuevas economías y también de nuevas empresas para contribuir a formar sociedades más humanas, sustentables, a través de las empresas B, llamadas de triple impacto…", que crean valor económico, social y medioambiental.

Asimismo, destacó que "El ecosistema B promueve modelos de negocios innovadores que benefician a la sociedad en general y dan sostenibilidad a empresas que utilizan la fuerza del mercado para resolver problemas sociales y ambientales".

En la legislación comparada se trató el tema como un modelo de innovación social, un nuevo modelo de negocio, razón que justificó, en palabras del Presidente, su promoción ante la Comisión de Innovación, Ciencia y Tecnología, sin perjuicio de la resolución final de la Presidencia de la Cámara.

Finalmente, se dio cuenta sobre "…la intención de que todos los sectores representados en esta Comisión y en el Parlamento nacional puedan dar inicio en conjunto a este trámite parlamentario, ya que es la forma de practicar una de las actitudes de este tipo de economías, como la colaborativa, una de las características de las nuevas economías en general".

Todos los integrantes de la Comisión manifestaron opiniones favorables a la iniciativa, dándole la bienvenida, destacando su valor de cambio y la preocupación por lo social.

La acumulación del saber científico y las aplicaciones tecnológicas que de él derivan, han transformado la vida humana en los últimos tiempos, aportando grandes beneficios a la sociedad. Pero, al mismo tiempo, la viabilidad del planeta y, por lo tanto, la vida de las personas, encuentran encendidas señales de alarma.

La tierra que nos da vida, refugio y alimento, el ambiente que nos rodea, el suelo que pisamos y el cielo que nos cubre, adquieren hoy ribetes amenazantes.

Esta iniciativa se inscribe en el proceso de Desarrollo Sostenible entendido originalmente como aquel tipo de desarrollo que satisface las necesidades de las generaciones presentes sin comprometer las posibilidades de las generaciones del futuro

para atender sus propias necesidades[1]. Tal concepto surge a poco de constatar que el desarrollo realmente se convirtió en insostenible desde la perspectiva ambiental.

Ahora bien. El Desarrollo Sostenible se origina a partir de las preocupaciones relativas al medio ambiente, pero en la actualidad no se circunscribe al Derecho Ambiental, no se agota en él.

La formulación del principio evidencia la posibilidad de ampliación del concepto, que proyectado a nuestros días, comprende también el desarrollo económico y el desarrollo social, además de la protección del medio ambiente[2]. El derecho a la sustentabilidad incorpora -además de la cuestión ambiental- la cuestión social y económica, que deben ser analizadas todas en conjunto.

La iniciativa de regulación de las Empresas de Beneficio e Interés Colectivo tiene como objetivo primordial crear las condiciones que permitan a dichas empresas focalizarse en la creación de valor económico a largo plazo, generando al mismo tiempo impacto positivo en la sociedad y el medio ambiente.

Conforme lo expuesto, todos los integrantes de la Comisión de Innovación, Ciencia y Tecnología, así como Diputados de todos los Partidos Políticos con representación parlamentaria han sido invitados a suscribir el presente proyecto en forma conjunta, con el propósito de dar estado parlamentario al proyecto, y avanzar en el camino del triple concepto de la sostenibilidad: ambiental, económica y social.

A continuación se transcribe literalmente la exposición de motivos y el proyecto redactado y presentado por la delegación del Sistema B Uruguay, a los efectos de iniciar el trámite parlamentario para su discusión:

EXPOSICIÓN DE MOTIVOS

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1. El presente proyecto de ley, se enmarca dentro las acciones tendientes a la solución de problemas de sustentabilidad, creación de empleo y crecimiento económico, dando intervención al sector privado, particularmente a las empresas, así como reconociendo y acompañando el rol de dichas empresas y de los emprendedores en el cumplimiento de los objetivos de interés público.

2. Las empresas con propósito o de beneficio, son empresas con fines de lucro, que asumen a su vez el compromiso de ser agentes de cambio y contribuir a la solución de las problemáticas sociales y ambientales globales.

3. Estas empresas, y sobre todo sus administradores, encuentran limitaciones e inconvenientes legales que dificultan su correcto desarrollo, ya que las estructuras legales previstas para la organización empresarial, no reflejan la realidad, propósito y formas de actuación de las empresas con propósito. Particularmente, estas empresas toman sus decisiones no sólo buscando la maximización de sus ganancias, sino teniendo en cuenta otros factores, en procura de generar un impacto positivo en la sociedad y el medioambiente.

4. Es así que se ha generado un movimiento legislativo a nivel mundial, con el objetivo primario de crear las condiciones que permitan a dichas empresas focalizarse en

[1] Informe Brundtland. www.ayto-toledo.org/medioambiente/a21/BRUNDTLAND.pdf
[2] Cumbre Social de Copenhague de 1985. http://www.un.org/spanish/esa/sustdev/agenda21/agreed.htm.

la creación de valor económico a largo plazo, generando al mismo tiempo impacto positivo en la sociedad y el medio ambiente. Varios Estados de Estados Unidos han promulgado leyes que reconocen a las empresas de triple impacto, asimismo, Italia ya tiene su ley y en América Latina el movimiento legislativo está en plena expansión, ya que los parlamentos de Argentina, Chile y Colombia se encuentran actualmente debatiendo sendos proyectos de ley.

5. El presente proyecto tiene su base en el proyecto de ley argentino, incluyendo como novedad la posibilidad de incorporar al régimen a aquellas empresas que se organicen bajo la forma de fideicomisos, siendo ésta una estructura jurídica idónea, versátil y segura para el desarrollo de actividades de triple impacto.

6. En general se entendió prudente establecer una política de ensamble con las Leyes Nos. 16.060 y 17.703, sin alterar el régimen general de sociedades comerciales y fideicomisos, evitando crear tipos especiales, sino como una categorización que oficie como un ropaje a los tipos sociales y fideicomisos ya definidos por sus respectivas normas.

7. Las principales disposiciones del presente proyecto de ley son las siguientes:

- Se propone una definición de empresas de beneficio e interés colectivo, que consiste en la ampliación del objeto, para incorporar la obligación de generar un impacto positivo social y ambiental en la comunidad. Hablamos de ampliación, puesto que es fundamental que se mantenga el interés económico de lucro. De esta forma se habla de empresas de triple impacto: económico, social y medioambiental.

- A su vez se exige que la obligación de procurar el triple impacto esté plasmado en el propio contrato constitutivo o estatuto y que se prevea un sistema rígido o de mayorías especiales para poder modificarlo. De esta manera se crea un resguardo y se dota de cierta estabilidad a estas empresas.

- Se amplían los deberes de los administradores y fiduciarios, quienes en el desempeño de sus funciones y en la toma de decisiones deberán tomar en cuenta los efectos sobre: (i) los socios o beneficiarios, (ii) los empleados actuales y, en general, la fuerza de trabajo contratada, (iii) las comunidades con las que se vinculen, el ambiente local y global y (iv) las expectativas a largo plazo de los socios y de la sociedad, y de los beneficiarios y del fideicomiso, en su caso, de tal forma que se materialicen los fines de la sociedad o del fideicomiso.

- A la vez se les otorga seguridad en cuanto a que el cumplimiento de dichas acciones sólo podrá ser exigible por los socios y beneficiarios (no por terceros).

- Se agrega un marco de reporte y trasparencia para las empresas BIC, quienes deberán confeccionar un reporte anual mediante el cual acrediten las acciones llevadas a cabo tendientes al cumplimiento del impacto positivo social y ambiental previsto en su contrato constitutivo o estatuto. El reporte deberá ser de acceso público".

Montevideo, 15 de setiembre de 2017

RODRIGO GOÑI REYES
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This translation of Korea's labor laws is intended mainly as a convenience to the non-Korean-reading public. If any questions arise related to the accuracy of the information contained in the translation, please refer to the official Korean version of the laws. Any discrepancies or differences created in the translation are not binding and have no legal effect for compliance or enforcement purposes.

