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Diletta Lenzi and Andrea Zorzi

THE HUMAN-CENTRED BUSINESS MODEL AND HYBRID BUSINESS FORMS: A PRIMER AND A ROADMAP

1. Introduction

1.1. *An evolving landscape*

Less than a decade ago, Mohammed Yunus could write that the law offered no specific instrument to entrepreneurs who wanted to do business

This article is the result of a joint work. However, paragraphs 1, 9 and 10 can be attributed to Andrea Zorzi and paragraphs 2 to 8 to Diletta Lenzi.

The research on which the article is based has been developed as part of preparatory activities for the Human-Centred Business Model Project, a research project developed within the framework of the Global Forum on Law Justice and Development – World Bank Legal Vice Presidency. The authors have been involved with the project since its inception and work mainly within the second of the six «pillars» composing the project, focusing on the legal framework and corporate governance devices for a «human-centred» enterprise. This pillar is co-lead by the International Institute for the Unification of Private Law (UNIDROIT) and the University of Florence (Università degli Studi di Firenze). Frédérique Mestre (UNIDROIT Senior Legal Officer) has been of precious help in the development of the research, with comments and suggestions. The inventory of the existing initiatives and organisational forms has widely benefited from the collaboration with researchers at UNIDROIT between October 2017 and July 2018, coordinated by Frédérique Mestre, who have helped in reporting from different jurisdictions. Namely, Lindsey Callahan (USA), Master of Laws (LLM) in Sustainable International Development Law at the University of Washington; Murat Cengizlier (USA), Master of Laws (LLM) in Sustainable International Development Law at the University of Washington; Li Jiankun (China), PhD Cand. of Private International Law, Wuhan University; Pedro Marcon (Brazil), Master in International Commercial Law, Università Europea di Roma/Universidade de Lisboa; Alessandra Pedinotti (France/Italy), Master/Laurea Mag. Cand. Univ. Poitiers/Roma 3; Irais Reyes de la Torre (Mexico), Master of Laws Rule of Law for Development, Loyola University Chicago School of Law (Rome); Tehilla Schwartz (Israel), LL.B. The Hebrew University of Jerusalem; Ashna Taneja (Australia), Master of Law (Global Competition and Consumer Law) Candidate, University of Melbourne; David Wouters (Belgium), Master in Laws, KU Leuven/LUISS. Further information on the Human-Centred Business Model is available at http://globalforumljd.com/new/communities-of-practice/human-centered-business-model (last accessed on 6th July 2020).

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with a goal to make society better off. Writing at a very general and international level, he noticed that one had to adapt business forms to the «social» aspect of business and that the law could hinder some important features of social businesses, such as the non-distribution constraint, and some forms of participatory governance (Yunus 2010).

This is certainly not the case any longer. Since the last century, there is a common trend towards a more sustainable way of doing business (for instance, Unidroit 2010). A global cultural shift has occurred about the role of businesses and corporations in society, as well as about their «responsibility» in terms of social and environmental impact: several initiatives have been developed on the international stage (*e.g*, GRI 2016; United Nations 2015; UN Global Compact 2014; OECD 2011; United Nations 2011), and States are strongly encouraging and incentivising businesses to take into account environmental and social interests in their operations. For-profit entrepreneurs are also voluntarily moving beyond compliance with human rights provisions and environmental regulations, making real business out of sustainability. Perhaps it is still a matter of auspices, but there is a growing belief that we are going towards an economy «in which economic growth and environmental responsibility work together in a mutually reinforcing fashion while supporting progress on social development» (definition of «green economy» by the International Chamber of Commerce 2012). This trend goes together with a growing awareness of consumers and investors on the need for sustainability of both production processes and products (Kassoy *et al.* 2016). While of unclear practical impact, the Business Roundtable's position of 2019 (Business Roundtable 2019) and Black Rock's Larry Fink's letters to CEOs since 2018 somewhat depart from the commonly accepted shareholder primacy paradigm (on the topic Bebchuk and Tallarita 2020; and Mayer 2020) and state – quoting from Fink's letter of 2018 – that «To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society» and «companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate».

This is not to say that all companies should necessarily embrace stakeholderism of some sort (a critique in Bebchuk and Tallarita 2020). However, the least one can say is that today the market is no longer a place for the sole for-profit business model. In every economy the share of some form of «social» business is increasing, and law and practice are developing new organisational forms to better carry out business and social activity, often referred to as «social businesses», since they aim at generating a positive impact on society in the broadest meaning.

It should be noticed, for the sake of clarity, that, while there is a common understanding that «social» business is a business done for a goal that tran-

scends the financial interests of shareholders or members, the term has very different implications depending on jurisdictions. Very generally, in Europe the concept of «social» business tends to include some forms of profit distribution constraint (paragraph 3.2), whereas in the US this is not the case. Among the most notable of the many initiatives intended to provide a legal form to «social» business which have occurred in the recent past, the most renowned is the US «benefit corporation», which has no distribution constraint and has gone beyond US borders. Many European States have also provided advanced legal forms for doing «social» business beyond social enterprises and the distribution constraint usually implied.

1.2. *Main purpose of the research*

This article aims to provide a general overview of some existing hybrid organisational forms, designed to carry out business with a view to generating a positive impact on the civil society, the environment, or other stakeholders, without foregoing profit altogether. This article has been developed as part of the preliminary activities of the «Human-Centred Business Model» (HCBM) project, within the framework of the Global Forum on Law, Justice and Development (World Bank Legal-Vice Presidency) and is now coordinated by the OECD Development Centre. The project aims to foster a holistic model to facilitate the development of an ecosystem for those who want to run a business generating a positive impact on society and the environment while being economically sustainable. In order to carry out this kind of business, «hybrid» companies are perfectly appropriate, given that they allow carrying out businesses organised in a collective way that balance profit and non-profit goals.

Activities seeking to generate a positive impact on society indeed can be carried out by different kinds of organisations, some of which carry out business, some of which do not. In a very simplified manner, organisations having some sort of «social» goal can fall within one of the following categories:

(1) not-for-profit organisations (such as associations, foundations, or charities) that do not carry out any business, and mainly rely on donations or grants to pursue their goals, or that may carry out business in an accessory fashion, as a means to provide financing to the pursuit of the social goal;

(2) not-for-profit organisations (in any form) that pursue social goals but carry out business as a chore means to pursue their goal (*e.g.*, some types of social enterprises);

(3) for-profit businesses that pursue social goals and also profit (in a varying degree, the main common ground being that they do not pursue only 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.

Among these categories, the research focuses only on categories (2) and (3), while not-for-profit organisations, when they do not carry out any business or when the business is a mere accessory of their activity (category (1)), are not included.

For each category, various governance characteristics have been analysed in order to sketch the core structure of each model. The collection of information, as well as the selection of corporate governance issues to be analysed, has been realised in a functional way, in order to concentrate only on those examples that can be used in the quest for HCBM corporate governance frameworks.

The analysis has involved several jurisdictions, in order to understand whether and how entrepreneurs can run a business balancing (to different degrees) profit goals with not-for-profit ones, and when a business model requires such a balance. Some laws enable members of for-profit entities to pursue not-for-profit goals, but some others do not. Even if a total profit-maximisation rule is probably inexistent, also in jurisdictions where corporate law tends to be mandatory and profit maximisation is the norm, the degree at which profit maximisation can be dispensed with is another issue; *e.g.*, while for companies under some US laws, which are traditionally of an enabling nature, shareholders could set out special rules in the certificate of incorporation referring to the social or environmental sustainability of the business at the expense of profit maximisation, it may not be the same in other jurisdictions, where some legal categories (normally companies) are legally allowed to pursue profit only. This was the case of Italy until 2016, where companies could provide for some limited deviation from profit maximisation but could not, *e.g.*, ban profit distribution, not even through a charter amendment (however, Stella Richter Jr. 2017). This is also one of the reasons why, in order to do business that aims to balance profit with social and environmental goals, new specific legal provisions on the Italian benefit corporation were deemed necessary (paragraph 3.3.4).

The issue of whether or not the law allows for the pursuit of not-for-profit goals alongside profit by using a traditionally profit-oriented organisational form may seem trivial to those accustomed to enabling laws (leaving aside «branding» issues, that are, however, extremely important) but should not be undervalued, since in many jurisdictions this is not possible, if there is no specific provision in the law that allows it. In contrast, some jurisdictions have special provisions for types of organisations that the parties are free to use or not. 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 L3Cs, community interest companies (in the UK), some types of co-operatives (*e.g.*, in Italy; Fici *et al.* 2013, for a worldwide comparative analysis of cooperatives), which can distribute profits, albeit with various limitations, and some kinds of «social enterprises» as so defined by some laws.

Within this framework, the research concerns only types of organisations as provided by the law, through which it is possible to set up «sustainable» businesses having also social or environmental goals.

2. The United States[1]

The US can be considered as one of the countries in which the cultural shift first occurred and where the debate about the role of business in society has begun, at least with such intensity, perhaps as a reaction to the shareholder value maximisation approach.

In the US, the notion «social enterprise» generically includes organisations of several levels of sustainability and stakeholders' involvement, from pure for-profit companies with a commitment to corporate social responsibility to not-for-profit organisations carrying out business. Also, State company laws across the US traditionally allow shareholders to set out, in the certificate of incorporation, special rules which refer to social or environmental pursuits.

In the US, two models seems to be particularly relevant within the present research: the low-profit limited liability company (or L3C), and the benefit corporation (and similar forms: some authors expressly include both L3Cs and benefit corporations in the category of «social enterprises»; Murray 2016). These models have taken a different approach to balancing the trade-offs involved when businesses pursue both profits and social or environmental goals. Slight differences are also reflected in State legislations within the same benefit corporation model (corporate law in the US is a matter of State law), where benefit corporations may also be named differently.

