


## Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective

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**Abstract:** The aim of the article is to demonstrate that economic, technological and social changes, also thanks to the principle of sustainable development, lead to the transformation of existing and the emergence of new hybrid forms of conducting business activity. On one hand, there is a noticeable expansion of social economy mechanisms that reflect an ‘economic’ approach to providing broadly defined goods and services in the public interest, and there is also resurgence of democratic member-based organizations (DMOs), such as cooperatives with their dual nature and social and economic dimensions. On the other hand, traditional forms of for-profit business are transforming into entities that integrate social and environmental goals into business, known as Sustainability-Driven Hybrid Business Models (SHBMs), and of which benefit corporations (like U.S. Benefit Corporation or French Purpose Corporation, Italian *Società Benefit* or French *Société à mission*) are an example. The transformation and emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by Joseph Schumpeter. The article presents advantages and disadvantages associated with the benefit corporations. The analysis is concluded with the open question of whether legislative intervention is needed in this area, in particular whether it would be expedient to introduce ‘mission companies’ in Poland.

## 1. Introduction

The aim of the research is to demonstrate that economic, technological and social changes, also thanks to the principle of sustainable development, lead to the transformation of existing and the emergence of new hybrid forms of conducting business activity. On one hand, there is a noticeable expansion of social economy mechanisms that reflect an ‘economic’ approach to providing broadly defined goods and services in the public interest, and there is also resurgence of democratic member-based organizations (DMOs), such as cooperatives with their dual nature and social and economic dimensions. On the other hand, traditional forms of for-profit business are transforming into entities that integrate social and environmental goals into business, known as Sustainability-Driven Hybrid Business Models (SHBMs), and of which benefit corporations are an example. The transformation and emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by Joseph Schumpeter. The article presents advantages and disadvantages associated with the benefit corporations. The analysis is concluded with the open question of whether legislative intervention is needed in this area, in particular whether it would be expedient to introduce ‘mission companies’ in Poland.

The paper goes beyond the traditional dogmatic (or ‘black-letter law’ in common law legal systems) approach of interpretation of law, accessed through court judgments and statutes with little or no reference to ‘the world outside the law’<sup>1</sup>. Instead, the ‘law in context’ or socio-legal approach is used, and the starting point of the study is not law but social issues, where the law may be treated as a means of providing a solution or part of a solution to such problems. The comparative legal research is also applied to discuss traditional categories of law from the perspective of domestic, European and U.S. law.

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<sup>1</sup> See Mike McConville and Wing Hong Chui, “Introduction and Overview” in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007), 11 et seq.

## 2. Social entrepreneurship

In recent years there has been a noticeable expansion of social economy mechanisms<sup>2</sup> that reflect an ‘economic’ approach to the provision of broadly defined goods and services in the social interest<sup>3</sup>. Social economy entities