** This Act reflects only the amendments made until May 31, 2011*

SOCIAL ENTERPRISE PROMOTION ACT

Act No. 8217, Jan. 3, 2007

Amended by Act No. 8361, Apr. 11, 2007
Act No. 9685, May 21, 2009
Act No. 10220, Mar. 31, 2010
Act No. 10339, Jun. 4, 2010
Act No. 10360, Jun. 8, 2010

Article 1 (Purpose)

The purpose of this Act is to contribute to social integration and the improvement of citizens' quality of life by expanding social services, which are not sufficiently supplied in our society, and creating new jobs through support for the establishment and operation of social enterprises and the promotion of social enterprises.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 2 (Definitions)

The meanings of the terms used in this Act shall be as follows:

1. The term "social enterprise" refers to an enterprise certified in accordance with Article 7 as one that pursues a social objective, such as raising local residents' quality of life, etc., by providing vulnerable groups with social services or jobs while conducting business activities, such as the production and sale of goods and services, etc;
2. The term "vulnerable group" refers to a class of people who have difficulties in purchasing the social services they need at the market price, or are particularly hard to be employed under ordinary labor market conditions, and for whom detailed criteria shall be prescribed by the Presidential Decree;
3. The term "social service" refers to service in the areas of education, health, social welfare, the environment and culture and other equivalent services in the areas prescribed by the Presidential Decree;
4. The term "associated enterprise" refers to an enterprise that provides various kinds of assistance, such as financial support and business advice, etc., to a specific social enterprise, and is independent of the social enterprise in respect to personnel, physical and legal matters; and

5. The term "associated local government" refers to a local government that provides administrative and financial support to a specific social enterprise in order to expand social services and create jobs for local residents.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 3 (Roles and Responsibilities by Each Operating Entity)

(1) In order to expand social services and create jobs, the State shall establish support measures for social enterprises and implement necessary policies comprehensively.

(2) A local government shall establish and implement support policies for social enterprises, which are suitable for the characteristics of the region.

(3) A social enterprise shall make efforts to reinvest the profits generated through its business activities into the maintenance and expansion of the social enterprise.

(4) No associated enterprise shall gain the profits generated by a social enterprise.

Article 4 Deleted. *<Act No. 10360, Jun. 8, 2010>*

Article 5 (Establishment of Basic Plan for Promotion of Social Enterprises)

(1) The Minister of Employment and Labor shall establish a basic plan for promotion of social enterprises (hereinafter referred to as "the basic plan") every five years after deliberation by the Employment Policy Council (hereinafter referred to as "the Employment Policy Council") under Article 10 of the Framework Act on Employment Policy, in order to promote social enterprises and support them systematically.

(2) The basic plan shall include the following matters:

1. The direction of support for social enterprises;
2. Matters concerning the creation of conditions condusive to the promotion of social enterprises;
3. Matters concerning support for the operation of social enterprises; and
4. Other matters prescribed by the Presidential Decree for the promotion of and support for social enterprises.

(3) The Minister of Employment and Labor shall establish and implement an annual implementation plan every year according to the basic plan.

(4) Matters necessary for the establishment and implementation of the basic plan and annual implementation plan shall be prescribed by the Presidential Decree.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 5-2 (Establishment of Social Enterprise Support Plan by Each City and Province)

(1) The head of a special metropolitan city, a metropolitan city, a province and a special self-governing province (hereinafter referred to as "the head of a city and province") shall establish and implement a social enterprise support plan (hereinafter referred to as "support plan") for his/her city and province under the conditions prescribed by the Presidential Decree, in order to promote social enterprise in the region under his/her jurisdiction and support them systematically.

(2) Having established a support plan under paragraph (1), the head of a city and province shall submit it to the Minister of Employment and Labor under the conditions prescribed by the Presidential Decree.

(3) The Minister of Employment and Labor may provide additional support to cities and provinces which have established an excellent support plan. *<Newly Inserted by Act No. 10360, Jun. 8, 2010>*

Article 6 (Factual Survey)

The Minister of Employment and Labor shall conduct a factual survey on the activities of social enterprises every five years and notify the Employment Policy Council of the results thereof. *<Wholly Amended by Act No. 10360, Jun. 8, 2010>*

Article 7 (Certification of Social Enterprises)

(1) A person who intends to operate a social enterprise shall satisfy the certification requirements under Article 8 and obtain certification from the Minister of Employment and Labor.

(2) If the Minister of Employment and Labor intends to grant certification under paragraph (1), he/she shall submit the case to the Employment Policy Council for deliberation.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 8 (Certification Requirements and Procedures of Social Enterprises)

(1) A person who intends to be certified as a social enterprise shall satisfy the following requirements:

1. It should take the form of an organization prescribed by the Presidential Decree, such as a corporation or an association under the Civil Law, a company under the Commercial Act or a non-profit private organization, etc.;
2. It should employ paid workers and conduct business activities, such as the production and sale of goods and

services, etc;

3. Its main purpose should be to realize a social objective, such as raising local residents' quality of life, etc., by providing vulnerable groups with social services or jobs or contributing to local communities. In this case, detailed criteria for judgment shall be prescribed by the Presidential Decree;
4. It should have a decision-making structure in which interested persons, such as service beneficiaries and workers, etc., can participate;
5. Revenue from its business activities should meet or exceed the standards prescribed by the Presidential Decree;
6. It should have articles of incorporation, rules, etc. in accordance with Article 9;
7. Where it has distributable profits for each fiscal year, it should spend at least 2/3 of the profits for social objectives (applicable only to a company under the Commercial Law); and
8. It should satisfy the other matters prescribed by the Presidential Decree regarding operational guidelines.

(2) If the Minister of Employment and Labor has granted certification to a social enterprise, he/she shall publish this in an official gazette.

(3) Necessary matters concerning the methods of and procedures for certification of social enterprises shall be prescribed by the Ordinance of the Ministry of Employment and Labor and the criteria for certification of social enterprises shall be announced by the Minister of Employment and Labor.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 9 (Articles of Incorporation, etc.)

(1) A person who intends to be certified as a social enterprise shall have articles of incorporation, rules, etc. (hereinafter referred to as "articles of incorporation, etc.") containing the following matters:

1. Purpose;
2. Contents of business;
3. Name of business;
4. Location of the main office;
5. Type of organization and governance, method of operation and method of decision-making on important matters;
6. Matters concerning profit sharing and re-investment;
7. Matters concerning capital contributions and loans;
8. Matters concerning the composition, appointment and dismissal of employees;

9. Matters concerning dissolution and liquidation (where it is a company under the Commercial Law and has remaining distributable property, including provisions requiring it to donate at least 2/3 of the remaining property to another social enterprise or a public-interest fund etc.); and
10. Other matters prescribed by the Presidential Decree

(2) Any change to the articles of incorporation referred to in paragraph (1) shall be reported to the Minister of Employment and Labor within 14 days of the date of that change.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 10 (Business Support, etc.)

(1) The Minister of Employment and Labor may provide support, such as provision of professional advice and information, etc., in the areas of business management, technology, taxation, labor affairs, accounting, etc. as may be needed for the establishment and operation of a social enterprise.

(2) The Minister of Employment and Labor may entrust the support business referred to in paragraph (1) to a government-funded institution or a private organization prescribed by the Presidential Decree. *<Wholly Amended by Act No. 10360, Jun. 8, 2010>*

Article 10-2 (Support, etc., for Education and Training)

The Minister of Employment and Labor may conduct education and training to cultivate the professional workforces needed for the establishment and operation of social enterprises and improve the skills of social enterprise workers.

<Newly Inserted by Act No. 10360, Jun. 8, 2010>

Article 11 (Support for Facility Expenses, etc.)

The State or a local government may provide subsidies or loans for land purchase expenses, facility expenses, etc., or lease national and public land as may be necessary for the establishment and operation of social enterprises.

