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The Human-Centred Business Model

Legal Framework and Corporate Governance Issues

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1. Introduction

1.1. The Human-Centred Business Model Project

The Human-Centered Business Model (HCBM) is a project developed within the Global Forum on Law, Justice and Development. The project aims at developing an alternative approach to doing business that potentially combines, on an equal level of importance the economic sustainability, the social sustainability and the environmental sustainability.

The Human-Centred Business Model is structured along the lines of **six pillars** that are intellectually guided by one or more co-leaders. The pillars will develop:

(1) a set of guiding principles common to all the Human-Centred Enterprises;
(2) legal and corporate governance options coherent with the guiding principles;
(3) suitable forms of financial instruments;
(4) elements of enabling fiscal regime;
(5) procurement policies (both corporate and public procurement);
(6) specific forms of stakeholder relationship.

The main output is to develop a theoretical model that will foster the pursuit of environmentally and socially desirable goals by non-profit entities as well as by profit-oriented ones. As regards companies, the model will look at enabling their use not only, as traditionally is, for profit maximization, but also to pursue the environmental and socials goals at par with profit. The idea is to build a model that has in itself all the necessary devices to ensure compliance and enforcement with the goals stated by the entity, protecting also who has invested in the company by reason of its 'human-centred nature'. This goal will be reinforced thanks to *ad hoc* financial instruments, fiscal techniques, public and corporate procurement mechanisms and mechanisms of stakeholder involvement.

The model is a holistic model that aims to reflect on the entire ecosystem in which businesses operate. It will be available to private enterprises for voluntary adoption as well as a blueprint for Governments wishing to develop innovative legislative provisions or to fine-tune their existing laws.

1.2. The Legal Framework and Corporate Governance Pillar

The second Pillar of the HCBM, *Legal Framework and Corporate Governance*, aims at developing corporate governance mechanisms to enable businesses to use companies not only for profit maximisation (as is traditionally the case), but also for the pursuing of environmental and social goals, in an enforceable way that will grant protection to those who have invested in the business taking into consideration its social and environmental goals. In a 'Human-Centred Enterprise' (HCE), social and environmental interests are no longer the 'external' interests that directors *may* consider when managing the organisation while pursuing profit, but are the proper corporate goals, *on a par with* profit, and directors and managers *must* consequently strive for these goals too, in compliance with their duties.

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

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

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

In this context, an analysis of the existing legal framework is necessary.

1.3. The Pillar's Co-Leadership

The second Pillar of the Human-Centered Business Model, *Legal Framework and Corporate Governance*, is co-lead by the International Institute for the Unification of Private Law (Unidroit) and the University of Florence, Italy, which have signed a cooperation protocol in this regard.

Unidroit is an independent intergovernmental organisation. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Unidroit has been engaged in the branch of social enterprise since 2010, when it published a preliminary report on social enterprises. Unidroit has been supporting the HCBM project by hosting events and directing its interns to study aspects of law relevant to the project, in particular with the guidance of senior officer Frédérique Mestre.

The University of Florence participates in the project through the Department of Economics and Management, where Andrea Zorzi teaches Business law. Diletta Lenzi is now a post-doc researcher at the University of Trento and has been a consultant to the World Bank.

Any opinion expressed in this draft paper is the sole responsibility of the authors and does not reflect the views of Unidroit.

2. Legal Framework for the Human-Centred Enterprise

2.1. 'Social' Businesses and the HCBM

1. Less than a decade ago, Mohammed Yunus could write that the law offered no specific instrument to entrepreneurs that wanted to do business 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, noticing that the law could hinder some important features of social businesses, such as the non-distribution constraint (this is Yunus's conception, which is not widely shared as regards the definition of 'social' business), and some forms of participatory governance (Yunus 2010).

This is certainly not the case any longer. In the past years there has been an impressive burgeoning of initiatives intended to give a legal form to social business (the most renown being the US L3Cs and benefit corporations, but many European states have also provided advanced forms for doing social business – see Par. 4.1 and 4.2). A preliminary study carried out by Unidroit in 2010 was able to list various old and new forms that could be apt to engage in social business (Unidroit 2010), but if that study were carried out now, the list would be significantly longer.

While there is a common understanding that 'social' business is a business done for a goal that transcends the financial interests of shareholders or members, the term has very different implications depending on jurisdictions. For example, until recently 'social businesses' had a full non-distribution constraint in Italy, whereas now they can distribute a part of the profits, with limitations, as do community interest companies in the UK (see Par.

4.2.5 and 4.3). In the US, benefit corporations and the like are commonly considered one possible form to carry out business, although they incur no limitation in distribution of profits. The EU operative definition requires reinvestment of most of the profits, which would exclude benefit corporations from 'social businesses'.

The first requirement to discuss about a Human-Centred Business Model, that is a business model carried out pursuing profit (possibly) but also a social goal following the guiding principles, is therefore to define the possible universe, 'business' being one first fundamental aspect.

2. Activities that seek to generate a positive impact on the civil society (e.g., a positive social or environmental impact) can be carried out by different kinds of organisations, 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 and 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.

The defining features of the HCBM are therefore *(a)* 'social' goals (as defined in the guiding principles) and *(b)* business. The Human-Centred Enterprise will be designed to fit organisations that carry out *business* by balancing the profit aim with goals of social and environmental sustainability, as defined in the bylaws, in respect with the guiding principles (on which see Pillar 1).

Consequently, the Pillar 2 research should focus 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)), should not be included. This preliminary paper is based on this conception, but the project may well change perspective, to include also non-profits that carry out business as a secondary activity if a compelling case were made.

Returning to the categories sketched above, a few more words on not-for-profit organisations that engage in business activities as a chore means to pursue their goal (category (2)). While not-for-profit organisations can carry out business *in order to* finance their main not-for-profit activity, in which case the business is a secondary aspect, not-for-profit goals can also be pursued by means of carrying out business. Imagine, for example, a business created to employ former prison inmates or disabled persons; a business that manages a childcare facility or a nursing home; a business that provides cheap and environmentally friendly energy or water or means of communication to remote, underserved and poor communities. When the organisation is 'not for profit', this means that profits are re-invested within the organisation to further its goals (there may be variations depending on the structure of the business: e.g., the law could allow distribution of profits to the sole shareholder who is a not-for-profit organisation).

A different and more diverse category includes for-profit businesses organisations, which *can* or *must* pursue social goals (category (3)). These are for-profit entities in which the goal is to make profit *and* distribute it to shareholders, while *also* pursue not-for-profit goals.

Sub-category (3.1) refers to for-profit entities whose governing laws enable shareholders to pursue not-for-profit goals. This is somewhat of a murky definition, because it may be overly vast. A *total* profit-maximisation rule is probably inexistent, even in jurisdictions where corporate law tends to be mandatory and profit maximisation is the norm. However, the degree at which profit maximisation can be derogated 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 only 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., bar profit distribution (however see Stella Richter 2017). This is also one of the reasons why, in order to do business that aims to balance profit with social/environmental goals, a new specific legal provision introducing the Italian benefit corporation was made necessary (see par. 4.2.5). 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) but should not be undervalued, since in many laws this is not possible, absent a specific provision in the law.

Sub-category (3.2), in contrast, refers to legal categories, specifically regulated by law, which the parties are free to choose to use or not, as the case may be, but, if they do, they *must* also pursue not-for-profit goals (as defined by the law). This includes, on the more 'profit' side of the spectrum, hybrid forms such as 'benefit corporations' or 'public benefit corporations', which can freely distribute profit, and – on the other side of the spectrum – forms such as L3Cs, public interest companies (in the UK), some types of co-operatives (e.g. in Italy or France), which can distribute profits, albeit with various limitations, and some kinds of 'social enterprises' as so defined by some laws (e.g. Italy again).

2.2. Social or Hybrid Goal as the Leading Concept

We have mentioned a 'social' goal as a distinctive concept. This is important because the HCBM is not contented by the mere furtherance of some sort of social or environmental positive effect of a profit-oriented enterprise, alongside profit, but requires that social goals come into the direct scope of the business. Positive social or environmental effects should not be mere by-products of the business, nor be at the service of the business's profit maximisation as is with the corporate social responsibility framework, typically in the long-term according to most accounts of the positive effects *on shareholders* of CSR.

Any discussion on social goals, of course, cannot avoid confronting what is the 'standard' goal of corporations (and business in general). A discussion into whether or not, *in general*, the shareholder-value maximisation paradigm is, or should be, overcome (e.g. Stout, Blair, Mayer, Sjåfell) would be overambitious and not directly expedient to the project, which refers to business entities which expressly hold themselves out as pursuing not-for-profit goals while doing business and seek to attract talent, investment, consumers *because of* its choice of not maximising profit at the expense of the pursuit of the goals, which should follow the 'guiding principles' set out in the company's charter. Nor it is necessary to dissent on the shareholder value approach in general to grant legitimacy to the HCBM: shareholder value serves as a fundamental means to monitor performance and, in some countries, its rise has contributed to curb relational practices that, under the cloak of stakeholder interests, rather sought to favour the controlling shareholder or other parties.