2.1. *The low-profit limited liability company (L3C)*

The first low-profit limited liability company (so-called «L3C») legislation was enacted in 2008 by the US State of Vermont, as an amendment to the general limited liability company (LLC) act, rather than as a separate act (Vermont Statutes, Title 11, Chapter 25, Subchapter 11: «Low-profit Limited

[1] Paragraph 2 is based on the work of Lindsey Callahan and Murat Cengizlier.

Liability Companies», §§ 4161-4163). Since then, several other US jurisdictions have followed[2].

The L3C is a legal form of «hybrid» business entity, the first of its kind to be provided in the US to bridge the gap between non-profit and for-profit business. It is a limited liability company prioritising the social impact along with the business success; a «for-profit with a non-profit soul» (Coren and Lang 2010), aiming at combining the structure of a limited liability company with a social purpose.

The L3C is required to be a «mission-driven» company, and its management is required to give higher priority to the achieving of the social mission than on making profits. This is made clear, for instance, in the Vermont, Illinois and Wyoming regulations: no significant purpose of the company is the production of income or the appreciation of property (Vermont. Stat. Ann. Tit. 11 § 4162 (A)(2); 805 Illinois Comp. Stat. 180/1-5 (2011); Wyoming Stat. Ann. § 17-29-102(a)(ix)(B)). However, it seems that some return to investors is allowed, and there is no express non-distribution constraint (the absence of a threshold to profit distribution has been considered as a reason of the limited use of the model: Pearce II and Hopkins 2014).

The original idea behind this model was to design a limited liability company capable to attract sustainable investors, and especially the program-related investments (PRIs) of private foundations which, in accordance to the Tax Reform Act (1969), have to periodically allocate 5% of their incomes to non-profit activities (Pearce II and Hopkins 2014; Callison and Vestal 2010; and Kleinberge 2010).

Today, the L3C model has been overcome in terms of popularity by benefit corporations, and also Vermont now has a benefit corporation statute (paragraph 2.3).

2.2. *The B Lab certification*

Hybrid businesses incorporated in any US State, as well as in any other country, can participate in the B Lab certification process and receive B

[2] Similarly to Vermont, the following States have authorised the L3C model by amending their general company act: Illinois (805 ILCS 180); Louisiana (HB1421/Act 417 amended Articles 1031, 1032, 1035, 1036, and 1309 Louisiana Corporate Statues Legislation); Maine (H-819); Michigan (Sec. 450.4101 et seq.); Rhode Island (H5279); Utah (Tit. 48, Ch. 02c); Wyoming (Tit. 17, Ch. 29). On the contrary, the following federal jurisdictions have adopted specific L3C legislations: The Oglala Sioux Tribe; The Crow Indian Nation of Montana; The Navajo Indian Nation. Also, Puerto Rico has adopted a L3C legislation (A-233-2015). Information from https://americansforcommunitydevelopment.org/laws/ (last accessed on 6th July 2020).

Lab's certification. B Lab is a non-profit organisation, founded in 2006 and headquartered in the US, aiming to build a global community of certified benefit corporations («B Corps»), with the mission to «redefine success in business» (B Lab official website). B Lab employs two methods for achieving its mission. Firstly, it certifies companies as «Certified B Corporations». To do so, B Lab developed the «B Impact Assessment», a standard for measuring the business social and environmental impact, its public transparency, and its legal accountability.

Secondly, it drafted a Model legislation for the development of Benefit Corporations, which has been highly influential on all legislation adopted in the US – and which has especially inspired the Washington State Social Purpose Corporation (paragraph. 2.3).

B Lab certification is available in any jurisdiction: businesses today can voluntarily apply for compliance with standards set by the B Lab, and there is no requirement that the business is run with any specific entity type.

2.3. *Benefit corporations and similar entities*

In 2010, Maryland adopted its benefit corporation legislation, the first State in the US. The law was based on the «Model Benefit Corporation Legislation» (MBCL)[3], developed by B Lab (*e.g.*, Cummings 2012; Hacker 2016; Hemphill and Cullari 2014; Hiller 2013; Loewenstein 2013). Benefit corporations are the most typical example of hybrid companies.

B Lab's MBCL requires companies to pursue or create «a general public benefit» and encourages (but does not require) that companies pursue one or more additional «specific public benefits». However, many State regulations (*e.g.*, Delaware) require benefit corporation's bylaws to include at least one specific public benefit. The general public benefit is defined as «[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard» (§ 102). Specific public benefits include «(1) providing low-income or underserved individuals or communities with beneficial products or services»; «(2) promoting economic opportunity [...] beyond the creation of jobs in the normal course of business»; (3) preserving the environment; «(4) improving human health», «(5) promoting the arts, sciences, or the advance-

[3] The full version of the Model Benefit Corporation Legislation is available at http://benefitcorp.net/sites/default/files/Model benefit corp legislation_4_17_17.pdf (last accessed on 6th July 2020).

ment of knowledge», and (6) fostering financing of entities having the purpose to benefit society. Any other «particular benefit on society or the environment» can also be included (MBCL § 102).

The MBCL requires benefit corporations to consider the impact of business on society and the environment «as a whole». In pursuing the best interests of the benefit corporation, directors must consider the impact of their actions not only on the shareholders, but also on a series of other stakeholder-related matters: «(*ii*) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; (*iii*) the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation; (*iv*) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; (*v*) the local and global environment; (*vi*) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation [...]» (§ 301(a)(1)). The standard business judgment rule applies (MBCL § 301 (c), (d), and (e); McDonnell 2014). All these interests are supposed to be balanced without giving priority to a particular interest over the others, «unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to the accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles» (§ 301 (a) (3)).

Such provision enables, and requires, directors to mitigate the traditional «shareholder value approach» (comment to § 301 MBCL). However, § 301(c) expressly denies that there is an enforceable duty of directors (or officers; § 305 (b) and (c)) to non-shareholder constituents, unless the company bylaws provide that an identified stakeholder category can bring an enforcement proceeding for the breach of duty to pursue or create general or specific public benefit (§ 305 (b)). The MBCL provides indeed for a «benefit enforcement proceeding» that has the effect of excluding other actions. According to § 305, a claim against a benefit corporation's directors or officers, with respect to their failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation, can be made only by the benefit corporation itself, or derivatively (in accordance with ordinary rules on the point), by a person or group of persons that own a certain amount of shares of the corporation or of its controlling entity (the MBCL suggests 2 and 5% respectively; § 305).

Furthermore, benefit corporations are required to draft, file with the secretary of 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. If a benefit director is designated (the designation is optional), one of his duties is to prepare the annual compliance statement (§ 302). The assessment must also refer to a third-party standard that is comprehensive, credible, and transparent, and which is developed independently from the benefit corporation (§ 102). However, the company can perform the assessment without a third-party audit or certification (§ 401 (c)).

Finally, any existing corporation can be converted into a benefit corporation. Nothing is said about the dissenting shareholders' rights, but since the conversion into a benefit corporation can be considered as a fundamental change to the company, it would be better if the shareholders' appraisal rights were regulated, at least in the bylaws (a regulation of appraisal rights exists in many States, *e.g.*, for the Delaware public benefit corporation).

As of July 2020, 36 States have passed slightly different legislations on benefit corporations, while 5 States are working on it[4]. Also, the US model(s) of benefit corporations has influenced the Italian legislation on the «società benefit» and the Colombian «sociedades comerciales de beneficio e interés colectivo».

Among the 36 US States regulating benefit corporations it is possible to identify some main differences. If one considers the MBCL (and the Maryland legislation) to lie at one side of the spectrum, we can place the Delaware «public benefit corporation» (PBC) on the opposite side; while the «social purpose corporation» (SPC) is located somewhere in between the two.

The SPC was firstly legislated in the State of Washington, in 2012[5], and was crafted to provide more flexibility to businesses as compared to the MBCL: the goal for the Washington State legislator was to enable good corporate behaviour, while avoiding legislating corporate behaviour (Brakman Reiser 2012; Reed and Wellman Lewis 2012; Mirzanian 2015). Similarly to the MBCL, the social purpose corporation must have a general social purpose and has the option to have one or more specific social purposes. However, social purpose corporations seem to have a great deal of latitude in defining and pursuing social goals[6].

[4] The US States with a pending legislation on benefit corporations are Alaska, Georgia, Iowa, Mississipi and New Mexico. Updated information is available at the following link: http://benefitcorp.net/policymakers/state-by-state-status (last access on 6th July 2020).

[5] House Bill 2239 introduced Chapter 23B.25, entitled «Social Purpose Corporations», and amended Chapter 23B.01 of the Revised Code of Washington (RCW). Social purpose corporations have been regulated in Washington, California, Florida, and Texas.

[6] Under the Wash. Rev. Code, the general social purpose is defined in the law as follows: «Every corporation governed by this chapter must be organised 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

With regard to directors' fiduciary duties, SPC directors and officers are 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» (*e.g.*, Wash. Rev. Code § 23B.25-060 (2) and 070 (2)). However, the articles of incorporation may optionally impose the consideration of one or more of the SPC's social purposes. Any action (or failure to take action) by directors that they reasonably believe is intended to promote one or more of the corporation's social purposes is presumed «to be in the best interests of the corporation» (Wash. Rev. Code § 23B.25-060 (3)). With regard to reporting duties, differently from the MBCL, the reference to a third-party standard is not required[7].