<sup>2</sup> On social economy see in particular Kuba Wygnański and Piotr Frączak, “Ekonomia społeczna w Polsce – definicje, zastosowania, oczekiwania, wątpliwości,” *Ekonomia Społeczna Teksty*, no. 1(2006): 1 et seq.; Anna Ciepiewska-Kowalik, Bartosz Pielniński, Marzena Starnawska and Aleksandra Szymańska, “Social Enterprise in Poland: Institutional and Historical Context,” *ICSEM Working Papers*, no. 11(2015), accessed November 10, 2022, [https://www.researchgate.net/publication/295073203\\_Social\\_Enterprise\\_in\\_Poland\\_Institutional\\_and\\_Historical\\_Context](https://www.researchgate.net/publication/295073203_Social_Enterprise_in_Poland_Institutional_and_Historical_Context); Anna Ciepiewska-Kowalik, *European Commission. Social enterprises and their ecosystems in Europe. Updated country report: Poland* (Luxembourg: Publications Office of the European Union, 2020), accessed November 10, 2022, <https://ec.europa.eu/social/BlobServlet?docId=22455&langId=en>; European Commission, EC Directorate-General for Employment, Social Affairs and Inclusion, *A map of social enterprises and their ecosystems in Europe* (Luxembourg: Publications Office of the European Union, 2015), accessed November 10, 2022, <https://ec.europa.eu/social/BlobServlet?docId=12987&langId=en>; European Commission, EC Directorate-General for Internal Market and Services, *The Social Business Initiative of the European Commission* (2015), <http://ec.europa.eu/DocsRoom/documents/14583>; Social Economy Europe, *The Future of EU policies for the Social Economy: Towards a European Action Plan* (Brussels: SEE, 2019), accessed November 10, 2022, <https://www.socialeconomy.eu.org/wp-content/uploads/2020/02/SEE-Action-Plan-for-Social-Economy.pdf>; OECD, *Social economy and the COVID-19 crisis: current and future roles* (2020), accessed November 10, 2022, [https://read.oecd-ilibrary.org/view/?ref=135\\_135367-031kjiq7v4&title=Social-economy-and-the-COVID-19-crisis-current-and-future-roles](https://read.oecd-ilibrary.org/view/?ref=135_135367-031kjiq7v4&title=Social-economy-and-the-COVID-19-crisis-current-and-future-roles). In light of the latest Act of August 5, 2022 on Social Economy (Journal of Laws 2022, item 1812, hereinafter: Act on Social Economy) which came into force on October 30, 2022, social economy is the activity of social economy entities for the benefit of the local community in the field of social and professional reintegration, creation of jobs for people at risk of social exclusion and provision of social services, implemented in the form of economic activity, public benefit activity and other activity for pecuniary interest. It is estimated that the social economy in Europe accounts for 8% of the EU GDP, represents 2.8 million entities and enterprises as well as over 13.6 million paid jobs, i.e. 6.3% of the working population – see Interreg Europe Policy Learning Platform on SME Competitiveness, *The social economy and support to social enterprises in the European Union. Policy brief* (2021), accessed November 10, 2022, [https://euagenda.eu/upload/publications/the\\_social\\_economy\\_and\\_support\\_to\\_social\\_enterprises\\_in\\_the\\_european\\_union\\_policy\\_brief.pdf](https://euagenda.eu/upload/publications/the_social_economy_and_support_to_social_enterprises_in_the_european_union_policy_brief.pdf).

<sup>3</sup> This can be seen from the example of Italy, which introduced a regulation relating to social cooperatives in 1991, and by the end of 2004, there were already 7100 of such cooperatives creating 223,000 jobs.

operate in the area at the intersection of the business and nonprofit sectors. When referring to the Polish legal regulation, social economy organizations may include social cooperatives operating under the Act of April 27, 2006 on Social Cooperatives<sup>4</sup>, labor cooperatives, including disabled cooperatives, operating under the Act of September 16, 1982 - Cooperative Law<sup>5</sup>, certain non-governmental organizations referred to in Article 3, paragraph 2 of the Act of April 24, 2003 on Activities of Public Interest and Voluntary Work<sup>6</sup> and entities referred to in Article 3, paragraph 3, items 1, 2 and 4 of that Act, including corporations.

Social economy entities may obtain the status of a social enterprise<sup>7</sup>, which, while carrying out economic activities (or other paid activities<sup>8</sup>), considers the services to members, employees or the community to be the primary purpose of its business activities (over economic goals) and not the profits, whose generation is only and as much as a means aimed at achieving certain social effects<sup>9</sup>. However, this activity has the characteristics of a typical business, carried out within a specific ownership structure corresponding to its mission<sup>10</sup>, in an organized and continuous manner, and

<sup>4</sup> Journal of Laws 2020, item 2085, as amended, hereinafter: the Act on Social Cooperatives.

<sup>5</sup> Journal of Laws 2021, item 648, as amended, hereinafter: the Cooperative Law.

<sup>6</sup> Journal of Laws 2022, item 1327, as amended, hereinafter: the Act on Activities of Public Interest and Voluntary Work.

<sup>7</sup> Thus, a private, autonomous organization that provides products or services to the broader community, which is either founded or managed by a group of citizens and in which the scope of material benefits is subject to restrictions – see Wygnański, and Frączak, “Ekonomia społeczna,” 19.

<sup>8</sup> Therefore, paid public benefit activity (or ‘paid mission-related activity’ – see Ciepielewska-Kowalik, *Social enterprises*, 46) as referred to in Article 8(1) of the Act on Activities of Public Interest and Voluntary Work, business activity, as referred to in Article 3 of the Law of March 6, 2018 - Entrepreneurs Law (Journal of Laws 2021, item 162, as amended) or other activity for pecuniary interest.

<sup>9</sup> Cf. Martyna Jedlińska, “Chapter XIV. Spółdzielnie socjalne,” in *Prawo spółdzielcze, System Prawa Prywatnego*, volume 21, Issue 1, ed. Krzysztof Pietrzykowski (Warszawa: C. H. Beck, 2020), 794.