HCBM should require proper compliance, go beyond it, and seek to maximise social utility *at least* at the same level as profit (how this can be done, and how the balance between social goals and profit should be stricken, is a tricky issue and the chore of the research: see Par. 3).

Also, with regard to social goals, it should be noticed that, although there may be some overlap among concepts:

- having a 'social' goal certainly does not exclude making a profit *for the entity*; a profit for the entity does not make it a for-profit entity, if there is no distribution to members;
- having a 'social' goal *can* also go hand in hand with making a profit for its members: either with limitations (some profits must be retained, as in some cooperatives, in community interest companies, etc.) or without (benefit corporations);
- a not-for-profit goal can be pursued also by carrying out an enterprise which is not a 'social' enterprise, but whose revenues are used for the pursuit of the not-for-profit goal (as mentioned, a for-profit entity that is controlled by a not-for-profit entity does not change its nature and purpose).

Discussing 'social' goals begs the question on which goals other than profit-maximisation *can* or *must* be pursued. Should it be any goal, as long as it implies a positive social impact (in the broader meaning), or any goal within a set of goals that are predetermined by law, or one or more goals predetermined by law? The law may, indeed, provide only for specific goals; or for any goal chosen by the members of the company as long as it fits within a broader definition, etc. There are examples of all three possibilities across jurisdictions and, within jurisdictions, among different models. For example, benefit corporations allow for very broad goals, almost indeterminate; at an intermediate level are CICs, which must serve a 'community' as quite narrowly defined by the law; yet another style are social enterprises in Italy, which have (a) either a very narrowly defined series of goals *or* (b) any goal, as long as *the way* in which business is carried out is 'social' (narrowly defined).

The heterogeneity of the concept of 'social' business reflects itself also on the need to define clearly what should be a HCBM-compliant business. HCBM should require credible commitment from investors and directors alike in exchange for the branding features. However, its adaptation to different institutional context may require that, depending on the jurisdiction, requirements to fulfil a 'HCMB status', so to say, vary.

Exactly as in corporate governance in general, in states where judicial infrastructure is efficient, capital markets developed, investors sophisticated, information readily available, etc., the law should be flexible, open to private ordering, and businesses should be able to offer any kind of agreement to shareholders and other investors. Where there are not the same features, it may be advisable to simplify the law, reducing options and adopting bright-line rules (an example could be the non-distribution constraint). This adaptive approach, however, raises a delicate issue with regard to possible cross-jurisdictional law shopping: the case is less easily dismissed with 'social' businesses as it is with 'ordinary' corporate forms because the content of what is 'social' is far more heterogenous from state to state, often carries with tax and other advantages, and could therefore mislead the public and give an unfair advantage to some operators.

Par. 3 contains a very preliminary and tentative assessment of various forms of possible candidates for the a HCBM-compliant business. As mentioned, the HCBM should pivot around a functional, rather than structural, definition: any kind of organisation, as long as it is in line with the HCBM's principles, should be able to sport the branding. There are some more likely candidates, however, from a structural point of view: some are traditional forms of doing business, such as cooperative, other, as mentioned, are new, such as benefit corporations and the like.

(1) **Cooperatives** are not per se 'selfless' or altruistic, in the sense that their finality is to enable members to buy at a lower price than market price, or sell at a higher price, or work for better wages, achieve affordable housing, access to credit on more favourable terms than commercial banking would allow. However, traditionally coops have been used to further the position of working classes, hence there is usually a 'social' impact inasmuch the members come from disadvantaged classes; coops offer a typically participatory model of governance (members are also those who use the services or goods provided by the cooperative) and also a democratic model (the default usually being one head, one vote). Of course, their being adequate for HCBM depends on which are its constituencies, whether or not the cooperative

also distributes profits, made through business with non-members, whether there are limitations to profit distribution, etc.

(2) We have mentioned above **social enterprises** or social businesses and the fact that the definition is far from univocal. In order to ‘qualify’ for HCMB it will be necessary to set out governance features that should be deemed necessary – which may or may not overlap with the legal definition of a social enterprise in one given jurisdiction.

(3) **Benefit corporations** are now widely available in many States and could be the ideal candidate for a HCBM entity, and much of the discussion in Par. 3 on legal issues intertwines with debate on such legal forms and similar ones. Benefit corporations, however, are slanted towards profit and may require further optimisation to work for the HCBM.

(4) **For-profit forms** adopting, on a voluntary basis, charter provisions allowing them to pursue hybrid goals (if so allowed by the law of incorporation) could also qualify as HCBM. In this case, however, the assessment of the credibility of commitment made by charter provision should be even more careful as compared to businesses adopting a specific form, because ‘mission drift’ becomes an ever more serious risk. In general, adopting standard entities with adaptations may be expose to legal risks and may not be effective (e.g. Murray & Hwang 2011; White Paper 2013; Brakman Reiser 2013).

(5) Mere compliance with **CSR policies** should not, to the contrary, be considered enough to define a HCBM enterprise, as mentioned above, given that, in its common conception, CSR relates to profit maximising in the long term.

3. Governance Issues to Be Addressed

3.1. The Issue in General

Once the goals are set, comes compliance and enforcement. Many issues are very similar to those faced by the design of social businesses, in the organisational form of companies or cooperatives. A vast literature is flourishing, revolving mainly around social enterprises and benefit corporations and the like, but many discussions apply perfectly also to a possible HCBM enterprise.

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 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 come to the forefront. 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 suboptimal 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.

3.2. 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 'human-centred' 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 and 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. In Europe, for example, 'social businesses' are expected to have some form of non-distribution constraint (see e.g. CIC, European Commission, Fici 2016) whereas, in the recent discussion about hybrid forms such as L3Cs, benefit corporations, public benefit corporations or special purpose corporations distribution constraints are not considered material (the discussion surfaces as regards L3Cs, which are designed to fit into idiosyncratic US tax regulations) and, to the contrary, are consistently looked upon as negative because they hinder access to funding (see e.g. Cummings 2012; the same has determined recent evolution in Italian law on social enterprises, that can now distribute profits, although in a limited manner – see Mosco 2017; Costi 2018).

The issue of whether or not a human-centred enterprises 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 the specific features of the relevant jurisdiction, globally considered.

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).

3.3. 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. 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 (see Par. 3.5) 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) (Par. 3.1), which in turn raised concern that so doing would stiffen excessively the matter of fiduciary duties and agent discretion in hybrid companies (Gold & 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. A classic example can be employees vs. the environment: historically, in some countries trade unions have been fierce opposers of environmentalists because of the fear that cracking down on factories for environmental reasons would result in loss of jobs. In this case, 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 (see Par. 3.4)

3.4. Governance Mechanisms

In order to make sure that proper goals are pursued, organisations can rely on the panoply of governance devices. Benefit corporations in most states are required to have a 'benefit director', that is a director entrusted with making sure that the company complies with the state goal. 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; Brakman Reiser 2013; Murray 2017).

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. 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 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 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 (e.g. in Italy directors of public companies must be elected by shareholders, with limited exceptions for public shareholders and investors holding some kinds of financial instruments).

3.5. Non-Financial Reporting

Key to any governance device are disclosure and reporting. 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 (Directive 2013/34/EU; Para. 4.2.1) are indeed relevant in setting standards, as well as very well know private initiatives such as GRI.

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 sue (this is a common problem in derivative and securities litigation in Europe – in general see Gelter 2012).

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, so precious in terms of economic sustainability of the business.

Much must be done, however, in finding shared metrics for annual reports (to be suitable also for smaller entities) and in developing mechanisms of evaluation and control of the disclosed information.

However, the impact on the environment and society, among other public benefits, tends to be measurable in the long-term, rather than the short-term, which potentially conflicts with the idea of having quantifiable measures in an annual report (Loewenstein 2013).

3.6. 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 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 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, 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), although there has been who has identified damages in the value of the purpose that was overlooked for profit.

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 (with action such as securities fraud, if the company were publicly traded, or other direct actions against directors).

The fact is that stakeholders, even intended beneficiaries, do not have standing to sue, unless – as provided for in the model law – the charter so provides; and it is not sure that in all jurisdictions a charter provision granting standing to third parties would be valid and sufficient, and it may be necessary to find some not simple workaround solutions. Most of all, one can doubt that any company may really want to tie its hands so tight by granting direct enforcement rights to stakeholders, especially since such very strong option would not be signalled in the legal form for branding purposes.

Granting standing to sue and providing for some form of liquidated damages could be, on the other hand, a very strong commitment device, that should be explored for the HCBM.