Similarly, the Delaware public benefit corporation (Title 8, Chapter 1, Subchapter XV of the Delaware Code. *E.g.*, Dorff 2017) voluntarily differs from MBCL to provide a corporation with sustainable-oriented options while not exposing it to increased liability. This intent shows in the extremely broadly definition of «public benefit»[8], as well as in the great deal of latitude in balancing different interests given to the director[9]. Thus, directors' liability is even more limited as compared to the MBCL, especially when considering Delaware's deferential common law business-judgment rule. Furthermore, PBCs are not legally required to assess performance against a third-party standard (Del. Code tit. 8 § 366 (c) (3)). Benefit reports are only required to be submitted biennially, and there is no requirement to make them publicly available (Del. Code tit. 8 § 366).

all of (1) the corporation's employees, suppliers, or customers; (2) the local, state, national, or world community; or (3) the environment» (§ 23B.25-020).

[7] 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 (Wash. Rev. Code § 23B.25-150 (2) (d)). Differently from the MBCL, where a separate report is required, in a SPC, information on the business's «social»/«sustainable» impact can be included in the corporation's regular annual report. However, this information must be made available to the public for free on the SPC's website (Wash. Rev. Code § 23B.25-150).

[8] «Public benefit» is defined as: «a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature» (Del. Code tit. 8 § 362 (b)).

[9] The board of directors is required to manage the public benefit corporation: «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» (Del. Code tit. 8 § 365).

2.4. *The Delaware voluntary sustainability certification law*

In order «to support Delaware business entities in their global sustainability efforts», in 2018 Delaware (as the first State in the US) has adopted a legislation enacting the «Delaware Certification of Adoption of Transparency and Sustainability Standards Act» (Zeberkiewicz 2019).

The Act enables a Delaware entity (meant as any corporation, partnership, or any other organisation, as long as governed by Delaware law: Del. Code tit. 6, § 5001E (6)) to be certified as a «reporting entity», allowing it to disclose commitment to sustainability and transparency.

The decision whether to seek certification is entirely voluntary, as well as the chosen «standards», considered as «the principles, guidelines or standards adopted by the Entity to assess and report the impacts of its activities on society and the environment» which have to «be based on or derived from third-party criteria» (Del. Code tit. 6, § 5001E-14).

In order to obtain the certification, an entity has to apply to the Secretary of State, and pay a fee set by the law.

Being qualified as a reporting entity allows it to improve the business «social» reputation on the market and to attract investors interested in social and transparent investments. However, the Act expressly specifies that reporting entities are not required to disclose any trade secrets or other competitively sensitive information nor privileged information (Del. Code tit. 6, § 5001E-11f).

Finally, with regard to the entity's members' rights, the Act does not seem to recognise any right to claim the entity's decision to qualify (or not) as a reporting entity, nor to develop any specific enforcement mechanism for a reporting entity's failure to comply with the standards.

3. The European Union framework

3.1. *Introduction: The EU policy on corporate social responsibility and sustainable development*

Among the many initiatives on social economy and sustainable ways of doing business engaged at the European Union level, a cornerstone is the European Union strategy on Corporate Social Responsibility (CSR). The first European Commission communication on social economy and business is of 1989. But is the Green Paper «Promoting a European Framework for Corporate Social Responsibility», presented by the Commission in July 2001, that launched a debate on the concept of corporate social responsibility and on how to build a partnership for the development of a Euro-

pean framework for the promotion of CSR. Ten years later, a Communication of a European Commission (European Commission 2011a) provided a «renewed EU strategy 2011-14 for Corporate Social Responsibility» (on the topic, also European Commission 2016). 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 throughout Europe (literature on CSR is extensive; in Italian Angelici 2018a; Bevivino 2018; Conte 2018; Libertini 2013; Vella 2013, focusing on the role that the representation of employees in a company's board can play in the long term, in terms of sustainability).

Of the same year is the Communication on the Social Business Initiative (European Commission 2011b), which has laid the foundations for the EU policy on social enterprises.

Since then, the EU has adopted a sort of «nudging» approach, developing sectorial soft and hard law instruments to incentivise and facilitate the development of a more sustainable way of doing business (also the Regulation (EU) No 1296/2013 of the European Parliament and of the Council on a European Union Programme for Employment and Social Innovation, «EaSI»).

Among the many EU actions in this sector, some documents seem to be particularly relevant with regard to the preliminary overview this article aiming at presenting. Firstly, the Directive 2014/95/EU of the European Parliament and of the Council 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 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 the business performance and of the impact of its activity. Although such duty of disclosure only applies to companies and other entities of a certain size, the Directive does not prevent member States from extending the scope of these rules through domestic law (among Italian authors, Strampelli 2020; Fortunato 2019; Maugeri 2019, who focuses on the effects of non-financial disclosures on directors' duties; Rondinone 2019; Angelici 2018a; Bruno 2018; Assonime 2017; Bellisario 2017).

Secondly, the Communication from the European Commission entitled *Action Plan: Financing Sustainable Growth* (European Commission 2018a) 97 final), which is part of broader efforts to connect finance with the spe-

cific needs of the European and global economy for the benefit of the environment and society. Specifically, the 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 (Action Plan, at 2). The Action Plan contains ten actions, some of which have already led to political agreements, such as the Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector. Also, the European Commission has developed an EU classification system – the so-called «taxonomy» – to determine what can be considered to be a sustainable and responsible investment (COM(2018) 353 final), which has been approved by the European Parliament and the Council on 18th June 2020 (Regulation (EU) 2020/852). The Commission is also working on an EU Green Bond Standard, «to enhance the effectiveness, transparency, accountability, comparability and credibility of the green bond market without disrupting the market, and to encourage bond issuers to issue their bonds as "EU Green Bonds"» (TEG, Report on Proposal for an EU Green Bond Standard, 2019, recommendation n. 1).

Further, at the end of 2019 the Regulation (EU) 2019/2088 of the European Parliament and of the Council on sustainability-related disclosures in the financial services sector has been adopted. The Regulation is addressed to financial market participants and financial advisers, providing for harmonised rules on transparency «with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products» (Article 1).

In the same direction, the EU Shareholders Rights Directive 2 (Directive (EU) 2017/828) – aiming to enhance the business long-term view, which European institutions consider having positive effect both on the long-term value of the company and on society as a whole – requires institutional investors and asset managers to develop and publicly disclose an engagement policy that describes not only how they integrate shareholder engagement in their investment strategy, but also how they monitor investee companies on relevant matters including non-financial performance and risk, and social and environmental impact (Article 3g (1) (a)).

Finally, along these lines was already the report of the European Political Strategy Centre entitled *Sustainability Now! A European Vision for Sustainability* of 2016. The report focuses on the EU's internal dimension, in order to analyse the EU Global Strategy on sustainability that aims to integrate the UN Sustainable Development Goals into a coherent EU Foreign and Security Policy.

3.2. *The European Union framework for social enterprises*

With the 2011 Communication on the Social Business Initiative (COM(2011) 682 final), the European Commission launched the EU policy on social entrepreneurship, recognising 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».

Within the Social Business Initiative framework, the European Commission stressed three areas of priorities: increasing private and public funding for social enterprises, improving their visibility, and developing a positive legal environment.

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, involves employees, consumers and stakeholders affected by its commercial activities» (COM(2011) 682 final, p. 2).

The Communication clarifies that to be considered as a social enterprise under the EU legal framework it is necessary:

i) that the social or societal objective of the common good is the reason for the commercial activity and it is often in the form of a high level of social innovation;

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

iii) that the method of organisation or ownership system reflect the mission, using democratic or participatory principles.

In April 2013, as a follow-up to the 2011 Communication, the European Commission launched a study to analyse the scale and characteristics of social enterprise activity in member States; the national policy and legal framework for social enterprise; the support measures targeting social enterprise; labelling and certification schemes where these exist; and social (impact) investment markets. A first, very interesting report gives an idea of the scale of the phenomenon (Thirion 2017) and consists of a map of social enterprises and their eco-systems in 29 European countries (European Commission 2016b; further reports have followed; among the most recent ones, European Commission 2020 offers an update on the state and development of social enterprise in Europe). The study shows that, despite their differences across Europe, social enterprises mainly operate in two areas: work integration and personal social services (Dima (2018), pp. 242-244). Other

fields include recycling and environmental protection, sports, culture preservation, research and innovation, and consumer protection.

Finally, in 2018 the European Parliament recommended the European Commission to develop a «European social economy label» for enterprises based on the social economy and solidarity (European Parliament 2018). The label – meant to be valid in all member States – would be available on an optional basis for businesses meeting the following requirements: 1) being a private entity (independent of the State and public authorities) established within a member State; 2) pursuing a general interest or public utility; 3) being subject to a profit distribution costraint (at least partial) and to specific rules on the allocation of profits and assets during its entire life (in any case, the majority of the profits made by the undertaking should be reinvested or otherwise used to achieve its social purpose); 4) adopting democratic governance models involving employees, customers and stakeholders affected by its activities. According to the proposal, the EU Commission should also establish a mechanism of certification and monitoring of the legal label, so as to increase the business's «social» reputation on the market and facilitating access to finance. The organisation willing to maintain the label would be also required to issue an annual «social» report.

3.3. *Relevant examples of hybrid companies in EU member States*

After the overview presented in the previous paragraphs on the present framework at the European Union level, the following paragraphs will focus only on selected EU member States, and specific innovative experiences, which have been considered particularly interesting for the development of the Human-Centred Business Model project[10].