<sup>10</sup> See Ciepielewska-Kowalik, *Social enterprises*, 39 et seq; Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini, *European Commission. Social enterprises and their ecosystems in Europe. Comparative synthesis report* (Luxembourg: Publications Office of the European Union, 2020): 28, accessed November 10, 2022, <https://ec.europa.eu/social/BlobServlet?docId=22304&langId=en>.

based on economic instruments<sup>11</sup>, involving economic risks<sup>12</sup>. The management of such an entity and the decision-making process of the enterprise are both autonomous and participatory<sup>13</sup>.

Social cooperatives, which aim to run a joint venture based on the personal work of members and employees of the social cooperative for their social and professional reintegration<sup>14</sup>, are some of the best examples of introducing market mechanisms to solve social issues, use social innovation, and generally respond to the challenges of supporting the goals of sustainable development<sup>15</sup>. However, all social enterprises have the same objective of searching for the solutions based on commercial experience to achieve social goals. In this sense, the social economy clearly appears as a result of the economization of the so-called third sector<sup>16</sup>. Social enterprises con-

<sup>11</sup> See in particular Eleanor Shaw and Sara Carter, “Social entrepreneurship: Theoretical antecedents and empirical analysis of entrepreneurial processes and outcomes,” *Journal of Small Business and Enterprise Development* 14, no. 3 (2007): 418 et seq., <https://doi.org/10.1108/14626000710773529> where Authors prove that while the contemporary practices of social enterprises share many similarities with their for-profit counterparts, significant differences can be found when comparing these practices with extant entrepreneurship research.

<sup>12</sup> Cf. EMES European Research Network and United Nations Development Programme, *Social Enterprise: A new model for poverty reduction and employment generation. An examination of the concept and practice in Europe and the Commonwealth of Independent States* (2008), accessed November 10, 2022, <http://www.undp.org/sites/g/files/zskgk326/files/publications/Social%20Enterprise-%20A%20New%20Model%20for%20Poverty%20Reduction%20and%20Employment%20Generation.pdf>.

<sup>13</sup> Companies operating not for profit are able to become social enterprise and the obligation to guarantee internal participation standards is ensured by Article 4(4) of the Act on Social Economy which specifies that the Supervisory Board or Audit Committee shall carry out the functions of the consulting and advisory body in the company.

<sup>14</sup> Cf. Article 2 of the Act on Social Cooperatives.

<sup>15</sup> Cf. Ryszard Praszkiar, Agata Zabłocka-Bursa and Ewa Jozwik, “Social Enterprise, Social Innovation and Social Entrepreneurship in Poland: A National Report,” *CSEM Working Papers* 11 (2014): 1 et seq., accessed November 10, 2022, [https://www.researchgate.net/publication/295073203\\_Social\\_Enterprise\\_in\\_Poland\\_Institutional\\_and\\_Historical\\_Context](https://www.researchgate.net/publication/295073203_Social_Enterprise_in_Poland_Institutional_and_Historical_Context).

<sup>16</sup> It is also important to recognize that social entrepreneurship is not limited to and is not only addressed to persons who, for various reasons, are not independent and require support, since - primarily in The United States and The United Kingdom - it is a mechanism for drawing persons with exceptional talents into creative solutions aimed at resolving social problems – as rightly pointed out by Wygnański and Frączak, “Ekonomia społeczna,” 19. Cf. esp. *Ahsoka*, an organization that identifies and supports the world’s leading social

stitute a “mechanism for regaining the sovereignty and subjectivity of individuals, institutions and communities”, implement the assumptions of the ‘new’ social economy in the area of entrepreneurship, understood as “the willingness and ability to take responsibility for their own destiny”<sup>17</sup>.

### 3. Cooperatives as democratic member-based organizations

Additionally, the phenomenon of reuse is prominent, just like the transformation and even creation of new hybrid entities that operate for profit but integrate social and environmental goals into economic activities.

The first example of such a successful combination are cooperatives or cooperative societies<sup>18</sup>, whose structure allows, on the one hand, to achieve certain social goals, and on the other hand, to achieve economic effects<sup>19</sup>. **Cooperatives are autonomous associations of persons united to meet common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise**<sup>20</sup>. At the normative level, they are designed to incorporate corporate social responsibility<sup>21</sup>.