Article 12 (Preferential Purchase by Public Institutions)

(1) The head of a public institution under Article 2 (8) of the Small and Medium Enterprises Promotion Act (hereinafter referred to as "the head of a public institution") shall promote the preferential purchase of the goods and services produced by social enterprises. *<Amended by Act No. 9685, May 21, 2009>*

(2) When the head of a public institution draws up a purchase plan according to Article 5 (1) of the Act on the Encouragement of Purchase of Small and Medium Enterprise

Products and Support for Their Sales, he/she shall include in it a separate plan on the purchase of the goods and services produced by social enterprises.

<Amended by Act No. 9685, May 21, 2009>

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 13 (Reduction or Exemption of Taxes and Support for Social Insurance Premium)

(1) The State and a local government may grant reduction of or exemption from national or local taxes under the conditions prescribed by the Corporate Tax Act, the Restriction of Special Taxation Act, and the Restriction of Tax Reduction and Exemption Act. *<Amended by Act No. 10220, Mar. 31, 2010>*

(2) The State may support part of the employment insurance premiums and industrial accident compensation insurance premiums under the Act on the Collection, etc. of Employment Insurance and Industrial Accident Compensation Insurance Premium, the insurance premiums under the National Health Insurance Act, and the pension contributions under the National Pension Act.

Article 14 (Financial Assistance for Social Enterprises Providing Social Services)

(1) The Minister of Employment and Labor may provide social enterprises providing social services with financial support, such as for labor costs, operating expenses, consultation expenses, etc. within the limit of the budget through open invitation and screening.

(2) When the Minister of Employment and Labor provides support to social enterprises receiving support from an associated enterprise or local government, pursuant to paragraph (1), he/she may provide additional support for business expenses, taking into account the current status of the financial support provided by the associated enterprise or local government.

(3) Necessary matters concerning requirements for the selection of enterprises eligible for financial support, screening procedures, etc., shall be prescribed by the Ordinance of the Ministry of Employment and Labor.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 15 (Limitations on Responsibility of Associated Enterprises)

No associated enterprise shall be responsible for the employment of workers of a relevant social enterprise.

Article 16 (Reduction or Exemption of Taxes for Associated Enterprises)

The State or a local government may grant reduction of or exemption from national or local taxes to associated enterprises under the conditions prescribed by the Corporate Tax Act, the Restriction of Special Taxation Act, the Restriction of Tax Reduction and Exemption Act and the Local Tax Act.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 16-2 (Day of Social Enterprise)

(1) The State shall set July 1st of every year as the day of social enterprise, and an one-week period from the day of social enterprise as the week of social enterprise in order to promote understanding of social enterprises and encourage the activities of social entrepreneurs.

(2) The State and local governments shall make efforts to conduct activities, such as an event, etc. fit for the intent of the day of social enterprise.

<Newly Inserted by Act No. 10360, Jun. 8, 2010>

Article 17 (Report, etc.)

(1) A social enterprise shall prepare a business report containing the matters prescribed by the Ordinance of the Ministry of Employment and Labor, such as business results and the participation of interested persons in decision making, etc., and submit it to the Minister of Employment and Labor by the end of April of every fiscal year. In this case, the Minister of Employment and Labor may make the business report public in accordance with the method prescribed by the Ordinance of the Ministry of Employment and Labor.

(2) The Minister of Employment and Labor shall provide guidance and inspection for social enterprises, and if it is deemed necessary, may order a social enterprise and its members to make a report or submit relevant documents as may be necessary for such guidance and inspection.

(3) The Minister of Employment and Labor may evaluate the operation of a social enterprise on the basis of the business report submitted under paragraph (1).

(4) If it is found necessary as a result of a review of the matters reported and the guidance, inspection and evaluation conducted under paragraphs (1) through (3), the Minister of Employment and Labor may order a correction.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 18 (Cancellation of Certification)

(1) If a social enterprise falls under any of the following subparagraphs, the Minister of Employment and Labor may cancel the certification:

1. Where it obtains the certification in a false or other fraudulent ways; and
2. Where it fails to satisfy the certification requirements under Article 8.

(2) If the Minister of Employment and Labor is to cancel a certification under paragraph (1), he/she shall hold a hearing.

(3) Specific criteria and detailed procedures for cancellation of certification shall be prescribed by the Ordinance of the Ministry of Employment and Labor.

<Wholly Amended by Act No. 10360, Jun. 8, 2010>

Article 19 (Prohibition of Use of Similar Names)

No person other than social enterprises shall use the name of social enterprise or any other similar names.

Article 20 (Establishment, etc., of Korea Social Enterprise Promotion Agency)

(1) The Minister of Employment and Labor shall set up the Korea Social Enterprise Promotion Agency (hereinafter referred to as "the Promotion Agency") in order to efficiently perform the work of fostering and promoting social enterprises.

(2) The Promotion Agency shall be a corporation.

(3) The Promotion Agency shall come into existence by having its establishment registered in the area in which its main office is located.

(4) The Promotion Agency shall conduct the following activities :

1. Training social entrepreneurs, discovering models of social enterprises and supporting commercialization;
2. Monitoring and evaluating social enterprises;
3. Helping to build and operate networks of social enterprises at industry, region or nationwide level;
4. Setting up and operating the homepages of social enterprises and a relevant integrated information system;
5. Other activities relating to social enterprises, entrusted under this Act or other Acts and subordinate statutes; and
6. Activities incidental to the activities referred to in subparagraphs 1 throught 5

(5) The government may contribute to the expenses required for the establishment and operation of the Promotion Agency within

the limits of its budget.

(6) The provisions on a foundation in the Civil Act shall apply mutatis mutandis with regard to the Promotion Agency, except as provided for in this Act.

(7) The Promotion Agency may request the State, local governments or public institutions, such as educational and research institutes, etc., to provide materials necessary for the performance of its duties.

(8) The officers and employees of the Promotion Agency shall be regarded as public officials in applying penal provisions under Articles 129 through 132 of the Criminal Act.

(9) No person who is or was an officer or an employee of the Promotion Agency shall divulge any confidential information learnt in the course of performing his/her duties or use it for other purposes.

(10) The Minister of Employment and Labor shall provide guidance and inspection for the Promotion Agency, have the Promotion Agency report necessary matters concerning its activities, accounting and property, and have his/her public officials enter the Promotion Agency and examine books, documents and other articles.

(11) The articles of incorporation, board of directors, officers, accounting and cooperation with relevant organization of the Promotion Agency, and other necessary matters concerning the establishment and operation of the Promotion Agency shall be prescribed by the Presidential Decree.

(12) No person other than the Promotion Agency shall use the name of Korea Social Enterprise Promotion Agency or any other similar names.

<Newly Inserted by Act No. 10360, Jun. 8, 2010>

Article 21 (Delegation and Entrustment of Authority)

(1) Part of the authority given to the Minister of Employment and Labor under this Act may be delegated to the head of a local government or the head of a regional employment and labor office under the conditions prescribed by the Presidential Decree.

(2) The Minister of Employment and Labor may entrust the following work to the Promotion Agency :

1. Work of conducting a survey on the activities of social enterprises under Article 6;
2. Work concerning the certification of social enterprises under Article 7 (1);

3. Work of receiving a report on changes to articles of incorporation under Article 9 (2); and
4. Work of conducting education and training under Article 10-2 *<Wholly Amended by Act No. 10360, Jun. 8, 2010>*

Article 22 (Penal Provisions)

A person who divulges any confidential information learnt in the course of performing his/her duties or use it for other purposes in violation of Article 20 (9) shall be punished by imprisonment of up to three years or a fine not exceeding ten million won.

<Newly Inserted by Act No. 10360, Jun. 8, 2010>

Article 23 (Fine for Negligence)

(1) A person who falls under any of the following subparagraphs shall be punished by a fine for negligence not exceeding ten million won:

1. A person who fails to comply with a correction order under Article 17 (4); and
2. A person who uses the name of social enterprise or any other similar names in violation of Article 19.