4. Relevant Existing Initiatives around the World: the State of the Art

Since the last century, a global cultural shift has occured about the role of businesses and corporations in the society, as well as about their 'responsibility' in terms of social and environmental impact. Today, the market is clearly no longer a place for the sole for-profit business model and hybrid forms of business are arising in every economy. It is possible to observe a common trend towards a more sustainable way of doing business: States are strongly incentivising the consideration of environmental and social interests in the running of the business and also for-profit entrepreneurs are voluntarily moving beyond the 'mere' compliance with human rights provisions and environmental regulations, making real business out of sustainability. 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' (ICC). A similar trend goes together with a growing cultural awareness of consumers and investors on the sustainability of both production processes and products (Kassoy et al 2016).

This paragraph aims to provide an overview of relevant existing 'hybrid' organizations, meant as organizations running a *business* activity with a positive impact on the civil society, the environment, and other stakeholders.

Within the examined jurisdictions, the analysis focuses only on relevant 'legal categories' – meant as types of organisations as provided by law –, through which it is possible to set up 'sustainable' (in the broadest meaning) *businesses*. The research has then embraced only the following organizations:

- not-for-profit organisations, whose goal is not-for-profit but carry out business (e.g. social enterprises);

- for-profit businesses that can pursue goals other than profit maximization;

- for-profit businesses that have to pursue also social/environmental goals (e.g. benefit corporations).

The findings are organised by countries. For each legal category, various governance characteristics have been analysed in order to assist the designing of corporate governance frameworks for the HCBM. The collection of information, as well as the selection of corporate governance issues to be analysed, have been realised in a functional way, in order to underline only those examples that can be used in the quest for HCBM corporate governance frameworks.

4.1. The United States of America

Company laws of US States are traditionally of an enabling nature: shareholders can set out, in the certificate of incorporation, special rules which refer to social and/or environmental pursuits. However, there are two main models that specifically reflect the cultural shift that has begun to occur in the debate about the role of business in society:

(i) the Low-Profit Limited Liability Company (or L3C); and

(ii) the Benefit Corporation and similar forms.

These models have taken a different approach to balancing the trade-offs involved when businesses pursue both profits and social goals. Slight differences are also reflected in national legislations within the same Benefit Corporation model (corporate law in the US is a matter of national law), where benefit corporations are often named differently.

4.1.1. The Low-Profit Limited Liability Company (L3C)

The first Low-Profit Limited Liability Company (so-called L3C) legislation has been enacted in 2008 by the US State of Vermont (Vt. Stat. Ann. Tit. 11, §3001(27)); since then, other ten US States have followed.[1]

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 no-profit and for-profit business. It is mainly a social venture (business prioritizing the social impact along with the business success), which aims at combining the structure of a limited liability company with a social purpose; it is a 'for-profit with a non-profit soul'.

The management of an L3C 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, the Illinois and the Wyoming regulations: '[n]o significant purpose of the company is the production of income or the appreciation of property' (Vt. Stat. Ann. Tit. 11 §3001(27)(B)

[1] Ilinois, Kansas, Louisiana, Maine, Michigan, North Carolina (authorizing legislation repealed in 2013), North Dakota, Rhode Island, Utah and Wyoming, but also Puerto Rico, the federal jurisdictions of the Crow Indian Nation of Montana and the Oglala Sioux Tribe.

(2011); 805 Ill. Comp. Stat. 180/1-5 (2011); Wyo. Stat. Ann. §17-15-102(a)(ix)(B)). However, all these regulations enable a small return to the investors (it should be noticed, however, that there is no express non-distribution constraint).

The L3C regulation recognises the difficulties to balancing the profit and social goals, and to limit the management discretion, it is required the L3C to be a 'mission-driven' company.

The original idea behind this model was the design of 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 the 5% of their incomes to no-profit activities. However, the Internal Revenue Code has not officially recognised the L3Cs as a PRI, creating uncertainty in terms of applicability of the related tax benefits (Callison-Vestal 2010).

The L3C Model has been overcome in terms of popularity by the Benefit Corporation model.

4.1.2. The BLab Certification

Hybrid businesses incorporated in any State, and under any of the models discussed above, can participate in the B Lab certification process and receive B Lab's Benefit Corporation certification.

B Lab is a non-profit organisation, founded in 2006, aiming to build a global community of certified Benefit Corporations ('B Corps'), with the mission to 'redefine success in business'; 'a global movement of people using business as a force for good'.

B Lab employs two methods for achieving its mission. First, it has drafted Model legislation for the formation of benefit corporations, which has been highly influential on all legislation adopted in the US – and which has especially inspired the Washington State Social Purpose Corporation (see Par. 4.1.4).

Second, it certifies corporations as 'Certified B Corporations'. To do so, B Lab has developed the 'B Impact Assessment', a standard for measuring the business social and environmental impact, its public transparency, and its legal accountability. To become a B Corp, businesses need to obtain 80 points or above out of a score of 200.

Across the World, businesses can voluntarily apply for compliance with standards set by the B Lab. Mainly, B Lab's model legislation requires companies to create 'a general public benefit' (Model Benefit Corp. Legis. § 201) and encourages (but does not require) that companies create one or more additional ‘specific public benefits’ including, but not limited to: (1) providing low-income individuals or communities with beneficial goods or services; (2) economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) preserving the environment; (4) improving human health, and (5) promoting the arts, sciences, or the advancement of knowledge, and increasing the flow of capital to entities with a public benefit purpose (Model Benefit Corp. Legis. § 201(b)).

4.1.3. The Model Benefit Corporation Legislation (MBCL)

In 2008, B Lab has developed the ‘Model Benefit Corporation Legislation’ (MBCL) based on which Maryland has adopted its benefit corporation legislation in 2010, the first of the US States.

Benefit corporations are the hybrid companies *par excellence*: they are *for-profit* businesses managed to pursue a ‘general public benefit’ and (eventually) also one or more ‘specific public benefits’ (Section 201 MBCL). However, many State regulations (e.g. Delaware; see Par. 4.1.5) require benefit corporation’s bylaws to include at least one specific public benefit.

A 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.’

While specific public benefits include:

> ‘(1) providing low-income or underserved individuals or communities with beneficial products or services; (2) the creation of promoting economic opportunity for individuals or communities beyond jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment’.

The MBCL requires benefit corporations to consider the business impact on the society and the environment ‘as a whole’. In considering the best interests of the benefit corporation, the board of directors (or the individual director) shall consider the impact of its actions not only on the shareholders of the benefit corporation, but also on a long-list of stakeholders (Section 301(a) MBCL), which includes:

> '(…) (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 (…)'.

All these interests are supposed to be balanced without giving priority to a particular interest over any 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' (Section 301 (a) (3) MBCL).

A similar provision enables (and requires) directors to mitigate the traditional 'shareholders value approach', as it is confirmed by Section 301 (e):

> 'A director who makes a business judgment in good faith fulfils the duty under this section if the director: (1) is not interested in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and (3) rationally believes that the business judgment is in the best interests of the benefit corporation'.

At the same time, Section 301 (c) explicitly negates any enforceable duty of directors 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.

On the contrary, shareholders, the director, or a 5% owner of an entity of which the benefit corporation is a subsidiary can bring action against the company, or its directors or officers for: (1) failure to provide the promised general or specific public benefit; or (2) violation of a duty or standard of conduct under the model legislation. However, the defendants will not be liable for monetary damages (see MBCL Sections 305(a)(2), 303(c)(2) and 302(e)).

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 is suggested to regulate the shareholders right of withdrawal in the bylaws (Murray 2012); and this is actually what has been done in many states (see e.g. Delaware Public Benefit Corporation, at Par. 3.1.5).

Finally, benefit corporations are required to produce, file with the state, and make publicly available an annual benefit report, describing how they have pursued their stated goals, and measuring levels of success in generating public benefits. The assessment must also refer to a third-party standard that is developed independently from the benefit corporation, which is comprehensive, credible, and transparent (Model Benefit Corp. Legis. § 102(a)). However, the company can perform the assessment without a third-party audit or certification (Model Benefit Corp. Legis. § 401(c)).

As of October 2018, 34 states and the District of Columbia have passed slightly different legislations on benefit corporations (Benefit Corporation, *State by State Status of Legislation*).

The US model(s) of benefit corporations has also influenced the Italian legislation on '*società benefit*' (below at Par. 4.2.5).

4.1.4. The Washington's Social Purpose Corporation

The benefit corporation model takes the name of 'Social Purpose Corporation' in the Washington State, where it was introduced in 2012 (House Bill 2239 introduced Chapter 23B.25, entitled 'Social Purpose Corporations', and amended Chapter 23B.01 of the Revised Code of Washington (RCW)). The in-charged Committee studied the Model Benefit Corporation Legislation but the ultimate approach that came into law is a different version of the benefit corporation governance structure.

The Social Purpose Corporation legislation was crafted to provide more flexibility to businesses comparing to the MBCL: the aim for the Washington State legislator was to *enable* good corporate behaviour, while avoiding *legislating* corporate behaviour (Reed-Wellman Lewis 2012).