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entrepreneurs, learns from the patterns in their innovations, and mobilizes a global community that embraces these new frameworks to build an “everyone a changemaker world.” – cf. “About Ashoka,” Ashoka, accessed November 10, 2022, <https://www.ashoka.org/en-us/about-ashoka>.

<sup>17</sup> Wygnański and Frączak, “Ekonomia społeczna,” 20.

<sup>18</sup> On the definition of cooperative see Stanisław Wojciechowski, *Kooperacja w rozwoju historycznym* (Warszawa: Wydawn. Wyzd. Propagandy Zw. Pol. Stow. Spożywców, 1923), 96; Piotr Zakrzewski, “Pozaprawne ujęcie spółdzielni,” *Roczniki Nauk Prawnych*, vol. XI, Issue 1 (2001): 165 et seq.

<sup>19</sup> There are many forms, models and structures on which the co-operatives are based and the purposes they serve (including retail, social, consumer, worker, and business and employment co-operatives).

<sup>20</sup> *The Statement on the Cooperative Identity (The Cooperative Charter)* adopted by the International Cooperative Alliance at its congress in Manchester in 1995, accessed November 10, 2022, <https://www.ica.coop/en/cooperatives/cooperative-identity>.

<sup>21</sup> Cooperatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others. The cooperative principles are: 1. Voluntary and Open Membership, 2. Democratic Member Control, 3. Member Economic Participation, 4. Autonomy and Independence, 5. Education, Training, and Information, 6. Cooperation among Cooperatives and 7. Concern for Community – see *The Statement on the Cooperative Identity*. Cf. Tim Mazzarol, Richard A. Simmons and Elena Mamouni Limnios, “A Conceptual Framework for Research into

From the very beginning of the development of this form of business activity, cooperatives had had a huge impact on the socio-economic development of Poland, but after a period of glory, due to unfavorable conditions, their role significantly diminished. Now again, as when the “shortcomings of the economic and social relations prevailing at the time”<sup>22</sup> became the cause of the emergence of the cooperative movement, we are seeing an increase in interest in cooperatives as a tool for implementing the principle of equity in the economy<sup>23</sup>. Many cooperatives (including worker cooperatives, food cooperatives, horticultural and beekeeping cooperatives) could skillfully adapt to the new conditions of the economy by transforming themselves into modernly managed enterprises able to compete in the market. Within the framework of cooperatives and cooperative societies, members create their own jobs, providing income for themselves, their families<sup>24</sup> and con-

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Co-Operative Enterprise,” *Centre for Entrepreneurial Management and Innovation (CEMI) Discussion Paper Series* No. 1102 (December 9, 2011): 5 et seq., <http://dx.doi.org/10.2139/ssrn.2015641> proving that there are three primary objectives for the co-op: the need to build identity; the need to build social capital and the need to build sustainability.

<sup>22</sup> Piotr Zakrzewski, “Pozaprawne ujęcie spółdzielni,” 162.

<sup>23</sup> Cf. Kazimierz Boczar, *Spółdzielczość. Problematyka społeczna i ekonomiczna* (Warszawa: Państwowe Wydawn. Ekonomiczne, 1986), 176.

<sup>24</sup> As a rule, cooperatives are for-profit entrepreneurs, within the meaning of Article 43<sup>1</sup> of the Law of April 23, 1964 – the Civil Code (consolidated text Journal of Laws 2022, item 1360, as amended) and Article 4 of the Entrepreneurs Law. They carry out business activities on the basis of economic calculation while providing benefits to cooperative members (Article 67 of the Cooperative Law). These benefits generally have an economic dimension, but not only. Cooperatives may obtain a balance sheet surplus (Article 75 of the Cooperative Law), whereas the rules for its distribution are determined - in addition to the Law - by the Articles of Association, which may provide for the distribution of the balance sheet surplus among the members of the cooperative and the payment of a share of the surplus (Article 18 § 2.5 of the Cooperative Law which is impossible in some types of cooperatives, such as housing cooperatives, which are entrepreneurs, yet, they conduct the so-called resultless enterprises. Although it is a non-profit activity in the sense that it does not translate into the payment of dividends, it is used to generate profits and it is subject to economic rules, the principles of rational (economic) management (see Articles 1(1), (3), (5) and (6), 6 of the Act of December 15, 2000 on Housing Cooperatives, consolidated text Journal of Laws 2021, item 1208, as amended). In addition, however, the non-income-generating nature of the activities of a housing cooperative should be referred only to that part of the activities of the cooperative that does not generate income, meaning, management of housing resources and incidentally conducted social, educational and cultural activities for

tractors<sup>25</sup>, maintain relationships, learn new social roles, gain skills and experience, in a word, generate tangible economic benefits as well as establish and strengthen human capital<sup>26</sup>.