(2) A person who falls under any of the following subparagraphs shall be punished by a fine for negligence not exceeding five million won:

1. A person who fails to comply with the obligation to report changes to articles of incorporation, etc. under Article 9 (2);
2. A person who is negligent in fulfilling the obligation to prepare and submit a business report under Article 17 (1) or prepares it in false or other fraudulent ways;
3. A person who fails to make a report or makes a false report or who fails to submit documents or submits false documents under Article 17 (2);
4. A person who uses the name of Korea Social Enterprise Promotion Agency or any other similar names in violation of Article 20 (12)

(3) The fine for negligence under paragraph (1) and (2) shall be imposed and collected by the Minister of Employment and Labor under the conditions prescribed by the Presidential Decree. *<Wholly Amended by Act No. 10360, Jun. 8, 2010>*

Addenda *<Act No. 9685, May. 21, 2009 ; Revision of the Act on the Encouragement of Purchase of Small and Medium Enterprise Products and Support for Their Sales>*

Article 1 (Enforcement Date)
This Act shall enter into force six months after its promulgation.

Articles 2 through 6 Omitted.

Articles 7 (Revision of Other Acts)
(1) through (10) Omitted.
(11) Parts of the Social Enterprise Promotion Act shall be revised as follows:
"Promotion of Small and Medium Enterprises and Encouragement of Purchase of Their Products Act" in Article 12 (1) shall be changed to "Small and Medium Enterprises Promotion Act", and "Article 12 (1) of the Small and Medium Enterprises and Encouragement of Purchase of Their Products Act." in paragraph (2) of the same Article to "5 (1) of the Act on the Encouragement of Purchase of Small and Medium Enterprise Products and Support for Their Sales".

Article 8 Omitted

Addenda *<Act No. 10220, Mar. 31, 2010 ; Revision of the Restriction of Tax Reduction and Exemption Act>*

Article 1 (Enforcement Date)
This Act shall enter into force on January 1st 2011.

Articles 2 and 3 Omitted.

Articles 4 (Revision of Other Acts)
(1) through (13) Omitted.
(14) Parts of the Social Enterprise Promotion Act shall be revised as follows:
"Local Tax Act" in Article 13 (1) and Article 16 shall be changed to "Restriction of Tax Reduction and Exemption Act".
(15) Omitted.

Article 5 Omitted.

Addenda *<Act No. 10339, Jun. 4, 2010 ; Revision of the Government Organization Act>*

Article 1 (Enforcement Date)
This Act shall enter into force one month after its promulgation. <Proviso omitted>

Articles 2 and 3 Omitted.

Articles 4 (Revision of Other Acts)

(1) through (45) Omitted.

(46) Parts of the Social Enterprises Promotion Act shall be revised as follows:

"Minister of Labor" in Article 4 (1) and (2), Article 5 (1) and (3), Article 6, Article 7 (1) and (2), Article 8 (2), Article 9 (2), Article 10 (1) and (2), Article 14 (1) and (2), Article 17 (1) through (3), Article 18 (1) and (2), Article 20 and Article 21 (3) through (5) shall be changed to "Minister of Employment and Labor".

"Vice Minister of Labor" in Article 4 (2) shall be changed to "Vice Minister of Employment and Labor".

"Ordinance of the Ministry of Labor" in Article 4 (3), Article 8 (3), Article 17 (1) and Article 18 (3) shall be changed to "Ordinance of the Ministry of Employment and Labor".

(47) through (82) Omitted.

Article 5 Omitted.

Addenda *<Act No. 10360, Jun. 8, 2010>*

Article 1 (Enforcement Date)

This Act shall enter into force six months after its promulgation.

Articles 2 (Preparation for Establishment of Korea Social Enterprise Promotion Agency)

(1) The Minister of Employment and Labor may appoint not more than five founding members to deal with work concerning the establishment of the Promotion Agency.

(2) The founding members shall prepare the articles of incorporation of the Promotion Agency and obtain authorization thereof from the Minister of Employment and Labor and then have the establishment registered.

(3) The founding members shall transfer the work to the head of the Promotion Agency immediately after having the establishment of the Promotion Agency registered, and be considered to be relieved from their duties when the transfer is completed.

ATTACHMENT C

Benefit Company - Proposed Amendments to the *Corporations Act 2001* (Cth)

1.	Definitions

Section 9

1.1 **Benefit company** has the meaning given by section 45C(1).

1.2 **Benefit enforcement proceedings** has the meaning given in section 247F(1) of this Act.

1.3 **General public benefit** means 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.

1.4 **Specific public benefit** means the conferring of a particular benefit on society or the environment but does not include general public benefit.

1.5 **Third party benefit standard** means a standard for defining, reporting and assessing the social and environmental performance of a benefit company that:

(a) assesses the effects of the business affairs of the company upon the matters listed in section 190C(1);

(b) is developed by an entity that is:

(i) not a related entity of the benefit company; and

(ii) prescribed by regulations made for the purposes of this definition.

2.	Substantial Modifications to the Corporations Act

2.1 *45C Benefit companies*

(1) [**Criteria for a benefit company**] A company is a benefit company if:

(a) it is a:

(i) proprietary company limited by shares;

(ii) public company limited by shares; or

(iii) public company limited by guarantee to which section 111K does not apply;

(b) it has a constitution;

(c) its constitution contains the general public benefit purpose required by section 125A of this Act; and

(d) it is not a deductible gift recipient.

(2) [**Company must notify ASIC**] If a company is a benefit company upon registration or becomes a benefit company following registration in accordance with this section, it must notify ASIC that it is a benefit company.

(3) [**Benefit company status does not affect other obligations**] Except so far as the contrary intention appears, a reference in this Act to a benefit company does not affect the company's rights or obligations under this Act.

2.2 *125A Constitution of a benefit company*

(1) [**General public benefit and specific public benefit**] A benefit company must have a purpose of creating general public benefit in its constitution and may have a purpose of creating one or more specific public benefits in its constitution.

(2) [**Contrary acts not invalid**] 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 its constitution.

2.3 *190C Application of Division to a benefit company*

(1) [**Consideration of interests**] In discharging the duties set out in this Division, the directors or other officers of a benefit company:

(a) must consider:

(i) the likely consequences of any decision or act in the long term;

(ii) the interests of the company's employees;

(iii) the need to foster the company's business relationships with suppliers, customers and others;

(iv) the impact of the company's operations on the community and the environment;

(v) the desirability of the company maintaining a reputation for high standards of business conduct;

(vi) the interests of the members of the company; and

(vii) the ability of the company to create its general public benefit and any specific public benefit purpose in its constitution; and

(b) need not give priority to a particular matter referred to in paragraph (a) over any other matter, unless the benefit company has stated in its constitution that the directors or other officers must give priority to certain matters related to the accomplishment of its general public benefit purpose or any specific public benefit purpose in its constitution.

(2) [**Interaction with other sections of this Act**] The consideration of the matters set out in subsection (1) by the directors and the other officers of a benefit company does not of itself:

(a) constitute a breach of sections 180, 181, 182, 183 or 184 of this Act;

(b) prevent a director or other officer from relying on section 180(2) of this Act;

(c) authorise a person to do an act which would be inconsistent with any section of this Act or a rule of law requiring the person to consider or act in the interests of creditors of the company;

(d) entitle a person (other than ASIC) to make an application to the Court to grant an injunction under section 1324 of this Act;

(e) entitle a Court to make an order under Part 2F.1 of this Act; or

(f) entitle a person to bring proceedings or intervene in any proceedings under Part 2F.1A of this Act.

(3) [**Liability for a failure to achieve general public benefit or specific public benefit**] No director or other officer of a benefit company can be liable under this Act or the general law for the failure of a benefit company to pursue or create general public benefit or any specific public benefit.

2.4 ***Part 2F.5 Benefit enforcement proceedings***

247F Bringing, or intervening in, benefit enforcement proceedings

(1) [**Meaning of benefit enforcement proceedings**] Benefit enforcement proceedings are any proceedings for the failure of a benefit company to:

(a) pursue or create general public benefit purpose or any specific public benefit purpose in its constitution; or

(b) comply with section 300C of this Act.

(2) [**Who may bring proceedings**] A person may bring benefit enforcement proceedings on behalf of a benefit company, or 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 for a particular step in those proceedings (for example, compromising or settling them), if the person is:

(a) a member or group of members with at least 5% of the votes that may be cast at a general meeting of the benefit company; or

(b) an officer of the benefit company.