Social Purpose Corporations must have a general social purpose and have the option to have one or more specific social purposes. Both the general social purpose and any specific social purposes must be defined in the SPC's articles of incorporation. The general social purpose is defined as follow (Wash. Rev. Code § 23B.25-3):

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

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

In addition, the law allows for specific social purposes, which are left to the SPC to define: 'every corporation governed by this chapter may have one or more specific social purposes for which the corporation is organized' (Wash. Rev. Code § 23B.25-4). The 'specific social purpose' is defined in the law (Wash. Rev. Code § 23B.25-17(34)) as: 'the specific social purpose or purposes for which a social purpose corporation is organized as set forth in the articles of incorporation of the corporation'. Thus, SPCs seem to have a great deal of latitude in defining and pursuing social goals.

Further, it is made clear that the SPC is a *new type* of corporate governance structure, and that any corporation may elect to be governed as a SPC (Wash. Rev. Code § 23B.25-1(1)). Consistently, the social purpose can be defined in three alternative ways:

(i) if a SPC is not previously incorporated, the SPC's social purpose or purposes are set out in the bylaws at the time of incorporating (Wash. Rev. Code § 23B.25-1(1)(a));

(ii) if an already-incorporated corporation is seeking to become a SPC, it needs the approval by two-thirds of the shareholders to amend the corporation's bylaws to comply with the legal requirements for a SPC (Wash. Rev. Code § 23B.25-1(1)(b) and 14);

(iii) similarly, a SPC's social purpose or purposes can be amended. The proposed amendment 'must be approved by two-thirds of the voting group comprising all the votes entitled to be cast (…), and by two-thirds of the holders of the outstanding share of each class or series, voting as separate voting groups, and of each other voting group entitled (…) to vote separately on the proposed amendment' (Wash. Rev. Code § 23B.25-10).

In addition to the shareholder rights under Washington's general corporation law, shareholders of SPCs have additional rights. Specifically, a shareholder has a right to dissent from certain corporate actions, and 'to obtain payment of the fair value of the shareholder's shares in the event of' some specific corporate actions. These corporate actions include: *(i)* a corporation electing to become a SPC; *(ii)* a SPC electing to cease to be a SPC; and *(iii)* an amendment to a SPC's articles of incorporation that changes one or more of the SPC's social purposes (Wash. Rev. Code § 23B.25-13).

However, no limits to profit distribution are provided.

With regard to the management and their fiduciary duties, the SPC does not place any restrictions on appointment of directors or officers, or methods of management, nor it have any restrictions or requirements regarding board composition. Directors and officers of a SPC must discharge their duties 'in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [the director or officer] reasonably believes to be in the best interests of the corporation' (Wash. Rev. Code § 23B.25-6(1) and 7(1)).

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' (Wash. Rev. Code § 23B.25-6(1) and 7(1)). However, an SPC's articles of incorporation may optionally impose to consideration of one or more of a SPC's social purposes. Any actions (or failures to take action) by a director or officer that they reasonably believe is intended to promote one or more of the SPC's social purposes, is presumed 'to be in the best interests of the corporation' (Wash. Rev. Code § 23B.25-6(3) and 7(3)). As long as a director or officer has complied with these requirements, they cannot be held liable for actions taken in the performance of their duties (Wash. Rev. Code § 23B.25-6(4) and 7(4)).

In contrast, strict requirements exist with regard to reporting duties: the board of directors is indeed required to provide an annual report to shareholders that includes discussion of the SPC's efforts to promote its social purposes. The report may identify and discuss objectives related to the SPC's social purposes, actions taken or planned towards the achievement of its social purposes, and describes 'the financial, operating, or other measures used by the corporation (…) for evaluating its performance in achieving its social purpose or purposes' (Wash. Rev. Code § 23B.25-16(2)).

However, this information can be included in the corporation's regular annual report, while a separate report is not required. The report must be made available to the public for free on the SPC's website (Wash. Rev. Code § 23B.25-16(1)).

In spite of the absence of any tax benefits, there are currently 186 SPCs in the state of Washington, which operate broadly across industries, including education, health, and food (Find a B Corp: Washington), 37 of which are certified B Corps (see Par. 4.1.2 above).

4.1.5. The Delaware Public Benefit Corporation (PBC)

If we consider the Maryland Benefit Corporation (see Par. 4.1.3) to lie at one side on a spectrum, we can place the Delaware Public Benefit Corporation (PBC) on the opposite; while the Washington SPC is located somewhere in between the two.

Delaware passed benefit corporation legislation in 2013; the 14th US state to do so. Delaware PBC voluntarily differs from MBCL to provide a corporation with sustainable-oriented options while not exposing it to increased liability.

Similar to Maryland Benefit Corporations, PBCs must adopt a specific public benefit and identify it in their certificate of incorporation (Del. Code Ann. tit. 8 § 362(a)). However, 'public benefit' is defined extremely broadly, such 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 Ann. 8 § 362(b)).

A great deal of latitude in balancing different interests is then given to the management. The board of directors is required to manage the PBC:

> 'in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation'.

In balancing these interests, directors cannot be held liable and their fiduciary duties to stockholders and the corporation are satisfied as long as the 'director's decision is both informed and disinterested and not such that no person of ordinary, sound judgement would approve' (Del. Code Ann. tit. 8 § 365).

Thus, the corporation's liability is considerably limited comparing to the MBCL, especially when considering the Delaware's deferential common law business-judgment rule.

As with the Washington SPC, PBCs are not required to assess performance against a third-party standard. Benefit reports – discussing the corporate efforts with regard to its social purposes – are only required to be submitted biennially, and there is no requirement to make the report publicly available (Del. Code Ann. tit. § 366). Also, there is no requirement to use a third-party standard to address the corporation's promotion of the public benefit or the best interests of those affected by the corporation's conduct.

4.1.6. The Two Options of the State of California

California law offers two options for socially oriented corporate governance structures *(i)* Benefit Corporations, on one side; and *(ii)* Social Purpose Corporations (formerly called Flexible Purpose Corporations), on the other.

The California's Benefit Corporation closely follows the Model Benefit Corporation Legislation and which will not be further analysed in this paragraph (but see Par. 4.1.3 below).

The California's Social Purpose Corporation (CSPC) was created in 2014, through the amendment of the California Corporate Code, and indeed the CSPC uses the California corporate form at its foundation, albeit in a much more flexible structure (Cal. Corp. Code § 2602(b)(2)).

The CSPC's articles of incorporation are to specify at least one 'special purpose', although the types of 'social good' purposes that the CSPC will pursue in these broad limits are entirely in the hands of the founders.

Also, this 'specific purpose' may be limited in duration (Cal. Corp. Code § 2603(a)(4)).

A CSPC may also freely pursue charitable purposes like traditional non-profit organisations, along with pursuing the interests of non-shareholder stakeholder interests to the broadest degree. Stakeholders include employers, customers, suppliers, creditors, the community, and the environment.

Shareholders have protection against the loss of economic value in CSPC conversions by way of converting a CSPC into a non-profit organisation by unanimity. Also, shareholders can convert a CSPC into an ordinary for-profit organisation (and *vice versa*) with the approval of at least two-thirds of each class of shares (Cal. Corp. Code § 3302(b)), and dissenters may opt to have their shares purchased by the corporation for the fair market value of the day before the first announcement of the terms of the proposed transaction (Cal. Corp. Code § 3305).

Prior to the 2014 amendments, directors of FPCs (the former version of the actual CSPC) *were permitted* to consider stakeholder interests (Brakman Reiser 2012), while CSPC directors can now pursue purposes beyond (and even in conflict with) the shareholder value maximisation (See Cal. Corp. Code § 3501(c)).

The CSPC statute requires an annual report to be shared with both shareholders and the public (*via* the Internet) (Cal. Corp. Code § 3500(a)). Similar to the Washington SPCs, there is no specific guideline as to what is to be included in the report, which allows corporations to omit the goals that have not been achieved (Mirzanian). Furthermore, there is no requirement of a third-party standard in the preparation of the annual report.

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

4.2.1. Introduction

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

Within the many initiatives at the European Union level, the cornerstone is the European Union strategy concerning Corporate Social Responsibility (CSR): the Green Paper 'Promoting a European Framework for Corporate Social Responsibility' presented by the Commission in July 2001, firstly aimed at launching a debate about the concept of corporate social responsibility and identifying how to build a partnership for the development of a European framework for the promotion of CSR. Ten years later, the Communication of the European Commission concerning Corporate Social Responsibility (CSR), in 2011, provided a 'renewed EU strategy 2011-14 for Corporate Social Responsibility'. The Communication, besides offering an interesting overview of CSR approaches across the European Union, addresses the European institutions, Member States, and Social Partners as well as business and consumer associations, individual enterprises and other concerned parties, encouraging the development and the implementation of a common strategy to promote CSR among Europe.