3.3.1. *Belgium: The experience of the* société à finalité sociale *and the 2019 Code on companies and associations*

Belgium has been one of the first European countries to introduce a legal framework for organisations ascribable to the EU Commission definition of «social enterprises»: the *société à finalité sociale* (or «SFS»), a social purpose company introduced in 1995 and regulated by Articles 661-669 of the orig-

[10] Spain, for example, has not been analysed since Spanish social entrepreneurship is apparently not as developed as that in other EU jurisdictions (Mas-Machuca *et al.* 2017; European Commission 2016c).

inal version of the Belgium Company Code, which has been recently superseded.

The *société à finalité sociale* allowed commercial companies to pursue goals other than profit. To be defined as an SFS, a company should pursue *exclusively* a «social goal», while profit-making goals in favour of its members were not allowed. The members could «obtain a limited profit from the assets of the company (determined by reference to a specific official rate) or no profit at all from the assets» (Unidroit 2010, p. 17). Profits and reserves had to «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)» (Unidroit 2010, p. 17). And indeed a not-for-profit association could legally convert into a *société à finalité sociale* without affecting its legal personality. Also, employees had the option of becoming members.

The law on SFS was superseded in 2019, when the new Company Code was adopted. The new Code on companies and associations applies, as the name itself suggests, to both companies and associations. However, the distinctive criteria between companies and associations or non-profit organisations has been simplified: the main criterion is the intention to distribute profits. On the contrary, the «civil» or «commercial» nature is irrelevant, with the consequence that business activities could be organised through a non-profit organisation as long as no direct or indirect dividends are distributed.

Under the new Code, only cooperatives are able to qualify as social enterprises: to be certified as an *entreprise social* a cooperative must *i*) set its main purpose to act in the general interest to generate a positive societal impact for the people, the environment or society; *ii*) not distribute any profits to its members during the life of the company, or at the moment of its liquidation.

3.3.2. *France: Towards a political engagement with a more sustainable way of doing business*

France has been recently at the centre of a legislative reform that aims to allow companies to give a broader, more varied goal to their businesses.

In March 2018, an inter-ministerial task force published a Report entitled «L'entreprise, objet d'intérêt collectif» (Senard and Notat 2018). The Report developed several policy recommendations on the basis of which the French Civil Code was amended by the so-called PACTE Act (*Plan d'action pour la croissance et la transformation des entreprises*; Law No. 2019-486 of 22nd May 2019). Recommendation No. 1, in particular, suggested to modify the 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 providing that companies should be managed in their own interest, but considering the social and environmental aspects of their activities. Further, Recommendation No. 2 suggested 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.

These recommendations have been accepted through a modification of Article 1833 of the Civil Code[11]. The latter now states that the company, which is incorporated in the common interest of shareholders, is managed in its corporate interest by also taking into consideration the social and environmental issues related to the business activity. Moreover, the *Code de Commerce* has been partially modified, and corporate directors must now manage the company in accordance with the social interest and taking into consideration the business's social and environmental impact (Articles L. 225-35 and L. 225-64). The provision seems to recall Section 172 of the UK Companies Act (paragraph 4).

However, in case of noncompliance with the new provisions of Article 1833, the corporate interest does not lead to the company's nullity (Article 1844-10, paragraph 1, of the Civil Code, as amended). A breach of the corporate interest may only lead directors to be held liable for mismanagement.

Furthermore, recommendation No. 11, in order to give a legal grounding to mission-based undertakings, proposed to enable companies to state a «fundamental purpose» (*raison d'être*) in their bylaws. Consistently, Article 1835 of the Civil Code has been amended[12]. The new provision (which came into effect on 24th May 2019) allows companies to specify, in their articles of association, their *raison d'être*, meant as those principles that will guide the company's management. This would allow social responsibly businesses to create «entreprises à mission»: businesses pursuing also social and environ-

[11] The new Article 1833 of the French Civil Code now states: «Toute société doit avoir un objet licite et être constituée dans l'intérêt commun des associés. La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité».

[12] The new version of Article 1835 of the French Civil Code declares: «Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l'objet, l'appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité».

mental objectives. Including a fundamental purpose seems to impose to the corporate directors a duty to comply with this vision[13].

3.3.3. *Germany: The absence of hybrid business legal entities within the jurisdiction of the «reputable business person» concept and codetermination*

Germany has not regulated hybrid legal organisations. There is, however, a long-lasting debate on the interests the board can, or must, pursue while managing the company. As regards what may be relevant for this research, the debate focuses on two main aspects: firstly, it is discussed whether directors have to consider the interest of shareholders, or whether they have to pursue the company's own interest; secondly, what «corporate interest» means is discussed.

The German Stock Corporation Act (*Aktiengesetz* of 1965 – AktG) does not include any reference to the corporate interest. The concept is mentioned only in Section 93(1), which states the German «business judgment rule» (Lutter 2007). In this context, Section 76 AktG – which states that the management board is to manage the affairs of the company on its own responsibility – has been traditionally interpreted by the majority of authors as the legal basis for a pluralistic corporate interest, which gives the board a certain discretion in pursuing interests other than those of shareholders, and in balancing different interests (Fleischer 2015 and 2017). This approach seems to be confirmed by the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) that, while stating that «The Management Board is responsible for managing the enterprise in its own best interests» (Principle 1), declares that «The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and

[13] The reform seems in line with the 2014 law for a social and responsible economy (Law No. 2014-856, 31st July 2014), which introduced and regulates two «labels»: the «Entreprise de l'économie sociale et solidaire» (ESS) and the «Entreprise solidaire d'utilité sociale» (ESUS). Businesses can be qualified as ESS companies if they (Article 1): *i*) pursue a social purpose of common utility (*utilité sociale*) as defined by the law (Article 2); *ii*) manage the business in a democratic way; *iii*) do not distribute any profit. Businesses can also obtain the ESUS label if they (Article 11): *i*) pursue a social purpose of common utility (*utilité sociale*); *ii*) set a cap on the compensation of directors and of certain employees; *iii*) demonstrate that the social business has an impact on the expenses of the company (as determined by the *Conseil d'Etat*, Decree 15th June 2015, No. 0145). To be defined as an ESUS company the law does not seem to require limitations on profit distributions.

its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour (the «reputable businessperson» concept, *Leitbild des Ehrbaren Kaufmanns*)» (*Deutscher Corporate Governance Kodex*, foreword). This formula seems to recall the one of Section 172 of the UK Companies Act, giving directors large freedom in defining in practice the corporate interest (Verse 2006, especially at pp. 254 ff.; for a comment in Italian, Portale 2018 and Tombari 2019). However, another part of the German literature (*e.g.*, Fleischer 2017) criticizes the stakeholder value approach in favour of the shareholder value approach stressing how the second theory better allows to contain management costs and directors' judgment (Portale, 2018, for an overview on the debate).

Germany is also, intrinsically, sensitive to worker's interests, having a long history of codetermination (the involvement of employees and labour representatives in the company's governance) (for an overview on codetermination, in English, Page 2018; Sandrock and Du Plessis 2017; Sandrock 2017). German codetermination allows workers to elect a certain number of representatives within the supervisory board (the role and number of employees' representatives depends on the industry and the overall number of the company's employees, as regulated by the *Mitbestimmungsgesetz* that applies to publicly held and private companies) or other committees (*Betriebsräte*, regulated by the *Betriebsverfassungsgesetz*). German codetermination has influenced the debate on the opportunity of employees' involvement in corporate governance across European jurisdictions, especially in France, where forms of employees' administrative rights have been widely expanded in 2013 (Article 9, Law n. 504/2013 introduces Articles L. 225-27-1 1, and 225-79-2 1; Corti 2014) and in the U.K. where proposals in this direction were presented in 2017 (McGaughey 2017; for a recent overview of the Italian discussion on employees' involvement in corporate governance, Pagani 2019).

However, as mentioned, despite the important debate on the corporate interest and the German long-lasting tradition of codetermination, in Germany there is no specific hybrid model for doing business. Nevertheless, the flexibility of the GmbH model (the German limited liability company) has allowed the development of the *gGmbh*, i.e. the «gemeinnützige Gesellschaft mit beschränkter Haftung», a non-profit limited liability company which does, however, suffer various limitations, given in part to the restricted number of non-profit activities recognised by tax law and in part to specific features of the GmbH model (European Commission 2018b and European Commission 2020, p. 110).

Moreover, applying the «operational» EU definition of social enterprise introduced by the Social Business Initiative (paragraph 3.2), no specific legisla-

tion on social enterprise seems to exist in Germany; «neither does any legal delimitation of the phenomenon, and public agencies still diverge in their understanding of the concept. At this stage, the involved ministries do not seem bothered by the absence of an ultimate or official definition of the term», as reported by the European Commission (European Commission 2018b). Nevertheless, eight types of organisations have been considered as «social enterprises» in the German context (European Commission 2018b). Among these types, there are at least two examples that should be mentioned in this context:

i) enterprises for the inclusion of persons with disabilities, which include both «Werkstätten für behinderte Menschen» and «Inklusionsunternehmen»; and

ii) enterprises for the integration of low-qualified youth, long-term unemployed and persons with labour market disadvantages other than a legally recognised handicap. These are both work integration social enterprises, which cannot however be defined as «types» of business organisations (European Commission 2018b).

3.3.4. *The Italian experience of the società benefit and the recent reform of social enterprises*

Italy was the first European country to adopt a legal regime for the «società benefit», a hybrid company based on the US benefit corporation experience (paragraph 2), and is thus probably the most advanced legal framework in Europe in this respect.

As in many continental European jurisdictions, until 2016 Italian companies could only be used to pursue for-profit goals (according to Article 2247 of the Italian Civil Code; Tombari 2019), which is why, in order to do business that aims to balance profit and social/environmental goals, a new specific legal provision introducing the Italian *società benefit* was necessary (Act 28th December 2015, No. 208, Article 1, paragraphs 376-382; any business organisation type can now be converted into a *società benefit*, including cooperatives and partnerships).