ASIC may bring benefit enforcement proceedings on behalf of a benefit company.

(3) [**Proceedings must be in company name**] Benefit enforcement proceedings brought on behalf of a benefit company must be brought in the company's name.

(4) [**Applying for and granting leave**] Section 237 of this Act applies to benefit enforcement proceedings in full as if each reference to proceedings in that section was a reference to benefit enforcement proceedings.

247G Orders the Court can make in relation to benefit enforcement proceedings

(1) [**Court may make orders**] The Court can make the following orders under this section that it considers appropriate in relation to the benefit company:

(a) an order that the company's existing constitution be modified or repealed, including to remove the general public benefit purpose and any specific public benefit purpose from the company's constitution;

(b) an order requiring the company to comply with section 300C of this Act;

(c) an order that an officer of the benefit company do an act specified in section 190C(1)(a) of this Act; and

(d) an order requiring the company to notify ASIC that the company is no longer a benefit company.

(2) [**Order altering constitution**] If an order made under this section repeals or modifies a benefit company's constitution, or requires the benefit company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the Court.

2.5 *300C Annual benefit report*

(1) [**Obligation to publish**] A benefit company must publish an annual benefit report on its website. If the benefit company does not have a website, the benefit company must send a physical copy of the annual benefit report to its members.

(2) [**Contents of annual benefit report**] The annual benefit report for a financial year must:

(a) contain a narrative description of:

(i) the ways in which the benefit company pursued its general public benefit purpose during the year and the extent to which general public benefit was created;

(ii) 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; and

(iii) details of any matter or circumstance that has significantly affected the creation by the benefit company of general public benefit and each specific public benefit in its constitution (if any); and

(iv) refer to likely developments in the benefit company's operations in future financial years and the expected impact of those developments on the general public benefit purpose and each specific public benefit purpose in its constitution; and

(b) an assessment of the overall social and environmental performance of the benefit company against a third party benefit standard which:

(i) has been applied consistently with any application of that standard in a prior annual benefit report; or

(ii) is accompanied by an explanation of the reasons for any inconsistency in the application of that standard when compared with the immediately prior annual benefit report.

(3) [**Publication deadline**] Subject to subsection (4), the time for publication of the annual benefit report is:

(a) for a benefit company which is a public company or a large proprietary company, within 4 months after the end of the company's financial year; or

(b) for a benefit company which is a small proprietary company, within 6 months after the anniversary of the company's registration.

(4) [**No publication for 2 years after registration**] 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 (as applicable) after the company's registration.

(5) An offence based on subsection (1) or (3) is an offence of strict liability.

3.	**Consequential Amendments to the Corporations Act**

3.1 Section 125(1) and section 125(2) are both amended to include the words "Subject to section 125A" at the beginning of each subclause.

3.2 Section 136(5) is amended to include the words "This also applies to a benefit company." after the words "has not yet been determined".

3.3 A note is inserted after section 136(5) as follows: "**Note:** A benefit company must have a constitution (see sections 45C and 125A)."

3.4 Schedule 3 is amended to include a new item in the table as follows:

Item	**Provision**	**Penalty**
103AB	Section 300C(1) and (3)	5 penalty units

4. Proposed Regulations

1.0.02B Third party benefit standard

(1) For the definition of ***third party benefit standard*** in section 9 of the Act, an entity must:

(a) meet the requirements listed in subregulation 1.0.02B(2): and

(b) be prescribed in subregulation 1.0.02B(3).

(2) An entity which develops a third party benefit standard must meet the following requirements:

(a) have access to the necessary expertise to assess the overall social and environmental performance of a business;

(b) make the following information publicly available on the entity's website:

(i) the criteria considered when measuring the overall social and environmental performance of a business;

(ii) the relative weightings, if any, of those criteria;

(iii) the identity of the officers and members of the entity that developed and controls revisions to the third party benefit standard;

(iv) the process by which revisions to the third party benefit standard are made; and

(v) 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; and

(c) not more than one-third of the officers and members of the governing body of the entity are officers, members or employees of any of the following:

(i) an association of businesses operating in a specific industry the performance of whose members is assessed against the standard;

(ii) businesses from a specific industry or an association of businesses in that industry; or

(iii) a business whose performance is assessed against the standard.

(3) The following entities are prescribed:

(a) [*to be inserted following appropriate public consultation*].

ATTACMENT D

Benefit Company - Proposed Amendments to the *Corporations Act 2001* (Cth): Explanatory Memorandum

1. Overview

1.1 The proposed benefit company amendments (**Amendments**) to the *Corporations Act 2001* (Cth) (the **Act**) are intended to establish a regulatory framework to facilitate the introduction of the benefit company in Australia. The benefit company regime includes:

(a) the eligibility requirements for a benefit company (*Part 3*);

(b) that the directors and other officers must consider a range of matters when discharging their statutory duties (*Part 4*);

(c) the process for enforcing compliance by a benefit company with the general public benefit purpose and any specific public benefit purposes in its constitution (*Part 5*); and

(d) the annual reporting process for a benefit company (*Part 6*).

1.2 The benefit company framework is intended to give shareholders a choice. It does not create any additional administrative or compliance requirements for companies which don't want to adopt the benefit company framework. The Amendments are intended to provide companies with the flexibility to adopt a structure that suits their purpose, and deliver transparency and adequate protection from legal liability whilst doing so.

1.3 Further consequential changes to other Commonwealth legislation may be needed. This will require further review of other legislation.

1.4 The Corporations Regulations 2001 (Cth) (**Regulations**) should be amended to set out the criteria which applies to those entities which will establish the third party standard for assessing the performance of a benefit company. The suggested additions to the Regulations will require further refinement following public consultation.

2. Background and Introduction

2.1 In the United States in 2008, a new type of for-profit company limited by shares was conceived, known as the 'benefit corporation'. The benefit corporation has been introduced via legislative amendment in more than half of all US states over the past five years.

2.2 A benefit corporation has two core purposes: to make a profit and to create a public benefit. Recognising the limits of voluntary action by companies, the benefit corporation enshrines the triple bottom-line principles of 'profit, people and planet'[i] in statute and in a company's governing documents, representing a significant shift in corporate law and governance practice.

2.3 The benefit corporation modifies directors' duties and imposes reporting requirements beyond those of a traditional limited liability company.

2.4 The benefit corporation is not to be confused with the voluntary 'B Corp' certification awarded by a not-for-profit organisation, B Lab (the Australian subsidiary of which is B Lab Australia & New Zealand Limited), to companies that meet particular standards of verified social and environmental performance, public transparency and legal accountability.[ii] While there are a great many certified B Corps which are also benefit corporations, it is equally possible in many US jurisdictions to be legally incorporated as a benefit corporation without being a certified B

Corp. Further, there are many certified B Corps in jurisdictions outside the US (including Australia) where the benefit corporation does not yet exist as a recognised legal form.

2.5 In order to more clearly delineate B Corps from the statutory benefit corporation (as it is called in many states in the US), the term 'benefit company' has been adopted for the proposed Australian legislation.

2.6 For close to a century, academics and others have debated whether a corporation is solely responsible to ownership interests, or whether it also possesses obligations to benefit the welfare of other stakeholders.[iii] Fundamental to this question is the role of the shareholder.