Of the same year is the Communication on the Social Business Initiative (SBI) [COM(2011) 682 final], which has laid the foundations for the EU policy on social enterprises (see Par. 4.2.2).

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

(i) Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, which imposes the disclosure of non-financial information to both public-interest entities, and to those public-interest entities which are the parent undertakings of large groups, in each case having an average number of employees over and above 500, in the case of a group on a consolidated basis. The disclosed non-financial information will 'provide investors and other stakeholders with a more complete picture of their development, performance and position and of the impact of their activity'.

Under the Directive, certain large companies are now required to consider the impact of their business activities on civil society and to give a review of policies, principal risks and outcomes, including those on environmental matters.

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

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

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

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

4.2.2. The European Framework for Social Enterprises

With the 2011 Communication, the European Commission has launched the EU policy on social entrepreneurship.

A social enterprise is defined by the Communication as (p. 2):

> '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'.

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

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

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

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

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

In April 2013, as a follow-up to the 2011 Communication on the Social Business Initiative, the European Commission has launched a study on the state, size, and scope of social enterprises in Europe. The study ended up with an interesting document that can give an idea of the scale of the phenomenon, which consists of a map of social enterprises and their eco-systems in 29 European countries.[2] Specifically, the study analyses the scale and characteristics of social enterprise activity in each country; the national policy and legal

[2] The research is based on a review of national policy documents, academic and grey literature on social enterprise, but also on semi-structured interviews with a range of stakeholders such as social enterprises, policy makers, social enterprise networks, support providers, investors and intermediaries. Within this context, the European Commission has developed several Country Reports.

framework for social enterprise; the support measures targeting social enterprise; labelling and certification schemes where these exist; and social (impact) investment markets.

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

(i) work integration: the training and integration of people with disabilities and unemployed people;

(ii) personal social services: health, well-being and medical care, professional training, education, health services, childcare services, services for elderly people, or aid for disadvantaged people;

(iii) local development of disadvantaged areas: social enterprises in remote rural areas, neighbourhood development/rehabilitation schemes in urban areas, development aid and development cooperation with third countries.

Other fields include recycling, environmental protection, sports, the arts, culture or historical preservation, science, research and innovation, consumer protection, and amateur sports.[3]

This being the framework at the European Union level, the following paragraphs will focus on selected EU Member States, and on specific innovative experiences (e.g. Spanish social enterprises are still at an embryonic state comparing to other EU jurisdictions or even to the USA: Mas-Machuca et al.). As the European Commission study has indicated, 'the national "social enterprise families" are incredibly diverse across Europe, encompassing a range of organisational and legal forms and statuses' (see European Commission, *A map of social enterprises and their eco-systems in Europe. Executive Summary*).

Given its particularities, a separate mention is made of the UK experience (par. 4.3).

4.2.3. Belgium: the (Overcome?) Société à Finalité Sociale

Belgium has been one of the first EU countries to introduce a legal framework for an organisation 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 original version of the Belgium Company Code.

The SFS allows commercial companies to pursue goals other than that of profit; and a not-for-profit association can legally convert itself into an SFS without affecting its legal

[3] See the European Commission webpage, specifically dedicated to Social Enterprises.

personality.

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

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

On July 20th, 2017 the Belgian government approved the draft bill for a new Company Code. The approval procedure is still ongoing, but a preliminary draft of the new Belgian Code of Companies and Associations has been submitted to the Belgian Parliament on June 4th 2018, for the final approval.

The New Code on Companies and Associations will apply, as the name itself suggests, to both companies and associations. However, the distinctive criteria between companies and associations/no-profit organizations will be simplified: the main criterion of distinction will be the intention to distribute profits. On the contrary, the 'civil' or 'commercial' nature will be irrelevant, with the consequence that business activities could be organised through an non-profit organization (NPO) unless no direct or indirect dividends are distributed.

If the draft of the new Code will come into force without any amendments, the SFS model described above will be abolished.

According to Section 8(5) of the draft Code, any business could be certified as having a 'social impact' as long as it does not distribute any profits to the members (a provision that is supposed to be stricter than the one recognized for cooperative companies and which will be then better determined by Royal Decree). The members could only take back their initial and effective contribution from the company, but dividend distribution during the life of the company, or at the moment of its liquidation, would be forbidden and void.

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

In France, an interministerial task force has recently published a Report entitled *L'entreprise, object d'intéret collectif* (March 9th, 2018).

The Report aims at allowing willing companies to assign to their businesses a broader, more varied object or goal; it aims at developing a corporate model that is more mindful of the public interest and of the people's expectations.

The Report develops several policy recommendations; between the many, the following seem of particular interest in the context of the HCBM project.

Recommendation No. 1 suggests modifying the French Civil Code to include, in the definition of a company's essential components (namely, a lawful object and a grounding in a common shareholder interest), a rule that corporations should be managed in their own interest, but *considering the social and environmental aspects of its activities*. A similar expression seems to recall the one of Section 172 of the UK Companies Act (see Par. 4.3 below).

Recommendation No. 2 recommends requiring the board of directors to consider social and environmental aspects of the company's activities, notably by using the company's 'fundamental purpose' as a strategic guide to business.

Recommendation No. 11, in order to give a legal grounding to mission-based undertakings, proposes to enable companies to state a *fundamental purpose* ('*raison d'être*') in their bylaws.

Recommendation No. 12, finally, gives statutory recognition to a mission-based undertaking, which should be available to companies of any legal form, provided that they meet four conditions:

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

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

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

(iv) and, for companies with over 500 employees, publication of a declaration on non-financial performance (this provision is in line with the EU Directive on non-financial statements – see Par. 4.2.1)

Even if at a preliminary stage, the recent French engagement to more sustainable way of doing business particularly interesting in the perspective of the HCBM project.

4.2.5. The Italian Experience of 'Società Benefit' and the Recent Reform of Social Enterprises

1. Italy is the first European country to have adopted a legal regime for the '*società benefit'*, a hybrid company inspired by the US benefit corporation experience (Par. 4.1), 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 be only used to pursue for-profit goals (according to Article 2247 of the Italian Civil Code), 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* (or SB) was necessary.

The *società benefit* is regulated by the 'Stability Act' of 2016, Act No. 208/2015, Article 1, paragraphs 376-382. It is a for-profit company, which aims at generating a 'general public benefit', intended as a material positive impact on the civil society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits. Differently from the US Model Benefit Corporation Legislation, any business organisation type under the Italian Civil Code can be 'transformed' into a benefit corporation, including cooperatives and partnerships.

The 'public benefit' has to be defined in the certificate of incorporation and directors must consequently *balance* the profit goal with the pursuit of the general public benefit, and can be considered as potentially liable in the case of a errouneous balance. However, the regulation on *società benefit* is complemented with ordinary legal provisions on corporate governance structure and enforcement mechanisms for director's misconduct: such rules have been created in a profit-centric way, and do not consider the specificities of a hybrid organisation. E.g., to consider a director liable for misconduct, damages to the common assets are required, but it is difficult to imagine how a balance that prefers the profit to the social goals will generate a detriment to the corporate assets.

Consistently to the US experience, the Italian benefit corporation does not provide any stakeholders' involvement within the corporate governance.

In spite of the absence of any tax benefits approximately 173 *società benefit* existed were incorporated as of March 2018.

2. The Italian legal framework is particularly interesting also in light of a recent reform of the social enterprises ('*imprese sociali*').

A social enterprise model exists in Italy since 2006 (Act No. 155/2006): this is a legal status that could be obtained by any no-profit organisation pursuing social aims. For an overview of the phenomenon of social enterprises in Italy see the Country Report of the European Commission (2014).

Legislative Decree n. 122 of July 3rd, 2017 has repealed the previous legislation on social enterprises and newly regulated the model, as part of the 'third sector' organizations. To be defined as such, a social enterprise, today, has two main options:

(i) it must carry out – as its primary business – one of the activities of 'public/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). However, under the reformed legal framework, social enterprises can exercise similar 'social' activity even *together with* other commercial activities, as long as 70% or more of the total profits come from the first ('social') business activity:

(ii) or, it 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 in the first case.

As under the previous regulation, Legislative Decree No. 122/2017 does not create a new legal entity. Rather, any type of organisation can be organized as a social enterprise: both associations, foundations and non-profit organizations on one side; and corporations or cooperatives, on the other side.

The main characteristics of the new Italian social enterprise can be summarised as follows. Firstly, the social enterprises articles of association or incorporation should provide for procedures for stakeholder consultation (the focus is mainly on employees). Stakeholders should be enabled to exercise a certain influence on the management (Article 10). However, in spite of the fact that stakeholder involvement is required, directors seem to remain subject to the same traditional fiduciary duties, owed to members of the organisation only; and no form of stakeholder enforcement is not provided.