The *società benefit* is conceived as a for-profit company, which aims to generate 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». The general and vague definition of public benefit recalls the Delaware Public Benefit Corporation more than the US MBCL, while the third-party standard seems inspired by the latter (on the *società benefit*, Angelici 2018b; Marasà 2018; Bartolacelli 2017; Denozza and Stabilini 2017; Palmieri 2017; Stella Richter Jr. 2017; Corso 2016; Lenzi 2016).

The «public benefit» must be defined in the certificate of incorporation. Directors must balance the profit goal with the pursuit of the public benefit; some authors have talked about a «benefit judgment rule» to stress the specificities of management duties of the *società benefit* (Stella Richter Jr. 2017).

Directors can be considered as potentially liable in the case of a wrong balancing. However, the regulation on *società benefit* is complemented with ordinary legal provisions on corporate governance structure and enforcement mechanisms for directors' misconduct: such rules have been created in a profit-centric way, and do not specifically take into account their application to a hybrid organisation. For example, directors' liability for misconduct requires that the company has suffered damages: besides reputational damages, it is hard to imagine how preferring profit over social or environmental goals can cause an economic loss to the company.

Similarly, nothing is said with regards to appraisal rights for dissenting shareholders in case an existing company is «converted» into a *società benefit* (Stella Richter Jr. 2017; Corso 2016).

The appointment of a «benefit director» («responsabile per il perseguimento del beneficio comune») is mandatory, and the company must publish a periodical report on the achievements of the public benefit and its developments.

Finally, consistently with the US experience, the Italian *società benefit* does not provide any involvement of stakeholders in the company's governance.

There are currently no tax advantages for the *società benefit* and only recently, has a law decree introduced a tax credit for benefit corporations to be further regulated by the Minister of Economic Development (Article 38-*ter* of Law 17th July 2020, No. 77). Nonetheless, the model has proved quite successful (as of September 2020, the Italian B Lab website indicates 257 *società benefit*; however, since the register is private and registration voluntary, it does not include all Italian benefit companies).

Social enterprises («imprese sociali») are also an important feature of the Italian system (Mosco 2018, for a comparison between *società benefit* and *imprese sociali*).

A social enterprise model exists in Italy since 2006 (Legislative Decree 24th March 2006, No. 155), when the law provided a legal status that could be obtained by any non-profit organisation having specific social purposes (for an overview of the phenomenon of social enterprises in Italy European Commission 2016d). Legislative Decree 3rd July 2017 No. 112 (subsequently amended) repealed the previous legislation on social enterprises and newly regulated the model, as a «third sector» organisation (Article 19).

To be defined as such, a social enterprise has two main options: *i*) it must carry out – as its primary business – one of the activities of public or general interest as listed and (narrowly) defined in Article 2. There are more

than 22 activities, mainly in the areas of education, welfare and health, which are considered having per se a positive social impact so that no further inquiry is required (this is not the case in other jurisdictions, where businesses have to pass a test verifying the generated benefit for the community; i.e. community interest companies in the UK – paragraph 4). However, under the reformed legal framework, social enterprises can exercise these «social» activities also together with other commercial activities, as long as 70% or more of the total profits come from the main social business activity; or, *ii*) they can exercise any business as long as the way in which business is carried out has a «social impact», i.e. hiring of at least 30% of disadvantaged workers (disabled people, former inmates, people with drug addictions, etc.). In this case, the social enterprise can exercise any business activity and it is not limited to the ones listed in Article 2.

As under the previous framework, Legislative Decree No. 112/2017 does not create a new legal entity. Rather, almost any kind of entity can be organised as a social enterprise (Article 1): associations, foundations and non-profit organisations, companies (with the only exceptions of single-member companies) and cooperatives (social cooperatives – regulated by Law 381 of 8th November 1991 – are automatically qualified as social enterprises: Article 1 (4)).

The most relevant characteristics of the new *impresa sociale* can be summarised as follows (special issue of *Analisi Giuridica dell'Economia*, Volume No. 1/2018, for an analysis of the new *impresa sociale*). Firstly, the social enterprise's articles of association or incorporation should provide for procedures for stakeholder consultation (the focus is mainly on employees), and stakeholders should be enabled to exercise a certain influence on the management (Articles 10 and 11). However, notwithstanding the fact that stakeholders' involvement is required, directors seem to remain subject to the same traditional fiduciary duties, which are owed to members of the organisation only. No form of stakeholders' enforcement is provided. Secondly, under certain conditions social enterprises can distribute profits up to a certain threshold (less than 50%; Article 3). This can be probably considered as the main innovative aspects of the Italian reform, and as a unique example among EU member States: within the European context, social enterprises were indeed traditionally characterised by the impossibility to distribute any profit (Fici 2016).

Also, social enterprises must draw up a non-financial annual report, to be published on the national business register and on the SE's website (Article 9 (2)). Furthermore, profits are tax exempt if they are reinvested into the social enterprise and not distributed to its members; below certain thresholds and under certain conditions (among which that the investment must be made for at least three years), money invested in an SEs is tax deductible for the investor (Article 18 Legislative Decree No. 112/2017 as modified by Legislative Decree No. 95/2018).

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

The UK legal framework is mainly of an enabling nature. Section 172 of the UK's Companies Act 2006, entitled «Duty to promote the success of the company», requires 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». Therefore, in doing so, directors may take into consideration the interests of stakeholders other than shareholders, such as the one listed in the Section: employees, suppliers, consumers, community and the environment. Further, they should consider «the desirability of the company maintaining a reputation for high standards of business conduct» and «the need to act fairly as between members of the company». The Section is meant to promote the so-called «enlightened shareholder value» principle (Keay 2012; for a critique, *e.g.*, Davies and Worthington 2016).

However, Section 172 has been heavily criticised as being nothing more than a «codification of directors' duties». Also, no specific enforcement mechanisms have been provided, while a common remark is that putting the interests of different stakeholders (*e.g.*, employees and the environment) at the same level could actually generate conflicts of interest (Tsagas 2017). «Thus» – it has been said – «the exhortation to boards to pursue their corporations' interests is less an equal sharing norm than, at best, a vague counsel of virtue, and, at worst, a smokescreen for board pursuit of their own interests» (Enriques *et al.* 2017, p. 98).

The UK legal framework deserves attention in this context also with regard to «community interest companies» (introduced by the Companies (Audit, Investigations and Community Enterprise) Act of 2004, they are now regulated by the Community Interest Company Regulations of 2005, and they also have to respect the general rules of company law, as regulated by the UK Companies Act of 2006) (Cabrelli 2016; Copp 2009).

The community interest company (CIC) consists in a legal model of «social enterprise», meant as a business aiming to meet the economic needs of producing goods and services with the primary purpose of improving the benefits of their stakeholders (Boeger *et al.* 2018). Any company may elect to become a community interest company (Companies Act 2004, Section 26 (1) and (2)). To be defined as such, a community interest company should respect the following requirements:

i) «passing» the community interest test, that is that a «reasonable» person should judge the community interest company's business as generating a benefit for the community (Section 35(2) of the Companies Act);

ii) corporate profits should be mostly retained within the company to fund its activities and used to benefit the community. Community interest

companies can also carry out collateral normal business activities, but 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 community interest company (the Regulator of Community Interest Companies Annual reports, available at www.gov.uk/government/publications).

Several provisions aim at ensuring that assets and profits are not diverted from the intended community goals, through an asset lock (*e.g.*, Section 1 of Annexes No. 1, 2 and 3 of *Community Interest Company Regulations of 2005*, in relation to the possibility to transfer business's assets) and a dividend cap. In 2014, the dividend cap was simplified and is now calculated only on profits, so that at least 65% of profits should be reinvested within the company. A cap is also established for interest rates to debt holders (so-called «interest cap»; Annex 4). The dividend cap is meant to strike «a balance between encouraging people to invest in CICs and the principle that the assets and profits of a CIC should be devoted to the benefit of the community; so to help ensuring that the dividends are not disproportionate to the amount invested and the profits made by the company» (UK Department for Business, Energy & Industrial Strategy 2016). The same balance is sought, as recalled earlier, by the Italian law on «social enterprises», which was amended in 2017: the prior total non-distribution constraint (of 2006) was scaled down to a limit of «less than 50%» profits that can be distributed.

5. Latin America: A brief overview on the B Corp movement and the *Colombian Sociedades BIC*[14]

South America is subject to a wave of innovations in terms of social entrepreneurships also due to the fact that the B Lab movement is extremely active in the area and it is being quite successful in pressing for the adoption of *ad hoc* legal frameworks at the country level, promoting the introduction of the «sociedad BIC», a legal organisation inspired by the US MBCL and the Italian *società benefit* experiences as well as the UK Community Interest Company.

Being the second country outside the United States after Italy to regulate benefit corporations, Colombia has passed the law introducing the *sociedades comerciales de beneficio e interés colectivo (BIC)* (Law 8th June 2018, No. 1901, and Regulation No. 2046/2019). Similarly to the US and Italy, BIC

[14] Paragraph 5 has benefited from the work of Irais Reyes de la Torre, which dates back to April 2019.

companies are not a new type of organisation. To become a BIC, a company is required to modify its articles of incorporation (with standard majorities for charter amendments) including in them the pursuit of a «public benefit», which is not specifically defined in the law. Directors must balance the corporate interest (identified with the one of its members) and the public benefit as defined in the bylaws (Article 4). However, comparing to the models it is inspired by, the Colombian BIC seems to specifically focus on employment rights (Article 2). In a way similar to that of the Italian law on *società benefit*, BICs have to publish a report on the improvements in its pursuit of the public benefit (Article 5), and the report should be consistent with independent standards (Article 6).