2.7 Many corporate law theorists argue that a shareholder is the only person that 'owns' a corporation in any sense.[iv] The shareholder contributes equity in return for this ownership stake. Those who take a 'shareholder primacy' view argue that in return for this investment, all the benefits of the corporation's activities should flow to the shareholder.[v] The alternative 'stakeholder primacy' view contends that corporations owe obligations to both shareholders and the community, that incorporation is a privilege bestowed solely by the state which carries significant advantages (limited liability and perpetual succession) and in turn society is justified in expecting the corporation to act in the general public interest.[vi]

2.8 At common law, directors of Australian companies are obliged to 'act in the interests of the company as a whole'.[vii] The phrase 'the company as a whole' has been interpreted to mean the financial well-being of the shareholders as a general body, with directors also being obliged to consider the financial interests of creditors when the company is insolvent or near-insolvent.[viii]

2.9 The authors of Ford, Austin & Ramsay's Principles of Corporations Law state that, although it is sometimes said that directors should be obliged to consider the interests of employees, customers, contractors and the community when making decisions for the company, "there is no case law or corporations legislation in Australia that imposes that obligation".[ix] The authors go on to state that "[a]lthough there may be no direct legal obligation in company law on directors to take other interests into account, it does not follow that directors cannot choose to do so".[x]

2.10 Nonetheless, the ability of directors of Australian companies to take into account extraneous interests is not untrammelled. The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company, but may not be generous with company resources when there is no prospect of commercial advantage to the company.[xi]

2.11 Under this approach, although Courts may adopt a more flexible attitude towards the application of directors' statutory duties (including the business judgement rule) which may offer some legal protection for directors when making decisions that don't maximise shareholder profits, if there is no connection between a business decision and shareholder value, then that decision will itself be open to shareholder criticism.

2.12 In the absence of specific legislative guidance, it would be very difficult for company directors to properly ascertain whether they are acting within the statutory duties owed to the company by reference to the 'general public benefit' which is the core feature of the benefit company. Further, without legislative guidance, third parties (such as ASIC or liquidators) may be in a position to argue that directors had neglected to consider certain aspects of the 'general public benefit' and were therefore in breach of their statutory duties.

2.13 The shareholder wealth maximisation principle remains the 'light on the hill' in modern corporate decision-making.[xii] As a consequence, the legal structure of the company itself gives rise to a somewhat irreconcilable tension. Directors have a practical duty (perhaps more perception than legal obligation) to act in the financial interests of a company's shareholders.

2.14 Whilst directors continue to be saddled with this profit-maximisation duty (whether perceived or otherwise) directors can only consider public or non-shareholder interests to the extent that they do not materially impact on the corporation's bottom line (and therefore shareholder returns), or to the extent that some other long-term commercial benefit accrues to shareholders. This constrains the ability of directors in a traditional company structure to consider non-shareholder interests, and creates a disharmony between profit-making activities and the active consideration of wider stakeholder interests.

2.15 Australian companies are free to adopt voluntary codes and corporate social responsibility measures to achieve sustainability targets or deliver social justice outcomes. However, these measures do not remove the practical legal uncertainty which directors are forced to confront when considering non-shareholder interests. The proposed benefit company amendments to the Act attempt to address this uncertainty by placing both profit-making and the public good at the forefront of the purpose of the corporation.

3. Benefit Company Eligibility Requirements

Detailed explanation of new law

3.1 The amendments do not create a separate additional type of company. Rather, the amendments prescribe particular actions which must be taken by a company (which can be a new company or an existing company) if it wishes to adopt an additional status as a benefit company ***[Item 2.1, section 45C(1)]***.

3.2 A company which elects to adopt benefit company status must be a proprietary company limited by shares, a public company limited by shares or a public company limited by guarantee which is not registered with the *Australian Charities and Not-for-profits Commission* (**ACNC**) and to which section 111K of the Act does not therefore apply. A benefit company cannot be any other type of company ***[Item 2.1, section 45C(1)(a)]***. A fundamental characteristic of the benefit company is that it should exist to make a profit and should be able to distribute that profit to its members. Therefore, the structure of a company limited by shares (whether public or proprietary) is most appropriate, as this type of company retains the ability to pay and distribute profits to its members under the existing provisions of the Act. However, the company limited by guarantee is also used as a legal structure to operate some large trading businesses in Australia which do not distribute profits to members but which are not charitable organisations. In order to allow as many companies as possible to have the opportunity to adopt benefit company status, public companies limited by guarantee which fall outside section 111K of the Act (and are therefore not registered with the ACNC) can elect to become benefit companies ***[Item 2.1, section 45C(1)(a)]***. This provision recognises that benefit company status may be equally appropriate for a smaller, closely-held private company as for a larger, publicly-listed company, or for a significant operating entity structured as a company limited by guarantee (for example, in the health or utilities sector). This is particularly the case given that less than 5% of Australian companies are incorporated as public companies limited by shares. Creating an additional type of company (for example, a 'benefit company limited by shares') would necessitate significant amendments to the Act and would be likely reduce the appeal of this structure for Australian businesses.

3.3 A benefit company cannot be an entity which itself is entitled to receive tax deductible gifts, as these entities are typically charitable or benevolent institutions. ***[Item 2.1, section 45C(1)(d)]***. A fundamental characteristic of a benefit company is that it should pursue profitable enterprise.

3.4 A benefit company must have a constitution ***[Item 2.1, section 45C(1)(b)]***. This applies even to a proprietary company which may otherwise have elected to be governed by the replaceable rules under the Act rather than have a separate constitution ***[Items 3.2 and 3.3, section 136(5)]***. This requirement recognises that one of the core features of a benefit company is the adoption of the general public benefit purpose in its constitution. Despite increasing the administrative and compliance costs for a proprietary company which desires to adopt benefit company status, this is an appropriate requirement to impose given the importance of the constitution to a benefit company.

3.5 The constitution of a benefit company must contain the general public benefit purpose ***[Item 2.1, section 45C(1)(c)]***. The general public benefit purpose requires the company to include in its constitution an object that the company will have 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 ***[Item 1.3, section 9]***. This object requires the directors and other officers of the benefit company to consider all of the effects of the company's business affairs and activities on society and the environment, with such consideration to be informed by the matters set out in section 190C(1) ***[Item 2.3, section 190C(1)]***. The 'third party benefit standard' requires the company to engage with a third party which is not a related entity of the benefit company and which will apply a standard for assessing the performance of the benefit company in creating general public benefit ***[Item 1.5, section 9]***. The third party will need to meet a set of criteria set out in the Regulations and will need to be prescribed in the Regulations as being permitted to carry out such an assessment. The 'business affairs' of the benefit company has the meaning given by the existing section 53AA of the Act.

3.6 A proprietary company limited by shares or a public company must notify ASIC upon modifying its constitution to become a benefit company, or upon registration if it is a benefit company from registration ***[Item 2.1, section 45C(2)]***. ASIC must be notified within 14 days of the date on which an existing company adopts benefit company status ***[Item 3.2, section 136(5)]***.

3.7 A company which adopts benefit company status is still required to comply with all the usual obligations which are imposed on that company and its directors and other officers by the Act, unless those obligations are expressly modified by another section of the Act ***[Item 2.1, section 45C(3)]***.

3.8 An existing company may adopt benefit company status by amending its constitution to include the general public benefit purpose, or by adopting a constitution which includes the general public benefit purpose ***[Item 2.2, section 125A(1)]***. The process for an existing company to amend its constitution or adopt a new constitution for the purpose of becoming a benefit company remains the same as set out in the existing section 136(1) of the Act, which requires the company to pass a special resolution of members. Under section 136(1), a special resolution is one that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.

3.9 In addition to general public benefit, a benefit company may also include an object in its constitution of creating one or more specific public benefits. Specific public benefit means the conferring of a particular benefit on society or the environment, but does not include general public benefit. A benefit company is not required to include the creation of a specific public benefit as an object in its constitution but may do so ***[Item 2.2, section 125A(1)]***. A specific public benefit may include:

(a) providing low income earners or disadvantaged communities or individuals with beneficial services;

(b) promoting economic opportunities for individuals or communities beyond that which occurs in the ordinary course of business;

(c) conserving or restoring the environment (either generally or in relation to a specific environment);

(d) improving the health or wellbeing of individuals or communities;

(e) promoting the arts, sciences or the advancement of knowledge;

(f) facilitating funding for other entities with a purpose to benefit society or the environment; or

(g) conferring any other particular benefit on society or the environment.

3.10 If a benefit company does any act which is contrary to or does not advance the general public benefit or a specific public benefit, that act is not invalid ***[Item 2.2, section 125A(2)]***. The concept and form of this new provision is similar to the concept and form already used in the existing section 125(2) of the Act, thereby providing greater certainty for persons applying this new provision.