Secondly, under certain conditions SEs can *distribute* profit up to a certain threshold (less than 50% of the profits; 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). On the contrary, today, social enterprises not only can *generate* profits (this was not prohibited even under the previous legislation), but they can also *distribute* them to its members (directly or indirectly) wih the limit of less than 50% of profits.

Further, tax benefits are provided; social enterprises' profits are tax exempt if they are reinvested into the social enterprise and not distributed to its members.

Finally, within the reform, social enterprises are able to raise financing through crowdfunding portals.

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

1. The Companies (Audit, Investigations and Community Enterprise) Act of 2004 introduced the Community Interest Company (CIC), a legal model of 'social enterprise', meant as a business with primarily social objectives. CICs – which are normally organised as limited liability companies – aim to meet the economic needs of producing goods and services with the primary purpose of improving the benefits for civil society and the social community in which they operate and/or of their stakeholders.

The regulation is the result of the work of the Social Enterprise Unit established in 2002 within the then Department of Trade and Industry. The programme was meant to develop a legal environment enabling entrepreneurs to do business in a sustainable way. CICs today are regulated by the Community Interest Company Regulations of 2005, as amended in 2009, but they also have to respect the general rules of company law, as regulated by the UK Companies Act of 2006.

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

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

(ii) corporate profits can only be: (a) retained within the company to fund its activities; and (b) used to benefit the community. However, CICs can also carry out collateral normal business activities, 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 CIC (see Regulator

of Community Interest Companies, *Annual report 2016-2017*. The report gives an overview of community interest companies in the UK).

2. However, the UK legal framework deserves analysis in this context also with regard to Section 172 of the UK's Companies Act 2006, entitled the 'Duty to promote the success of the company', which requires a director of *any company* to

'act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.

In doing so, directors should consider a series of factors listed in the Section, which refer to the promotion of social, environmental and governance objectives.

The Section – which, from a first reading, would seem to be particularly innovative – has been heavily criticised as being nothing more than a 'codification of directors' duties'. It must be said that not only no enforcement mechanisms have been provided; but also that putting the interests of different stakeholders (e.g. employees and the environment) at the same level could actually generate *conflicts* of interest (Sagas 2017).

4.4. Latin America: A Brief Overview on the B Corp Movement

South America is subject to a wave of innovations in terms of social entrepreneurships; the BLab movement is extremely active and is able to operate across jurisdictions in a more co-ordinated way than in other countries. The B Corp movement in Latin America is becoming an effective framework for entrepreneurs, a network that offers solutions to businesses willing to operate in a sustainable way. The movement is also pressing for the adoption of *ad hoc* legal frameworks at the country level, promoting the introduction of 'Sociedades B.I.C', a legal organisation inspired by the USA and Italian experiences (see Paragraphs 4.1.3 and 4.2.5) and the UK Community Interest Company (see Par. 4.3).

In Argentina, for instance, a draft law proposed by the Executive Power in 2016 provides for a business model similar to that of benefit corporations, in which directors have to consider the effects of their business on civil society and on the environment in which they operate. The proposed law is, however, more detailed than, for example, the Italian *società benefit* (Par. 4.2.5), since it specifically regulates important corporate governance aspects such as enforcement mechanisms, members' right of withdrawal, and thresholds for profit distribution. It also requires companies to prepare an annual report describing the actions carried out to comply with the self-imposed social and/or environmental goals, which would be audited by an independent registered professional specialised in the subject. The draft law, at this stage, does not seek to introduce a new corporate type, nor any tax exemption or benefit.

A new regulation, similar to the Argentinian one, has been proposed in Brazil as well. The Brazilian Group of experts in B Corp has already finalised the third version of the draft law. The most suitable draft is the one which considers Benefit Corporations not as a new type of corporation, but as a legal qualification for the existing types of companies, conditional to changes in the corporate bylaws to indicate the purpose of social and environmental impact on the corporate purpose, adapt the governance of the company/corporation to assess decision-making in relation to stakeholders, the community and the environment, through the creation of an impact director and/or a multidisciplinary impact committee, and provide for the publication of an annual impact report (exactly as is required under the Italian law on *società benefit*. See Par. 4.2.5).

In June 2017, two Chilean members of parliament (Maya Fernández and Felipe Kast) presented a draft bill that would regulate 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 regulates the enforceability of compliance with the purpose adopted in the corporate bylaws and the report that the companies must perform annually.

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

Finally, a similar movement is active also in Peru and in Uruguay (proposed legislation by members of the house of representatives of Uruguay dates September 15th, 2017).

4.5. Asia: An Overview

4.5.1. Introduction

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

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

(I) North Asia, composed of China, Japan and South Korea. The three North Asian countries analysed 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 (whether it was communist ideology in China or anti-communist in Japan). 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. South Korea is, for what it is concerned, the only Asian country which provides an *ad hoc* legal framework for social enterprises, which is progressively inspiring other Asian countries.

(II) The economy of South Asia – which includes the Philippines, Cambodia and Indonesia – developed later than in other Asian countries, and it is still predominantly rural. Here, local and international NGOs provide an essential contribution, organising activities that seek to provide an answer to poverty and exclusion. Two relevant organisational forms exists in all the selected South Asian jurisdictions:

(a) non-profit co-operatives, meant as collective self-employment responses to unmet needs based upon the co-operative tradition, mainly developed as agricultural cooperatives (but also as social co-operatives, especially in Indonesia); and

(b) Community Development Enterprises, intended as multi-stakeholders partnerships (e.g. non-profit organizations) promoting participatory local development.

Beyond their differences (mainly due to different historical roots), the identified Asian countries seem however to share four economical and sociological features, whose relative impact varies according to the national contexts (Defourny and Kim):

(i) the growing role of not-for-profit organisations in providing social services (privatisation);

(ii) the consequent trend of not-for-profit organisations to adopt a market-oriented approach and to participate in public procurement tenders and compete for those contracts;

(iii) the growth of the corporate social responsibility movement across the continent;

(iv) and a growing awareness of the positive effects of a more sustainable way of doing business among both civil society and the academic world.

4.5.2. South Korea: A Legal Framework for Social Enterprises

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. As stated in

Article 1, the purpose of this regulation was to 'contribute to social integration and the improvement of citizens' quality of life by expanding social services, which are not sufficiently supplied in our society, and creating new jobs through support for the establishment and operation of social enterprises and the promotion of social enterprises' (Bertotti et al.).

The Act is part of the Korean Labour Laws and the Minister of Employment and Labour is responsible for implementing a plan for the promotion of social enterprises every five years after the deliberation by the Employment Policy Council. Social enterprises have been indeed introduced with the primary aim of providing new job opportunities, but also 'as an attempt to establish a more formalised civic society' (Defourny and Kim), by employing disadvantages people (at least 50% of the total employees), providing for social services to disadvantaged groups (at least 50% of the total users of the service) and, more generically, by generating a positive impact on the local community.

Legal entities that can be certified as social enterprises are: *(i)* no-profit organisations carrying out business; *(ii)* associations regulated by civil law; and *(iii)* corporations as regulated by the Commercial Act.

In 2014, social enterprises were mainly organised through companies (50.7% of the total), followed by organisations under the 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%) (Bertotti et al.).

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

- Social goals: the main purpose of the enterprise should be to realise a social objective (e.g. improving local residents' quality of life; providing vulnerable groups with social services or jobs; contributing to local communities), as defined by an *ad hoc* Presidential Decree.
- Stakeholders' participation: a social enterprise should 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.
- Profits: revenues from business activities of social enterprises should not exceed certain limits defined by law. Specifically, Article 3, Sections (3) and (4) state: 'A social enterprise shall make efforts to reinvest the profits generated through its business activities

into the maintenance and expansion of the social enterprise. No associated enterprise shall gain the profits generated by a social enterprise'.

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

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

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

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

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

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

Similarly to what was done by South Korea, also Thailand has regulated social enterprises: in 2010, Thailand adopted the Thai Social Enterprise Office (TSEO), which has been established under the Thai Health Promotion Foundation Act, as the executive authority to deliver the Social Enterprises Master Plan (2010–14). The Office's priority is to stimulate co-operation among social enterprises and develop their networks in Thailand.

With the only exemption of South Korea and Thailand, other 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. However, in spite of the absence of a common legal framework for social enterprises, the Asian Institute for Social Entrepreneurship (ISEA) was created in 2001 to set up a learning and action network for social enterprises to catalyse knowledge creation, capacity development and movement-building for social entrepreneurship in Asia.

4.5.3. China: The Farmers' Specialised Cooperatives and the Social Welfare Enterprises

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

Among the different Chinese organizational models, there are mainly two models that seem to be somewhat 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), especially focused on agriculture, and even private co-operatives operate under the strict control of public authorities, in contrast to the European and USA systems.

Within the existing cooperatives types, the Farmers' Specialised Cooperative (FSC) seems to be the closest Chinese example to the Human-Centred Enterprise.