In Argentina, a draft law proposed by the executive power in 2016 and approved by the lower chamber at the end of 2018 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 (Law Proposal n. 58/2018, «Proyecto de ley en revision que establece el regimen de sociedades de beneficio e interes colectivo (BIC)»; in January 2020, the law was in the process of being discussed by the Argentinian parliament: https://www.senado.gov.ar/parlamentario/comisiones/verExp/58.18/CD/PL). The proposed law is very detailed as compared to the US MBCL or the Italian *società benefit*, since it specifically regulates important corporate governance aspects such as enforcement mechanisms, members' appraisal rights, and thresholds for profit distribution. It also requires companies to develop an annual report describing the actions carried out to comply with the self-imposed social and/or environmental goals, which should be audited by an independent registered professional specialised in the subject. At this stage, the draft law does not seek to introduce a new corporate type; nor does it provide any tax exemption or fiscal benefit.

A new regulation, similar to the Argentinian one, has been proposed in Brazil as well. It appears that the Brazilian group of experts in B Corp has finalised the third version of the draft law, which resembles the Italian law on *società benefit*. In June 2017, a draft bill was presented in Parliament aiming at regulating the creation and operation of «beneficial companies» and «collective interest companies». This project does not regulate the management of the assets of the company nor the distribution of its profits, but only the enforceability of compliance with the purpose adopted in the corporate bylaws and the report that the companies must perform annually.

Similar initiatives were also taken in Peru and in Uruguay (for a comparative overview of social enterprises and hybrid organisations in Latin America, Silva 2018).

6. Asia: An overview[15]

China, Japan and South Korea are marked by a co-operative and associative tradition, which have remained for a long time under the strict control of the administrative and political power. Only recently this public interventionism has faded in Japan and South 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. However, South Korea and Thailand are, for what it is concerned, the only Asian countries that provide an *ad hoc* legal framework for social enterprises.

6.1. *A legal framework for social enterprises: The case of South Korea*

With the only exemption of South Korea and Thailand, Asian countries do not have regulated the phenomenon, nor they have converged to a common definition of «social enterprise», «social entrepreneurship» and «community business», but there still seems to be as many definitions as there are Asian countries[16].

With the 2007 Social Enterprise Promotion Act (SEPA), South Korea became the first Asian country to enact a specific legal framework to support social enterprises (Act No. 8217, 3rd January 2007). The Act is part of the Korean Labour Laws, and the Minister of Employment and Labour is re-

[15] This paragraph has benefitted from a research developed by Alessandra Pedinotti and Li Jiankun, and is current as of April 2019.

[16] While there is no 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 to catalyse knowledge creation and movement-building for social entrepreneurship in Asia. More and more entrepreneurs in Malaysia are indeed self-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.

No legal framework for social enterprises exists 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. Furthermore, two bills that could have a direct impact on social enterprises have been under discussion in recent years: the Social Value Act (Senate Bill No. 350, filed on 4th July 2016) and the Poverty Reduction through Social Entrepreneurship («PRESENT») Act (Senate Bill No. 2108, filed on 21st November 2018). However, these bills still do not seem to have been passed, and PhilSEN is currently lobbying for the PRESENT Act in both the Senate and Congress in order to promote social enterprises.

sponsible for implementing a plan for the promotion of social enterprises every five years after the deliberation of the Employment Policy Council. Social enterprises have been indeed introduced with the primary aim of providing new job opportunities (Defourny and Kim 2011).

Any association regulated by civil law, non-profit organisations carrying out business, and corporations as regulated by the Commercial Act can be certified by the Minister of Employment and Labour as social enterprises (Bertotti *et al.* 2014)[17], if they comply with the following requirements (Articles 7 and 8):

i) The main purpose of the enterprise must be to realise a social objective, as defined by an *ad hoc* Presidential Decree;

ii) A social enterprise must have a decision-making structure in which interested parties, such as service beneficiaries and workers, can participate. The law does not, however, specify which mechanisms should be used to ensure such participatory governance and the stakeholders' involvement in general;

iii) Revenues from business activities of social enterprises must not exceed certain limits defined by the law. Specifically, Article 3 states: «A social enterprise shall make efforts to reinvest the profits generated through its business activities into the maintenance and expansion of the social enterprise» (Section 3); and «no associated enterprise shall gain the profits generated by a social enterprise» (Section 4);

iv) If the social enterprise is organised as a company under Commercial Law, whenever it has distributable profits, it must spend at least the two-thirds of the profits of each fiscal year on social objectives (Article 8).

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 (Article 12). The Minister of Employment and Labour also supports social enterprises with professional consultation on management techniques (Article 10), taxation (Article 13), labour affairs (Article 14), accounting and others.

The South Korea legislation on social enterprises has inspired Thailand that in 2010 has adopted the Thai Social Enterprise Office (TSEO), which has been established under the Thai Health Promotion Foundation Act.

[17] In 2014, social enterprises were mainly organised through companies (50.7% of the total), followed by organisations under the 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%).

6.2. *China: Farmers' Specialised Cooperatives and Social Welfare Enterprises*

China does not have a structured legal framework for social enterprises. Also, due to the similarities of the Chinese translation of «social enterprises» and «corporate social responsibility», the two concepts have often been considered to be synonymic (Man and Kai Terence 2013; Defourny and Kim 2011; Wang and Zhu 2010).

Among the different Chinese organisational models, there are mainly two examples that seem to be somehow characterised by a balance between profitability and social sustainability: *i*) farmers' specialised cooperatives; and *ii*) social welfare enterprises.

In general, China has a massive cooperative sector (around 160 million families involved) (Defourny and Kim 2011), especially focused on agriculture; also private co-operatives operate under the strict control of public authorities.

The farmers' specialised cooperative (FSC) is a mutual-aid economic organisation, which is voluntarily adopted for the production and management of agricultural products, in favour of its members (Law of Farmer Professional Cooperatives of 31st October 2006, revised by the Law of the People's Republic of China on Farmers' Professional Cooperatives, issued by the Standing Committee of the National People's on 27th December 2017).

To be defined as FSC, as a general rule at least 80% of the cooperative members must be farmers. It must aim to provide services to its members, seek the common interests of all its members, ensure the equal treatment of its members and the free withdrawal from membership, and it must be managed in a democratic way. Any surplus is to be returned to the members according to the volume (amount) of transactions with the farmers' professional co-operative.

According to the law, a farmers' specialised cooperative can invest in enterprises and other companies, and take limited responsibility for the enterprises they invested in, although it cannot be listed on the capital market.

Being a farmers' specialised cooperative can be rewarding in terms of dedicated legal benefits, such as fiscal support, preferential tax treatment, and other financial and capacity building support.

Another interesting example in China can be found in Social Welfare Enterprises. Regulated by the «Law of the People's Republic of China on the Protection of Disabled», social welfare enterprises are businesses set up for the employment of people with physical or mental disabilities (the minimum of 50% of employees was then reduced to at least 25% of employees). Due to the social positive impact, tax benefits are provided (Xiaomeng 2016). Even if, since the 1990s, those models have started to decrease, in 2008 there were still 23,000 social welfare enterprises across China, employing nearly 620,000 people with disabilities (Defourny and Kim 2011).

Finally, in 2016 the B Corp movement has reached China, where it is however growing slower than in other countries: since 2016, only 13 companies have been certified as BCorps (https://www.bcorpasia.org/china/).

7. Australia: The indigenous corporation and the developing framework for benefit corporations[18]

7.1. *Overview*

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 the directors' fiduciary duties (firstly, 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 enterprises enough flexibility to pursue their social goals in circumstances in which profit may be compromised. Also, there is no specific legal framework for social enterprises in Australia. However, widespread consensus describes them as organisations with an economic, social, cultural or environmental mission that is consistent with a public or community benefit; and whose majority of profits or surpluses is re-invested into fulfilling their mission. Considering such «operational» definition, there were approximately 20,000 social enterprises operating in Australia in 2016, with an annual turnover that varies from zero to AUD 199 million. These «social enterprises» are mainly associations (32.8%), followed by companies limited by guarantee (31.3%), and private companies (18%). While the most common pursued social goals, as of 2016, were income equality and poverty alleviation, creating meaningful employment opportunities for a specific group of individuals, or developing new solutions to social, cultural, economic or environmental problems (Centre for Social Impact *et al.* 2016).

7.2. *Indigenous corporations*

An interesting model, which may be of inspiration for the development of hybrid, sustainable companies especially for micro and small enterprises, is the Australian indigenous corporation.

Indigenous corporations are a type of limited liability company that is only available for Aboriginal and Torres Strait Islander (ATSI) organisations (which however are not limited to organise their business through this legal

[18] Paragraph 7 is based on the work of Ashna Taneja.

structure). The idea was to create a corporate structure that suits the specific needs of a marginalised community and accounts for its limitations. Indigenous corporations, for instance, can take into account the Indigenous customs and traditions in their bylaws (referred to as the «rule book»). Also, they are monitored by a specialist regulator, the «Office of the Registrar of Indigenous Corporations» (ORIC), rather than the Australian Securities and Investments Commission.

To incorporate as an indigenous corporation the following requirements must be met: *i*) at least 5 members must be ATSIs; *ii*) there must be no less than 3 and no more than 12 directors on the board; and *iii*) the majority of directors must be ATSIs.