4. Mandatory Consideration of Interests by Directors

Detailed explanation of new law

4.1 The directors and other officers of a benefit company are still subject to all the duties imposed on them by the Act and under the general law. However, in discharging these statutory and fiduciary duties, the directors and other officers of a benefit company are required to consider a specific list of matters ***[Item 2.3, section 190C(1)]***. This provision does not derogate from already developed case law surrounding the application of existing duties of directors under the Act and at general law. ***[Item 2.3, section 190C(2)(a)]***. Rather, it defines the scope of those duties for the directors and other officers of a benefit company when making decisions for the benefit company, in the context of the existing law.

4.2 In discharging the duty to exercise care and diligence under section 180, a director or other officer must consider each of the matters listed in section 190C(1)(a). Similarly, in discharging the duty to act in good faith in the best interests of the corporation and the duty to act for a proper purpose under section 181, a director or other officer must consider each of the matters listed in section 190C(1)(a). A director or other officer is not required to do more than the duty to act in good faith and the duty to exercise care and diligence would require, but in doing so must have regard to the matters listed in section 190C(1)(a).

4.3 This construct, and the list of matters in section 190C(1)(a), provides directors and other officers with statutory protection from any alleged breach of their existing statutory and general law duties merely because a decision has been made which fails to maximise shareholder value or optimise financial returns for shareholders, but which focuses on other benefits which may accrue to the company, its employees, customers, suppliers, the environment or the community. This is a core feature of the benefit company.

4.4 The matters to be considered by the directors and other officers of a benefit company closely follow the matters set out in section 172 of the *Companies Act 2006* (UK) with some exceptions ***[Item 2.3, section 190C(1)(a)]***. Adopting with some variation the approach which has been used in the UK will provide benefit companies and Australian practitioners with a greater degree of certainty when applying and interpreting the matters in section 190C(1). The list of matters is not an exhaustive one and additional matters may properly inform the discharge by directors and other officers of their statutory and fiduciary duties.

4.5 Each matter in the list of matters in section 190C(1)(a) requires the directors and other officers of a benefit company to take into account the likely impact or effect of an act or decision on that matter. The requirement for the directors and other officers to consider each matter does not require one particular matter to be given priority or favour over another ***[Item 2.3, section 190C(1)(b)]***. However, the constitution of the benefit company may specifically require the directors and other officers to give priority to a particular matter when seeking to pursue the company's general public benefit purpose or a specific public benefit. For example, a benefit company operating in a particular industry may give priority to a matter which arises more commonly in that industry. Any matter listed in section 190C(1)(a) which refers to a particular group (for example, the 'interests of the company's employees', or the impact of the company's operations 'on the community') does not require the directors and other officers of the benefit company to consider particular individuals, but rather the impact on that group collectively of any decision made by the directors and other officers ***[Item 2.3, section 190C(1)(a)***.

4.6 The benefit company amendments to the Act are not intended to interfere with the other provisions of the Act which apply to proprietary companies or public companies respectively. Accordingly, by considering the matters set out in section 190C(1), the directors and other officers of a benefit company are not in breach of, or otherwise acting inconsistently with, other provisions of the Act ***[Item 2.3, section 190C(2)]***. As noted above, the consideration of those matters does not constitute a breach of sections 180 (the duty to act with due care and diligence) or 181 (the duties to act in good faith in the best interests of the corporation and to act for a proper purpose) ***[Item 2.3, section 190C(2)(a)]***. Directors and other officers may still rely on the business judgement rule in section 180(2) when discharging their obligations under section 190C(1) ***[Item 2.3, section 190C(2)(b)]***. The interests of creditors are also given priority to any other consideration when directors are discharging their duties in a near insolvency or insolvency situation ***[Item 2.3, section 190C(2)(c)]***. This reflects the paramountcy of the company's obligations to its creditors, notwithstanding its benefit company status.

4.7 The mechanism for enforcing compliance by directors and other officers with section 190C(1) is dealt with indirectly, via the benefit enforcement proceedings regime, rather than under the existing mechanisms which are available to ASIC, shareholders and other persons under the Act. No person other than ASIC is entitled to bring proceedings under section 1324 of the Act ***[Item 2.3, section 190C(2)(d)]*** merely as a result of the directors or officers of a benefit company considering, or failing to consider, the matters in section 190C(1). Similarly, a Court is not entitled to make orders just by the fact of the directors and officers of a benefit company considering the list of matters in section 190C(1), and no person is entitled to bring proceedings or intervene in proceeding under Part 2F.1A of the Act for the same reason ***[Item 2.3, section 190C(2)(e)-(f)]***. The benefit company amendments to the Act are not intended to expand the scope of the existing members' rights and remedies provisions in the Act, but rather to establish a separate regime for enforcing rights relating to the benefit company in its capacity as a benefit company ***[Item 2.4, Part 2F.5]***. Nonetheless, if ASIC determines that it can bring proceedings to obtain an injunction under section 1324 as a result of the directors or other officers considering the matters set out in section 190C(1) then it may do so. The rights of enforcement for members and officers on behalf of the benefit company are set out in the new Part 2F.5 ***[Item 2.4, Part 2F.5]***.

4.8 Directors and other officers are required to discharge their existing statutory and fiduciary duties, the scope of which is informed by the mandatory considerations in section 190C(1). Provided that directors and other officers comply with these provisions, the mere failure by a benefit company to achieve general public benefit or one or more specific public benefits set out in its constitution does not make the directors and officers personally liable for such failure. Rather, the appropriate remedy is against the benefit company itself under section 247G of the Act ***[Item 2.4, section 247G(1)]***. This is consistent with the current approach to directors' statutory duties. For example, provided that a director or other officer acts with due care and diligence (and in accordance with his or her other obligations), that person shall not be liable for a mere failure of the company to make a profit.

5. Benefit Enforcement Proceedings

Detailed explanation of new law

5.1 Benefit enforcement proceedings can be brought against a benefit company on two grounds, being a failure of the benefit company to pursue or create general public benefit or a specific public benefit purpose in its constitution, or a failure to comply with the reporting obligations in section 300C ***[Item 2.4, section 247F(1)(a) and (b)].*** This recognises that the benefit company should be responsible to ASIC, shareholders and other persons in the usual way for its underlying obligations under the Act (i.e. those which are not specifically related to its benefit company status). The benefit company's liability should therefore be limited to those core elements of its status as a benefit company.

5.2 In a similar manner to the existing section 236 of the Act, benefit enforcement proceedings are brought as a statutory derivative action on behalf of a company, and to assist persons in

applying this new provision, the language in this new provision 247F(2) is intended to be substantially similar to the existing language in section 236(1) of the Act ***[Item 2.4, section 247F(2)]***.

5.3 Standing to bring benefit enforcement proceedings is limited to a single member or group of members with at least 5% of the votes that may be cast a general meeting of the benefit company. ***[Item 2.4, section 247F(2)(a)]***, or to an officer of the benefit company ***[Item 2.4, section 247F(2)(b)]***. The 5% threshold is consistent with the threshold for members who can call a general meeting of a company under section 249D of the Act, and will reduce the possibility of minority recalcitrant members bringing baseless proceedings in the name of the company. This is deliberately narrower than the standing currently given to all members to bring a derivative action under section 236 of the Act.

5.4 Benefit enforcement proceedings will be subject to the same procedural requirements as derivative proceedings brought under Part 2F.1A of the Act, and to this effect section 237 of the Act is to apply to benefit enforcement proceedings as if each reference to a proceeding in section 237 was a reference to a benefit enforcement proceeding ***[Item 2.4, section 247F(4)]***. A person applying to bring proceedings must therefore satisfy the Court of the matters in section 237(2) of the Act, including that the applicant is acting in good faith and that it is in the best interests of the company (and therefore its members) that the application be granted. This is a key reason why the right to bring benefit enforcement proceedings is a derivative rather than a personal one.