The FSC is a mutual-aid economic organisation, which is voluntarily adopted for the production and management of agricultural products (the purchase of agricultural production materials, sale, processing, transport and storage of agricultural products, as well as the technologies and information relating to agricultural production and business operations), in favour of its members.

According to the law, however, an FSC can invest in enterprises and other companies, and take limited responsibility for the enterprises invested in, although it cannot be listed on the capital market.

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

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

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

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

(iv) It must be managed in a democratic way;

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

Being an FSC can be rewarding in terms of dedicated legal benefits, such as fiscal support, preferential tax treatment, and other financial and capacity building support.

Enacted in 2006, FSCs have then grown rapidly, and, by June 2010, the number of officially registered FSCs had exceeded 300.000, while 25 million farmer households (which consist of 10% of China's total farm households) have become members of FSCs.

Another interesting example in China can be found in Social Welfare Enterprises, businesses set up for the employment of people with physical or mental disabilities (at least the majority). In 2008, there were still 23,000 social welfare enterprises across China, employing nearly 620,000 people with disabilities, since the 1990s, those models have started to decrease rapidly, mainly because of the China's market-oriented operational model (Wang-Zhu).

Finally, in 2016 the B Corp movement has reached China: since then, eight companies have been certified as B Corps (Par. 4.1.2).

4.5.4. Malaysia and the Philippines

Despite the absence of a specific legal setting for social enterprises, more and more entrepreneurs in Malaysia are defining their business as 'social'. Social businesses are carried out through existing legal entities, from associations to limited liability companies. However, a common definition of social enterprise does not exist yet, and entrepreneurs rely on components of the social enterprise that they consider important to qualify as such. Generically, they are understood to be entities that accomplish a social mission using an economic model, like a combination of elements of both NGOs and for-profit enterprises, and Malaysian social enterprises are strongly influenced by the British Model of the Community Interest Company (see Par. 4.3 above).

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

However, the cultural environment in the Philippines has been sensitive to social entrepreneurship since the last century. In 1999, the Philippine Social Enterprise Network (PhilSEN) was created to discuss the practices and experiences of social enterprises, operating mainly as a capacity-building supporter for social entrepreneurs. Two bills that could have a direct impact on social enterprises have been under discussion in recent years: the Social Value Bill and the Social Enterprise Poverty Reduction Bill (PRESENT). However, these bills still do not seem to have been passed. PhilSEN is currently lobbying for the PRESENT Bill in both the Senate and Congress in order to promote social enterprises 'as vehicles for poverty reduction and spearheading social enterprise education in the country'.

4.6. Australia[4]

Australian company law does not permit for-profit companies to pursue social goals *at the expense of making profit*: to do so, may be a breach of director fiduciary duties (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.

Organisations have to choose either to be a for-profit structure in order to access equity funding (without the tax and financial benefits of a not-for-profit structure or the access to grants and donations), or to be a not-for-profit structure in order to be eligible for donations and grants and gain tax concessions (but without the ability to raise equity funding or distribute profits to members). The benefits of different funding avenues are therefore limited by the chosen legal framework.

[4] The study on the Australian legal framework is based on the report developed by Ashna Taneja, intern at Unidroit.

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

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

(ii) the majority of the profits or surpluses is re-invested into fulfilling their missions (FASES Report).

Besides the absence of a proper legal framework for social enterprises, the research report produced in collaboration between the Centre for Social Impact, Swineburne University of Technology, and Social Traders entitled 'Finding Australia's Social Enterprise Sector 2016', provides an overview of the activity of social enterprises in Australia and may help in identifying the boarders of the notion of 'social enterprise' in Australia.

At the time of the report, there were at least 20,000 social enterprises operating in Australia, with 38% in operation for more than 10 years, and 33% of them in operation for a period of between 2 and 5 years. 75% of them are small organisations, 23% are medium-sized organisations, and 3.6% are large organisations. The annual turnover of social enterprises varies from zero to AUD 199 million.

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

The most common beneficiaries were the wider community or public (61%), followed by the members (less than 25%), and generally serving the beneficiaries of a related not-for-profit entity (less than 15%). The largest beneficiaries of the work of social enterprises are people with disabilities (34.9%), young people (33.3%) and disadvantaged women (27.5%). Other beneficiaries of social enterprise activity include people with alcohol, drug, or substance use issues, Aboriginal and Torres Strait Islanders, a particular geographic community, the elderly, families, the homeless, migrants, refugees, or asylum-seekers, LGBTI individuals, disadvantaged men, individuals with mental illness, prisoners and ex-offenders, remote or rural communities, the unemployed, animals, and the environment.

It is interesting to notice how 68% of social enterprises are providing services (rather than goods) for a fee.

As regards the corporate governance structure, social enterprises are mainly incorporated as associations (32.8%), followed by companies limited by guarantee (31.3%), and private companies (18%). 81% of social enterprises re-invest all of their income into their business, and less than 15% re-invest half of their income into their business. The higher percentage of social enterprises re-invests all of their profits back into the business; this may reflect their choice of a not-for-profit legal structure (which makes it mandatory for all profits to remain within the business).

Finally, 86% of social enterprises use their profits to invest in improving and expanding their operations, 22% donate their income to external organisations, 18% return their income to a parent organisation, and 6% distribute their profits to members (rounded figures).

4.6.1. Indigenous Corporations

An interesting and unique model, which may be of inspiration for the development of the Human-Centred Enterprise, especially in developing countries and emerging markets, 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, of course, not limited to organise their business through this type of legal 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 are able to take into account the Indigenous customs and traditions in their bylaws (referred to as the 'rule book').

To incorporate as an Indigenous Corporation the following requirements should be met:

a) there must be at least 5 members (at least 15 years old) who must be ATSIs;
b) there must be no less than 3 and no more than 12 directors on the board; and
a) the majority of directors must be ATSIs.

Indigenous Corporations are regulated by the Office of the Registrar of Indigenous Corporations (ORIC, a specialist regulator with additional powers beyond pure regulation), rather than the Australian Securities and Investments Commission (ASIC).

ORIC provides Indigenous Corporations with simplified and cheaper processes for registering (i.e. ORIC provides a bylaws model that only needs to be filled in with the business personal information). Further, no fees are charged for registering an Indigenous Corporation.

Similarly, the reporting requirements to ORIC are generally low; and it provides face-to-face training in remote areas, dispute resolution services, telephone advice, assistance with examining books and records to identify financial and corporate governance issues. Further, ORIC 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 no-profit status and operate accordingly. However, directors remain subject to the same fiduciary duties to their members only, like other public and private company directors. In this case, the members of an indigenous corporation are the desired beneficiaries underlying the social purpose, similarly to the co-operatives model.

4.6.2. Proposal for the Introduction of Benefit Corporations

In 2016, the Australia and New Zealand branch of B Lab formed a working group composed by of 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 27 February 2017, B Lab submitted a draft set of provisions and an accompanying explanatory memorandum to the Australian Department of Treasury as part of a submission on the subject of social impact investing.

The following are the main features of the proposed amendments, which seem to have been inspired by the US Model Benefit Corporation Legislation (see Par. 4.1.3).

A benefit company must have a purpose of creating a general public benefit in its constitution and *may* have a purpose of creating one or more specific public benefits in its constitution (Section 190C). Section 125A(1) defines what a positive social impact is; it requires at least one purpose of creating general public benefit.

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

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.

Finally, a benefit corporation could distribute profits to its members with no limitations.

4.7. Israel

No-profit organisations (hereafter NPOs) have played a central role in the development of Israeli society and its economy as they functioned as the main service providers (education, welfare, health) prior to the establishment of the State. Then, some of these NPOs were nationalised and integrated into government ministries, while others maintained their NPO status, although, in both cases, the result was an abundance of NPO characteristics in influential institutions.[5-6] Much of the attention of social enterprises has then been geared towards the employment of disadvantaged communities, such as Ethiopian Jews, Ultra-Orthodox Jews, Negev Bedouin, and Israeli and Palestinian Arabs, especially for the involvement of women among the workforce, and programmes committed to peace-making efforts between Israeli Jews and Palestinian Arabs.

Today it is possible to observe a growing abundance of facilitation in the form of social impact funds, accelerators and hubs, as well as the Forum for Social Enterprises in Israel, which strives to aggregate the relevant information on social business in Israel, which, however, provides minimal, if any, legal guidance (Gidron; Feit).

In November 2012, the Prime Minister's office held a round table discussion on the topic of social enterprises. The definition provided for the discussion was a business activity within a no-profit organization or a public benefit company, which strives mainly to achieve these social goals alongside profit; or alternatively, 'a company that aims to achieve social goals alongside profit maximization, and has included a profit distribution limitation for

[5] Regulated by the Amutot Law, n. 5740-1980, NPOs exercise business activity unless they remain not-for-profit. Coherently, profit distribution is prohibited and NPO memberships cannot be transferred or sold. 'Certificate of Proper Management'– issued by the Registrar of Amutot after an examination of compliance with the various NPO Law provisions – must be obtained for receiving tax benefits. A key component to receiving the certification is a non-financial annual report detailing the actions taken to promote the NPO's objectives, a detailed breakdown of the organisational structure, the corporations whose officeholders are also officeholders in the NPO, etc.