Cooperatives face a daunting task; surviving and competing in a globalized market without sacrificing their own character can be demanding<sup>27</sup>.

The management of a cooperative as a democratic member-based organization (DMO)<sup>28</sup>, with its participatory structure, is problematic and it requires specific competences to assume board responsibility, in order to ensure effective governance<sup>29</sup>.

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the benefit of cooperative members and their environment. The rules for the payment of profits to cooperative members may resemble those known under company law, and thus be based on a link between the value of the contributed share but may also be correlated with the value of turnover, labor contribution or membership seniority (cf. Articles 76, 77 of the Cooperative Law).

<sup>25</sup> Cf. Qiao Liang and George Hendrikse, “Pooling and the yardstick effect of cooperatives,” *Agricultural Systems*, vol. 143(2016): 97 et seq., <https://doi.org/10.1016/j.agsy.2015.12.004>.

<sup>26</sup> Cf. Svenja Damberg, „Does creating perceived co-operative member value pay off? An empirical study in the German co-operative banking context,” *Journal of Co-operative Organization and Management*, vol. 10, Issue 1(2022): 100170, <https://doi.org/10.1016/j.jcom.2022.100170> about “co-operative member value” as an important predictor of sustainable satisfaction, next to corporate reputation.

<sup>27</sup> Cf. especially Mazzarol, Simmons and Limnios, “A Conceptual Framework,” 22, 30 et seq. writing about the need to build “resilience architecture” for co-ops; Ignacio Bretos and Carmen Marcuello, “Revisiting globalization challenges and opportunities in the development of cooperatives,” *Annals of Public and Cooperative Economics*, vol. 88, Issue 1(March 2017): 47 et seq., <https://doi.org/10.1111/apce.12145>; with respect to new technologies Eduard Cristobal-Fransi, Yolanda Montegut-Salla, Berta Ferrer-Rosell and Natalia Daries, “Rural cooperatives in the digital age: An analysis of the Internet presence and degree of maturity of agri-food cooperatives’ e-commerce,” *Journal of Rural Studies* Volume 74(2020): 55 et seq., <https://doi.org/10.1016/j.jrurstud.2019.11.011>.

<sup>28</sup> Also known as member-owned businesses (MOB’s). Cf. especially Johnston Birchall, “The Comparative Advantages of Member-Owned Businesses,” *Review of Social Economy* 70, no. 3(2012): 263 et seq., accessed November 10, 2022, <https://www.jstor.org/stable/23257800> and Mazzarol, Simmons and Limnios, “A Conceptual Framework,” 9 et seq.

<sup>29</sup> Roger Spear, “Governance in Democratic Member-Based Organisations,” *Annals of Public and Cooperative Economics* 75(2004): 33 et seq., <https://doi.org/10.1111/j.1467-8292.2004.00242.x>; The Working Group on Cooperatives, *Fostering cooperatives’ potential to generate smart growth & jobs* (2015): 1–6, accessed November 10, 2022, <https://ec.europa.eu/docsroom/documents/10450?locale=pl>.



Like other organizations, they can only develop in a favorable institutional environment, in particular, with wider access to capital<sup>30</sup> and favorable normative environment<sup>31</sup>. However, studies conducted indicate that there is something to fight for<sup>32</sup>; membership in a cooperative positively affects the economic status, financial security of cooperative members and allows for additional benefits of a general social nature<sup>33</sup>, triggering a kind of developmental chain reaction in the area of environment<sup>34</sup>, investments,

<sup>30</sup> Cooperatives have no or limited access to venture capital on the capital markets. They primarily depend on their own member capital as well as member and bank loan finance, in order to satisfy the specific member needs. There is a need for cooperatives to explore alternative forms of financing such as crowd-funding or the set-up of specific capital funds, in order to provide financing, which has been successfully developed in some EU countries like France or Italy – Cf. The Working Group on Cooperatives, *Fostering cooperatives' potential to generate smart growth & jobs*, 4.