5.5 In recognising the principle expressed in paragraph 5.1 above, namely that benefit enforcement proceedings should be limited to those matters which apply only to a benefit company, rather than those which apply to the company more generally, the range of orders which the Court may make in respect of benefit enforcement proceedings is limited ***[Item 2.4, section 247G(1)]***. The orders available to the Court are as follows:

(a) an order modifying or repealing the benefit company's constitution, including to remove the general public benefit purpose and remove or alter a specific public benefit purpose ***[Item 2.4, section 247G(1)(a)]***. The Court should have the power to strip a company of its benefit company status where it fails to pursue or create general public benefit, or have the power to modify any specific public benefit if it is not being pursued or created;

(b) an order requiring the company to comply with its obligations to publish an annual benefit report on its website (or send a physical copy of the report to its members if it does not have a website) and include in that report the content which is required by section 300C(2) ***[Item 2.4, section 247G(1)(b)]***. The Court may specifically enforce this requirement;

(c) an order that an officer of the benefit company do an act specified in section 190C(1)(a) of the Act ***[Item 2.4, section 247G(1)(c)]***. Although under section 190C(3) an officer cannot be liable for the benefit company's failure to create or pursue general public benefit or a specific public benefit, the officer can be liable for a failure to consider the matters in section 190C(1). ASIC has standing to directly enforce this against directors and other officers via its right to bring an action under section 1324 of the Act. In bringing benefit enforcement proceedings, a person may also seek an order from the Court requiring an officer to consider a matter in section 190C(1) of the Act; and

(d) an order requiring the benefit company to notify ASIC that it is no longer a benefit company ***[Item 2.4, section 247G(1)(d)]***. This recognises the inherent power of the Court to remove a company's status as a benefit company.

5.6 Where a Court makes an order modifying or repealing all or part of a benefit company's constitution under section 247G(1), it is appropriate that the protections provided by section 233(3) are extended to such an order made by the Court ***[Item 2.4, section 247G(2)]***.

Accordingly, the language of section 233(3) is substantially similar to the language of this new provision.

6. Annual Benefit Report

Detailed explanation of new law

6.1 Each benefit company must publish a benefit report on its website on an annual basis, or send a physical copy of a benefit report to its members if the benefit company does not have a website ***[Item 2.5, section 300C(1)]***. A benefit company which is a public company or a large proprietary company must publish its annual benefit report within 4 months after the end of the company's financial year ***[Item 2.5, section 300C(3)(a)]***. This is consistent with the current deadline imposed under sections 315 and 319 of the Act respectively for the lodgement of a company's financial statements. In recognition of the additional administrative and compliance burden on small proprietary companies which may otherwise not lodge financial statements with ASIC or their own members, the period to publish an annual benefit report is 6 months after the anniversary of the company's incorporation ***[Item 2.5, section 300C(3)(a)]***. A benefit company which is within 2 years of its date of registration is only required to publish an annual benefit report within the time period under section 300C(3) once the company's second full calendar year or second full financial year has elapsed. This grace period recognises the administrative and compliance burden on a start-up company which is a benefit company from the time of its incorporation ***[Item 2.5, section 300C(4)]***. However, disclosure of a benefit company's progress against the general public benefit purpose and any specific public benefit purpose is critical to the benefit company's transparency to all stakeholders, and therefore each benefit company must publish an annual benefit report.

6.2 There are two core components of the annual benefit report. The first is a narrative description of four matters which are somewhat similar to those matters on which the directors of a reporting entity are required to comment under section 299 of the Act ***[Item 2.5, section 300C(2)(a)]***. The matters are:

(a) the ways in which the benefit company pursued its general public benefit purpose and the extent to which general public benefit was created ***[Item 2.5, section 300C(2)(a)(i)]***. This requires the company to describe which of its activities created or was reasonably expected to create general public benefit, and to describe the general public benefit which was actually created;

(b) the ways in which the benefit company pursued each specific public benefit in its constitution and the extent to which each specific public benefit was created ***[Item 2.5, section 300C(2)(a)(ii)]***. This requires the company to describe which of its activities created or was reasonably expected to create each specific public benefit, and to describe the specific public benefits which were actually created;

(c) details of any matter or circumstance that has significantly affected the creation by the benefit company of general public benefit and each specific public benefit in its constitution ***[Item 2.5, section 300C(2)(a)(iii)]***. This information should be described in a similar manner to the information which would be contained in an annual directors' report by reason of section 299(1)(d) of the Act; and

(d) the likely developments in the benefit company's operations in future financial years and the expected impact of those developments on the general public benefit purpose and each specific public benefit in its constitution ***[Item 2.5, section 300C(2)(a)(iv)]***. This information should be described in a similar manner to the information which would be contained in an annual directors' report by reason of section 299(1)(e) of the Act.

6.3 The second core component of the annual benefit report is an assessment of the overall social and environmental performance of the benefit company against a third party benefit standard ***[Item 2.5, section 300C(2)(b)]***. The third party benefit standard must be developed by a third party which meets the set of criteria set out in the Regulations, and which is prescribed in the Regulations for that purpose. This will ensure that the standard is applied with independence and objectivity. Assessing each benefit company against an independent and regulated third party standard gives the benefit company credibility and allows external stakeholders (including members) to form a judgement as to whether the benefit company is creating general public benefit or a specific public benefit.

6.4 A third party benefit standard must be applied consistently across each annual benefit report ***[Item 2.5, section 300C(2)(b)(i)]***. If the third party benefit standard is not applied consistently, there is potential for stakeholders to be misled about changes in the general public benefit or a specific public benefit which is being created from year to year. Any inconsistency in the application of a third party benefit standard must be explained ***[Item 2.5, section 300C(2)(b)(ii)]*** and reasons must be given for any such inconsistency.

6.5 A failure to publish an annual benefit report or a failure to publish within the specified timeframe in section 300C(3) constitutes a strict liability offence under the Act, the penalty for which is 5 penalty units. This recognises the importance of the reporting requirement.

7. Consequential Amendments

Detailed explanation of the new law

7.1 Sections 125(1) and 125(2) are amended to include the words "Subject to section 125A" at the beginning of each subclause. This amendment is to avoid any confusion as to the application of sections 125 and 125A to a benefit company.

7.2 Section 136(5) is amended to include the words "This also applies to a benefit company". This creates the obligation on the benefit company to lodge its constitution with ASIC within 14 days of adopting or modifying it, even where the benefit company is a proprietary company limited by shares and would otherwise not be required to do so.

7.3 Section 136(5) is amended to insert a note that "A benefit company must have a constitution (see sections 45C and 125A)". This note confirms that a proprietary company which adopts benefit company status must have a constitution notwithstanding that it may otherwise elect to rely on the replaceable rules under the Act.

7.4 The table in Schedule 3 is amended to include subsections 300C(1) and (3) in the list of specified penalty provisions.

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[i] Elkington J, 1999, 'Cannibals With Forks: The Triple Bottom Line of 21st Century Business', Capstone.
[ii] 'About B Lab', B Lab, available at <www.bcorporation.net>.
[iii] Early notable works are Berle A A, 1931, 'Corporate Powers as Powers in Trust', 44 *Harvard Law Review* 1049; Berle A A, 1932, 'For Whom Corporate Managers Are Trustees: A Note', 45 *Harvard Law Review* 1365; Dodd E M, 1932, 'For Whom Are Corporate Managers Trustees?', 45 *Harvard Law Review* 1145.
[iv] For further discussion see Ford, Austin & Ramsay's Principles of Corporations Law, Online Looseleaf, LexisNexis Australia, [1.380] to [1.390].
[v] Dodd, 'For Whom Are Corporate Managers Trustees?', above n iii, 1147-48.
[vi] Ibid 1162.
[vii] Corporations and Markets Advisory Committee, "The Social Responsibility of Corporations", December 2006, pp. 84-85.
[viii] Ibid.
[ix] Ford, Austin & Ramsay's Principles of Corporations Law, Online Looseleaf, LexisNexis Australia, [8.120].
[x] Ibid at [8.130].
[xi] Ibid.
[xii] Bainbridge S M, 2003, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547, 577-83.