It is interesting to notice the central role played by the ORIC, oriented at simplifying the creation and development of indigenous corporations, and making the whole process cheaper for businesses. Firstly, ORIC has additional powers beyond pure regulation and it provides indigenous corporations with simplified and cheaper processes for registering (for example by providing a bylaws model that only needs to be filled in with the business personal information) and simplified reporting. Also, ORIC assists indigenous corporations through several services, from face-to-face training in remote areas and telephone advice, to dispute resolution services and assistance with examining books and records to identify financial and corporate governance issues. ORIC also provides access to free legal advice through an in-house «LawHelp» service.

Finally, even if indigenous corporations are, by default, for-profit entities, they can also register for non-profit status and operate accordingly. However, directors remain subject to the same fiduciary duties to their members only; and the desired beneficiaries underlying the social purpose are the members of the indigenous corporation.

7.3. *Proposal for the introduction of benefit corporations*

In 2016, the Australia and New Zealand branch of B Lab formed a working group composed by academics, lawyers, business leaders, and governance experts to draft amendments to the Corporations Act (2001) and to set up a regime for benefit corporations in Australia. On 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.

The proposed amendments are inspired by the US Model Benefit Corporation Legislation (available at www.consult.treasury.gov.au; attachment «C»): the Australian benefit company must have a purpose of creating a general public benefit in its constitution and may include a purpose of creating one

or more specific public benefits (proposed Section 125A(1))[19]. In managing the corporation, the directors 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 the general public benefit it has elected to pursue and any specific public benefit purpose in its constitution (proposed Section 190C). Directors need to consider all these matters equally, unless the benefit company has stated in its bylaws that they must give priority to certain matters related to the accomplishment of the general public benefit purpose or any specific public benefit purpose in its bylaws. This gives directors a broad discretion in managing the company. Finally, the proposal allows profit distribution with no limitation except the ones imposed by general company law (like in the US or Italy).

8. Israel[20]

In Israel, companies and partnerships must strive for profit maximisation, and the pursue of stakeholders and public interests is possible as long as it is somehow realised in the shareholders interest.

Israeli public benefit companies (PBCs), while sharing the name, have very little in common with the Delaware model in the US. Israeli PBCs are the organisations mostly employed by public and national institutions such as museums, schools, synagogues, or research and policy-making institutes. They pursue social goals only, and cannot distribute any profit[21]. PBCs differ from non-profit

[19] Proposed Section 125A(1) defines what a positive social impact is and requires at least one purpose of creating general public benefit: «(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».

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.

[20] Paragraph 8 is based on the work of Tehilla Schwartz and is current as of April 2019.

[21] They are regulated by the Companies Law, No. 5760-1999, but they are also partially subject to the same regulator of non-profit organisations (the Registrar of Amutot). Non-profit organisations (Regulated by the Amutot Law, n. 5740-1980) can exercise business activity as

organisations since PBCs are companies by definition, while non-profit organisations can choose to be organised as a company, but do not have to; and the social goals must be chosen from a predetermined (extremely broad) list provided by the legislator (Schedule II of the Israeli Company Law). Very much like non -profit organisations, PBCs must provide proper reporting on the promotion of social goals; and they can have access to tax benefits.

Notwithstanding the lack of a legal framework for «hybrid» companies, it is possible to observe a growing interest for sustainable businesses in Israel (*e.g.*, Israeli Ministry of Economy 2014), from the abundance of facilitation in the form of social impact funds, accelerators and hubs, as well as the development of a Forum for Social Enterprises (*e.g.*, *The 8200 Social Program* at https://www.8200impact.com), striving to aggregate the relevant information on social business in Israel, which, however, provides minimal, if any, legal guidance (Gidron 2010; Feit 2011).

In 2017, a joint initiative of the Israel Venture Network – a venture philanthropy network that invests in social businesses – and various parliament members from different political parties, brought forth a legislation proposal (Legislation Proposal 4088/20/P) to create a tailor-made legal structure for social enterprises, a process of approval which is still ongoing. 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 social enterprises. If the law passes, Israeli social enterprises will be required to identify social goals among those listed by law (excluding the mere activity of donation to other entities) within the company bylaws. Directors will have to, consequently, prioritise the social goal over profit maximisation. If the company wishes to change the goal, a 75% majority vote and the approval of the Registrar of Companies are required.

With regard to profit distribution, the company will be permitted to put a cap up to 50% on profit distribution of shares. This cap would only apply after the initial investment has been returned. Changing the cap on profit distribution would be possible only with the 90% majority and the approval of the Registrar, or with the permission of the court.

A social enterprise will then have to 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.

long as they remain not-for-profit. Coherently, profit distribution is prohibited, and non-profit organisations' memberships cannot be transferred or sold. A «Certificate of Proper Management» – issued by the Registrar of Amutot after an examination of compliance – must be obtained in order to receive tax benefits. A key component to receiving the certification is a non-financial annual report detailing the actions taken to promote the non-profit organisations' objectives, the organisational structure, etc.

9. An overview of governance issues

9.1. *The issue in general*

Hybrid organisations challenge common assumptions and require special rules: once the goals are set, one must worry about compliance and enforcement.

Business organisations that were conceived to make profits (such as companies) or anyway to serve selfish goals (cooperatives) have in place corporate governance mechanisms that are based on the assumption that directors should serve the interests of shareholders or members in the first place; profit is a relatively straightforward way to measure performance.

Pursuing mixed (hybrid) goals complicates the picture, because the beneficiaries of the organisation are no longer one constituency (shareholders), but at least two and often more. On the other hand, the rules on non-profits – in particular those that seek to avoid that funds collected by the organisation are not diverted from its charitable goals – do not apply to hybrid organisations, thus requiring substitute rules (in general, *e.g.*, Plerhoples 2015).

Various issues, therefore, come to the forefront. We have seen some possible solutions offered for hybrid organisations in general, across jurisdictions. How can you ensure that capital, both equity and debt, raised in the light of the «human-centred» nature of the business is not diverted from its intended goals and perhaps even distributed to shareholders? How can you properly measure performance in non-financial terms? How can you make sure that managers and directors pursue the goals they were meant to or, at a higher level, how can you avoid that shareholders change their mind and pursue only profit? Further, how can you make sure that managers and directors appeal to the not-for-profit goals of the organisation to justify sub-optimal and perhaps self-interested decisions? These and many other are the questions that arise in the context of corporate governance of hybrid organisations and should be addressed in any project of a HCBM. The risks of inadequate monitoring, underperformance in non-profit goals, mission drift (if not «bait and switch» marketing to investors), are significant and could have serious, perhaps irreparable negative reputational effects on the whole of the sector if not credibly curbed.

9.2. *Capital lock-in and profit distribution constraints*

A pivotal element on any business which is not solely profit-maximising is how to ensure that capital, both equity and debt, raised in the light of the hybrid nature of the business is used to pursue the intended goals.

Many laws already provide for such mechanisms, at least in part: there are rules that impose reinvestment in the business and mandate that, upon liquidation, all raised capital, exceeding capital paid-in by members, does not exit the «social stream» and is given to other organisations. Capital that members can recoup is usually increased to the extent necessary to preserve present value or to offer some minimal form of remuneration (this is usually the rule in cooperatives).

Distribution constraints regard both capital (hence are another face of asset lock) and profits. Profit distribution constraints can be designed so as to limit the amount of profits that can be distributed relative to the total profits (*e.g.*, no more than 50% of annual profits can be distributed, after accounting for previous losses and legal or voluntary capital reserves, etc.) or can be capped relative to a certain maximum return relative to the capital invested (*e.g.*, a certain percentage above a relevant benchmark, that could be that of a central bank's base lending rate or that of treasury bonds, etc.).

Asset lock and distribution constraint have three main finalities:

i) firstly, of course, they avoid the organisation's funds being distracted from the intended goal and, as a correlated effect, also support self-financing of the organisation, which is particularly important given the *de facto* constraints to financing that usually «social» enterprises face;

ii) secondly, they also screen investors, who already know *ex ante* that they can only expect a certain return;

iii) thirdly, especially if defined in terms relative to capital invested (rather than a percentage of total profits) they mitigate the risk of «mission drift» – i.e. the risk of a business starting as a hybrid, later tending only to profit – under the pressure of investors or of managers' selfishness.

Interestingly enough, while non-distribution constraint is a staple of non-profit organisational law in any country, this is not so for businesses that go under a «social» tag: as mentioned above, «social» has different implications on the point in Europe and in the US (paragraph 2).

The issue of whether or not a capital should be locked in and whether there should be distribution limits is an open question and, as mentioned above, the answer could well depend on a global consideration of the specific features of the relevant jurisdiction.

Connected to the asset lock is that of change of purpose: whether it is possible, who decides it, what remedies are given to dissenting shareholders, to affected stakeholders, and to the public (*e.g.*, when there were tax advantages connected with the organisation's prior status). Some jurisdictions give appraisal rights (Argentina, paragraph 5), some do not (Delaware, paragraph 2.3; Italy, paragraph 3.3.4), some require a supermajority, and some the approval of an authority (Israel, paragraph 8).

9.3. *The «two (or more) masters» problems*

Among the issues that hybrid forms raise is that of fiduciary duties of directors and to whom they are owed. In for-profit companies, the system is based on *a*) a comprehensible and shared metric of success (share price, profit) and *b*) shareholder interest. Hybrid forms raise both problems.