<sup>31</sup> The economic and social role of cooperative enterprises in Europe is of significant importance. There are 250,000 cooperatives in the EU, owned by 163 million citizens (one third of EU population) and employing 5.4 million people and that hold substantial market shares in agriculture, forestry, banking, insurance, housing, retail and pharmaceutical and health care – “Cooperatives”, European Union, accessed November 10, 2022, [https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/cooperatives\\_en](https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/cooperatives_en).

<sup>32</sup> Cf. The Working Group on Cooperatives, *Fostering cooperatives' potential to generate smart growth & jobs*, 3.

<sup>33</sup> Por. OCDC's International Cooperative Research Group, *What Difference Do Cooperatives Make? Poland. A Pilot Study* (2019): 1–42 resulting from the project “What Difference Do Cooperatives Make?” (WDDCM), accessed November 10, 2022, <https://www.ocdc.coop/wp-content/uploads/2018/08/What-Difference-Do-Cooperatives-Make.-Poland..pdf>. and *What Difference Do Cooperatives Make? Global Outcomes Report Kenya, Peru, Philippines, and Poland* (2021): 1–15, accessed November 10, 2022, [https://ocdc.coop/wp-content/uploads/2021/09/WDDCM\\_Global.pdf](https://ocdc.coop/wp-content/uploads/2021/09/WDDCM_Global.pdf), that proves an existence of „cooperative difference”, and therefore the impact that cooperatives have, economically, through income, and socially, as measured by well-being indicators.

<sup>34</sup> Cf. i.a., Jiehong Zhou, Qing Liu and Qiao Liang, “Cooperative membership, social capital, and chemical input use: Evidence from China,” *Land Use Policy*, vol. 70(January 2018): 394 et seq. <https://doi.org/10.1016/j.landusepol.2017.11.001>; Apurbo Sarkarab, Honhyu Wang, Airin Rahman, Lu Qian and Waqar Hussain Memon, “Evaluating the roles of the farmer's cooperative for fostering environmentally friendly production technologies-a case of kiwi-fruit farmers in Meixian, China,” *Journal of Environmental Management*, vol. 301(1 January 2022): 113858, <https://doi.org/10.1016/j.jenvman.2021.113858>.

infrastructure or jobs<sup>35</sup>. Cooperatives around the world are undergoing an evolution, not for the first time, resulting in their modernized models being referred to as ‘hybrid cooperative business models’<sup>36</sup>. Solutions are being sought to improve the governance mechanisms of cooperatives<sup>37</sup>, support their development, internationalize them, provide with broader access to financing, harmoniously link the social and economic aspects of their activities or the possibility of creating group structures<sup>38</sup>.

#### 4. Benefit corporations

The so-called ‘benefit corporations’ (‘flexible purpose corporations’) are another example of entities that are equipped with a mechanism to

<sup>35</sup> Cf. WDDCM, *What Difference Do Cooperatives Make? Global Outcomes Report Kenya, Peru, Philippines, and Poland* (2021):1–15, which confirms that they also play a significant role in women’s lives, allowing them to gain or improve skills and experience, earn income, become independent, hence creating positive social impact for communities, including future generations.

<sup>36</sup> Cf. John Rolfe, Delwar Akbar, Azad Rahman and Darshana Rajapaksa, “Can cooperative business models solve horizontal and vertical coordination challenges? A case study in the Australian pineapple industry,” *Journal of Co-operative Organization and Management* Volume 10, Issue 2(2022): 100184, <https://doi.org/10.1016/j.jcom.2022.100184>, using the example of pineapple cooperatives in Australia, which use referral tools, information distribution, market forecasts, accountability mechanisms and other methods to support farmers, but which also raise the cost of operating such cooperatives and force them to be larger in size. See also “Copa and Cogeca position on sustainable crops protection Agricultural production,” Copa & Cogeca, Brussels, November 2019, accessed November 10, 2022, <https://copa-cogeca.eu/Download.ashx?ID=3741437&fmt=pdf>, where it is pointed out that farmers and agricultural cooperatives are already investing and using innovative solutions to maintain the competitiveness and sustainability of their businesses, better manage natural resources, provide goods and services to consumers, adapt to the effects of climate change and respond to social needs.

<sup>37</sup> Cf. Darrell Hammond and John Luiz, “The co-operative model as a means of stakeholder management: an exploratory qualitative analysis,” *South African Journal of Economic and Management Sciences* 19 (4)(2016): 630 et seq., DOI:10.17159/2222–3436/2016/v19n4a11.