[6] In Israel, a traditional company (both private limited liability companies and partnerships) must strive for profit maximisation, although it may pursue any other legal goal, consequently considering stakeholders' (e.g. workers, creditors, the public) interests as part of its business considerations, and it can also donate a reasonable amount of money to charity, for a 'worthy cause', outside business considerations, unless this is somehow realised in the shareholders interest.

private investors up to 50% after the initial investment are returned' (*Recommendations of The Secondary Committee Of Social Enterprises Regarding the Definition of Disadvantaged Communities*, Prime Minister's Office (27.2.2012); *CEO instructions for social businesses assistance plan (pilot) 4.31*, Ministry of Economy (first published 13.05.2014, last updated 19.09.2017).

4.7.1. Public Benefit Companies (PBC)

Public Benefit Companies (PBC) are the organisations mostly utilised by public and national institutions such as museums, schools, colleges, synagogues, research and policy-making institutes, etc. It is regulated by the Companies Law, 5760-1999, but is also partially subordinated to the same regulator of no-profit organisations (the Registrar of Amutot).

PBC is defined as a company that pursues social goals only, and which cannot distribute any profit. It differs from no-profit organisations since: (i) PBCs are companies by definition, while NPOs can choose to be organised as a company, but do not have to; (ii) the social goals must be chosen from a predetermined (extremely broad) list provided by the legislator (see Schedule II of the Israeli Company Law). Under the court permission, shareholders may transfer, however, the ownership of their PBC participation.

Similarly to no-profit organisations, PBCs must provide proper reporting on the promotion of social goals, in exchange for tax benefits.

4.7.2. Proposed Legislation on Social Enterprises

In the summer of 2017, a joint initiative of IVN (the Israel Venture Network, a venture philanthropy network that has invested in over 30 social businesses) and various parliament members from different political parties, brought forth a legislation proposal (Legislation Proposal 4088/20/P) to create a tailor-made legal structure for social enterprises, which process of approval is still ongoing.

The explanatory note of the proposal states its purpose of creating a legal structure suitable for the needs of a social enterprise, such as employment expenses of disadvantaged communities or funding difficulties.

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, forming a social enterprise company and/or a social enterprise partnership.

If the law will pass, Israeli social enterprises will be required to identify social goals, excluding the mere activity of donation to other entities, within the company bylaws. Directors should, consequently, *prioritise* the social goal over profit maximisation.

Members, however, will not free to decide between any possible social goal, as it should be identified within a legal list.

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 on profit/bonus distribution of shares, up to 50%. This cap would only apply after the initial investment has been returned. Alternatively, changing the cap on profit distribution would be possible only with the 90% majority and the approval of the Registrar, or with the permission of the court.

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

Finally, a social enterprise can only merge with another social enterprise and only with the approval of the Registrar. Also, the court has the authority to order the liquidation of a social enterprise if it has engaged in illegal activities or it has acted contrary to the goals determined in the bylaws (presumably through derivate action, though it is not specifically stated). The assets of a liquidated company are transferred to the shareholders of the company. However, if the company has established a distribution cap, the shareholders only receive assets up to the value of their initial investment, and the remaining assets are transferred to either a no-profit or a Public Benefit Company that pursue similar social goals.

5. Final Remarks

5.1. Need for the Development of the Human-Centred Business Model

The inventory of the existing models of ‘hybrid forms’ of doing business in a more sustainable way, together with the growing international awareness (see, among many, the UN Global Compact, *Guide to corporate sustainability. Shaping a sustainable future*, 2014; the UN *2030 Agenda for Sustainable Development*, 2015), 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. As a result, many businesses have sought to operate in more socially responsible and sustainable ways, consumers have started to make purchasing decisions based upon good business practices, and governments have begun to enact laws that both enable and foster an environment in which businesses can play a more positive role in society (Kassoy et al. 2016). As part of this effort, many legal systems have enacted legislation to create corporate governance structures that enable businesses to make decisions and carry out operations in more socially oriented ways (Par. 4).

However, something is still missing. Firstly, there is a lack of common definitions: concepts such as 'social enterprise' or 'benefit corporation' differ among jurisdictions, sometimes on very central aspects (such as profit distribution constraints). Secondly, corporate governance mechanisms to ensure the consideration of social and environmental interests within the management of the corporation are still mainly based on the common governance rule, traditionally created in a profit-centric way. Hybrid companies introduce greater complexity into the corporate structure to attain the benefits of for-profit and not-for-profit structures. A similar complexity cannot be faced in the traditional corporate governance structures developed in a 'profit-centric' perspective, but *ad hoc* mechanisms should be developed to protect shareholders minority from a change of purpose (e.g. withdrawal rights); provide effective directors fiduciary duties; assure capital lock in; etc. (see Par. 3 above). Similarly, hybrid companies increase the burden of reporting requirements (in line with this need see the Directive 2014/95/EU on the disclosure of non-financial statements, Par. 4.2).

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

The project proposes to address the entire business ecosystem through an agreed set of guiding principles, which would ultimately shape a legal and institutional framework that would lay down specific guidelines for enterprise governance, financial instruments, investment policies, procurement, and other matters.

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

Moreover, a system of legal recognition could assist social enterprises in communicating to potential investors and grantors or donators their social purposes. This would improve a social enterprise's ability to **attract the 'social' investors** which are recently arising and secure access to finance or grants that have a social purpose requirement for eligibility, lower interest rates and/or generally more favourable terms. The HCBM will have in itself all the necessary mechanisms to ensure compliance and enforcement with the goals stated by the entity, thereby protecting those who have invested in the company because of its 'human-centred nature'. This would ensure the economic sustainability of the human-centred enterprise.

5.2. Some Preliminary Considerations on the Human-Centred Enterprise

Even if the project has still to be developed, some standpoints can be already identified. Firstly, the human-centred enterprise (HCE) is meant to carry out *business* activities. Secondly, the Model would be offered to businesses on a voluntary basis but, when adopted, the business must be run balancing the economic sustainability with the social and/or environmental goals set in the bylaws. A set of principles of social and environmental sustainability (as defined by the Pillar 1 group) will be identified as the minimum common denominator for all enterprises that wish to participate in the project ('binding principles'), and could be further defined in the bylaws ('optional principles'). It is central to give HCEs a clear core nature, to make it properly recognisable on the market, making it possible to attract those consumers and investors attracted by the 'social' nature of the HCE.

Finally, the developed inventory of existing relevant initiatives (Par. 3) has shown that adopting a modular approach, which differentiates between small or newly established businesses and large businesses, is necessary. Similarly, simplified mechanisms of incorporation should be developed: the Australian Indigenous corporation could be a good example in this sense (see Par. 4.6.1), especially for developing countries. A similar approach is also necessary to balance the need to report on the social and financial outcomes, yet reduce the administrative burden of social enterprises that are usually small- to medium-sized enterprises with limited funds.

5.3. Further Issues for the Project Development

The development of the project should face at least the following issues (see also the discussion in Par. 3).

What is meant for ‘human-centred’ nature should be clarified. If it is clear that it does not refer only to business, but is also related to the *way* the business is carried out, it remains however unclear whether some industries should be excluded by definition from the model (e.g. the production of cluster bombs). Similarly, it should be clarified whether a HCE can be defined as such when generating a positive social impact to its members only (as it can be the case of cooperatives). Also, it will have to be decided whether the ‘human-centred’ activities should be the only ones carried out by the HCE, or if the business could also carried out pure for-profit activities under certain conditions (e.g. as long as the ‘social’ activity is predominant, or the majority of profit comes from the ‘social’ activity).

Directors’ fiduciary duties (as strictly related to the directors appointment techniques) will have to be deeply analysed.

Further, it should be evaluated whether and how stakeholders should participate in the governance of the business, e.g. appointing of one or more directors. Stakeholders’ involvement is not enough if it does not go hand in hand with enforcement mechanisms, which should also be deeply analysed.

Another key point to be discussed is whether the HCBM should provide for asset lock and distribution constraints and, if so, with which limits.

The issue of disclosure of non-financial information, to both members and the public, will have to be tackled.

Finally, the question on how a HCE can participate in a group of companies (as controlling or controlled company) should be considered, especially when some of those are traditional for-profit companies.

A very similar reflection should be made regarding the HCE supply chain. If it is true that, through the suppliers/business partners selections, HCEs could exercise the highest influence on the market, fostering a transition towards a sustainable economy, it also true that the HCE should be enabled to be economically sustainable and to compete on the market. This would be a very sensitive and challenging balance to be developed

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