The «two masters» problem refers to the fact that, in hybrid companies, managers and directors owe fiduciary duties not only to one principal (shareholders), but to more than one, i.e. the different stakeholders involved (Bebchuk and Tallarita 2020 for a discussion on the difficulty of selecting the stakeholders to be protected). This issue is the object of a significant debate with reference to benefit and special purpose corporations, mainly in the US, and authors tend to concur on the idea that directors may gain even more discretion in their decisions if they are given the power (and duty) to balance shareholders' interests with those of interested stakeholders (McDonnel 2014). Given that enforcement primarily lies with shareholders, the most likely effect of enhanced discretion is that decisions will be slanted towards shareholders, rather than the social purpose. Therefore, one of the possible solutions is to clearly prioritise social goals (apart from structural measures such as dividend caps mentioned above), which in turn raises the concern that so doing would stiffen excessively the matter of fiduciary duties and agent discretion in hybrid companies (Gold and Miller 2018).

Further issues may arise when shareholders are happy to pursue idealistic goals even when losing on some of their profit, but directors must mediate among different interests of apparently equally deserving stakeholders. Besides director discretion, a key feature becomes the setting of the special benefit and stakeholder prioritisation made by the company (in its charter or bylaws). This could be explicit (as in proper «public benefit plans» – Winston 2018) or could result implicitly from the allocation of power among stakeholders different from shareholders.

9.4. *Governance mechanisms*

In order to make sure that proper goals are pursued, organisations can rely on the panoply of governance devices. As mentioned above (paragraphs 2.3 and 3.3.4), benefit corporations in most States may have a «benefit director». The director would be elected, as the rest of the board, by shareholders.

This is a possibility, as is having an adequate number of independent directors, even when this is not required by the law or by market rules. However, the problem with benefit directors or independent directors in general

is that – similarly to what happens with control of related-party transactions – while they can be an excellent bulwark against managers' pursuit of profits against the will of shareholders, the device does not work when the departure from social goals is supported by shareholders to the detriment of stakeholders that should benefit from the company's business.

There is ample space, therefore, for stakeholder representation, participation and in general empowerment, to different degrees and with different systems: advisory boards, committees having consulting or veto power, the election of one or more directors, or direct stakeholder voice over some issues (or even all issues otherwise demanded to shareholders), depending on which stakeholder groups should be involved (McDonnell 2018; Murray 2017; Brakman Reiser 2013).

Stakeholder representation is easier when stakeholders are homogeneous and concentrated: employees are, therefore, the ideal candidates for stakeholder representation, which has well known precedents, even mandatory, in many countries (as in Germany, as mentioned above, paragraph 3.3.3). It becomes increasingly difficult, on the other hand, to offer proper representation to somewhat abstract (sets of) stakeholders such as the «environment».

When designing a hybrid model (and in particular a HCBM) it should be decided whether stakeholder participation, beyond mere advice, should be essential. Indeed, such a mechanism could show deep commitment, but could, of course, cause undesired consequence in terms of loss (or weakening) of control to people that have paid nothing to be empowered and could lend itself to opportunistic behaviours.

It should also be noted that allowing stakeholders to elect directors may not be always possible for some entities in some jurisdictions and may require complex charter provisions or workarounds that may not always be effective.

9.5. *Non-financial reporting*

Key to any governance device are disclosure and reporting (paragraph 3.1). Almost all laws provide for some sort of non-financial reporting for social businesses and benefit corporations, and recent developments at the European Union level are indeed relevant in setting standards, as well as private initiatives such as GRI (Global Reporting Initiative 2016).

Reporting obligations are relevant in at least two respects: firstly, they force the company to consider and record all aspects that have to be reported. It therefore helps focusing on the environmental and social impact of the company. Secondly, it is a premise to any kind of enforcement. Absent information, it is impossible to require compliance and, in the worst case, to bring legal action.

Disclosure of non-financial information should be assured at least in two directions: from the directors/managers to the members of the organisations (*e.g.*, its shareholders); and from the organisation to the public (the market and the stakeholders in general). A disclosure to the public can reassure investors and consumers or clients on the «human-centred» behaviour of the business.

9.6. *Private and public enforcement*

Governance rights and disclosure must be supported by a serious threat of enforcement, both private and public.

The latter can come in many forms. In the context of social enterprises tilted towards non-profits, as well as with cooperatives, it is common to have public administrative controls upon formation and then during the life of the company, with reporting requirements to public authorities, periodical routine audits by such authority, etc. Similar devices have been suggested, in a completely different context, also for benefit corporations (Hacker 2016); however, the problem with any kind of public enforcement is, in the best case, lack of resources on the part of the public authority, and often inefficiency and formalism – the «tick the box» attitude – which could lead directors to obey only the letter of the law or of the corporate charter.

Private enforcement is also problematic (Brakman Reiser 2013; Loewenstein 2013). Benefit statutes provide for possible derivative actions (benefit enforcement proceedings), but standing is given only to shareholders. This would make the action potentially effective if shareholders were those committed to the purpose and the mission drift came from directors, which is possible, but improbable – rather, managers, more than non-executive directors, could share a more profit-oriented vision, and the board should be enough to curb such perspective. It is improbable that, of all actors in a benefit corporation, directors, absent shareholder pressure, would seek profit at the expense of the stated social goal. Of course, the board could be subject to pressure by controlling shareholders, in which case a derivative action may make sense. Any derivative action – especially outside the very peculiar US legal environment – would face the usual collective action problem due to the absence of incentives, in this case even worse than in usual cases in profit-oriented companies because damages would be very difficult to assert and prove (besides the fact that, according to the model law in the US, directors would not be «liable for monetary damages for failing to pursue or create a general public benefit or a specific public benefit» as set forth by the charter) (McDonnell 2014).

The same reasoning would apply also to investors other than shareholders, who were deceived in extending credit or buying securities by the prospect of investing in a business with a positive impact.

10. Final remarks: Why we need the Human-Centred Business Model and what works for it

This article attempts to skim the surface of «social» businesses, in the broadest sense, around the world, listing some examples and drafting a work plan on the need to deepen and broaden the research, but some trends and needs can be identified in order to better focus on the possible role of the Human-Centred Business Model and on the issues it will face. However, some preliminary conclusions can be drawn.

It should be noted that we are not advocating a vision under which all companies necessarily should embrace stakeholderism or that the protection of stakeholders by means of corporate governance devices should be mandated (recently on the subject with different approaches, Bebchuk and Tallarita 2020; Fisch and Davidoff Solomon 2020; Mayer 2020; Rock 2020; Sjåfjell 2018). To be true, the idea of hybrid models is to make it clear to all players – first of all, investors – that the company that chooses to organise under such form has a broader, non-shareholder centric, corporate purpose. Moreover, when selecting and designing a hybrid model, members can make their commitment stronger by putting in place «heavy» devices such as stakeholder representation on the board, stakeholder standing to sue, etc.

That said, the inventory of the existing models of «hybrid forms» of doing business in a more sustainable way, together with the growing European and international awareness testify how policy and lawmakers 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 started to take place in the debate about the role of business in society (Sjåfjell and Bruner 2020). 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 enacted laws that both enable and foster an environment in which businesses can play a more positive role in society (as mentioned, this is not to say that such perspective should be mandatory; it should only be made very clear to the public). As part of this effort, many legal systems have enacted legislations to create corporate governance structures that enable businesses to make decisions and carry out operations in more socially oriented ways.

However, something is still missing. Firstly, there is a lack of common definitions: concepts such as «social enterprise» or – to a lesser degree – «benefit corporation» differ among jurisdictions, sometimes on very central aspects (such as profit distribution constraints).

Secondly, corporate governance mechanisms intended to ensure compliance of directors to the goals of the company are still mainly based on the

common governance rules, traditionally based on profit-centric companies, and require further thought when goals are also social and environmental. Hybrid organisations introduce greater complexity into the corporate structure, while seeking to attain the benefits of for-profit and not-for-profit structures. As mentioned (paragraph 9), this complexity cannot be faced in the traditional corporate governance structures developed in a «profit-centric» perspective, but *ad hoc* mechanisms should be developed to protect minority shareholders from a change of purpose, provide effective directors' fiduciary duties, assure capital lock-in, protect stakeholders and intended beneficiaries, etc. On another note, hybrid companies increase the burden of reporting requirements, including non-financial reporting.

Thirdly, there is an extremely important issue of branding for hybrid organisations. Being recognisable in a complex and layered market is key to business, as well as social, success, and bringing different initiatives, across multiple countries, under the same roof may prove valuable for all actors involved. This is even more so for young businesses seeking to gain market access and build up a customer base: creating legitimacy around their business operations and goals is very important in order to attract and retain customers. Moreover, a common «brand» could assist these businesses in communicating to potential investors and grantors their social purposes, while adequate governance systems, tailored on the hybrid nature of the organisation, would help to ensure that commitment is credible. This would improve a «human-centred» enterprise's ability to attract investors that are responsive to social or environmental concerns, and secure access to finance or grants that have a social/environmental purpose requirement for eligibility.

Within this context, the Human-Centred Business Model Project acknowledges the existing initiatives, and aims to go beyond them, developing an alternative, sustainable, business ecosystem, which respects the profit motive, within a framework of social and environmental sustainability.

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Diletta Lenzi and Andrea Zorzi, *The Human-Centred Business Model and Hybrid Business Forms: A Primer and a Roadmap*

The Article was written as part of the preliminary research for the Human Centred Business Model Project, a project developed within the Global Forum on Law, Justice and Development and now supported by the OECD Development Centre. In a preliminary fashion, the Article skims the surface of «social» businesses, in the broadest sense, around the world, identifying some general trends and commonalities and some differences. The Article covers jurisdictions from North and South America, Europe, Asia and Australia and describes the organisations that can be used to carry out social business.

Keywords: Corporate Governance; Corporate Social Responsibility; Stakeholder Value; Social Enterprise; Benefit Corporation; Hybrid Organisations; Sustainability.

JEL Classification: G30; G34; G38; K20; K22; K38; L31; M14.

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