<sup>38</sup> Cf. Roger Spear, “Governance in Democratic Member-Based Organisations”, *Annals of Public and Cooperative Economics*, 75(2004): 33 et seq., <https://doi.org/10.1111/j.1467–8292.2004.00242.x>. Social cooperatives may form cooperative consortia based on a contract to increase the economic and social potential of affiliated social cooperatives, jointly organize production, trade or service networks, organize joint promotion of cooperative or economic activities, or promote a common trademark (Article 15b of the Act on Social Cooperatives).

complement the business model with solutions that pursue social and environmental goals. These are modernized, hybrid versions of commercial companies, or, in other words, a special legal regime and associated special status that allows them to conduct business ‘with a mission’ (*société à mission*, mission-driven company)<sup>39</sup>.

The first to introduce a law allowing the creation of benefit corporations was the US state of Maryland in 2010<sup>40</sup>. The Maryland Benefit Corporations shall have the purpose of creating a ‘general public benefit’<sup>41</sup>, which means “a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits”. In doing so, it should be emphasized that general public benefit ‘may be a limitation’ of the ‘traditional purposes’

<sup>39</sup> Also referred to as the “hybrid social ventures” – cf. Matthew Lee and Jason Jay, “Strategic Responses to Hybrid Social Ventures,” *California Management Review*, 57(3) (2015): 126 et seq., <https://doi.org/10.1525/cmr.2015.57.3.126>. Certified B Corporations are something different, i.e. the companies that achieved B Corp Certification granted by international nonprofit organization B Lab. B Corp Certification is a designation that a business is meeting high standards of verified performance, accountability, and transparency on factors from employee benefits and charitable giving to supply chain practices and input materials. In order to achieve certification, a company must demonstrate high social and environmental performance, make a legal commitment by changing their corporate governance structure to be accountable to all stakeholders, not just shareholders, and achieve benefit corporation status if available in their jurisdiction and exhibit transparency by allowing information about their performance. There are nearly 5,000 companies worldwide from 153 industries that have obtained B Corp Certification – see “About B Corp Certification”, B Corp, accessed November 10, 2022, <https://www.bcorporation.net/en-us/certification>. However, the principles of their operation coincide with the benefit corporations, described here, hence, the conclusions derived from the analysis of their activities may be useful and applicable to the subject of the study – cf. i.a. Sabrina Tabares, “Certified B corporations: An approach to tensions of sustainable-driven hybrid business models in an emerging economy,” *Journal of Cleaner Production*, vol. 317(1 October 2021): 128380, <https://doi.org/10.1016/j.jclepro.2021.128380>. It is worth noting that, like *Ashoka*, discussed below, the activities of this organization confirm the multicentricity of the legal system – cf. especially Ewa Łętowska, “Multicentryczność współczesnego systemu prawa i jej konsekwencje,” *Państwo i Prawo*, no. 4(2005): 3.

<sup>40</sup> The Maryland Annotated Code, Corporations and Associations Article, Section 6-C-01–08.

<sup>41</sup> Cf. the Maryland Limited Liability Corporations, The Maryland Annotated Code, Corporations and Associations Article, Section 6-C-01–08. Sections 4A-1201 to 4A-1303.

of the corporation. In addition, the charter of a benefit corporation may identify as one of the purposes of the benefit corporation the creation of one or more specific public benefits, which includes: providing individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; preserving the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; increasing the flow of capital to entities with a public benefit purpose or the accomplishment of any other particular benefit for society or the environment.

A director of a benefit corporation, in performing the duties of a director, including the director's duties as a member of a committee, in determining what the director reasonably believes to be in the best interests of the benefit corporation, shall consider the effects of any action, or decision not to act, on the stockholders, the employees and workforce, the subsidiaries and suppliers, the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation, community and societal considerations and the local and global environment; and may consider any other pertinent factors or the interests of any other group that the director determines are appropriate to consider. A director of a benefit corporation, in the performance of duties in that capacity, does not have any duty to a person that is a beneficiary of the public benefit purposes of the benefit corporation. In the reasonable performance of duties in accordance with the standard provided in this subtitle, a director of a benefit corporation shall have the immunity from liability described in § 5-417 of the Courts Article.

Benefit corporation shall deliver<sup>42</sup> to each stockholder an annual<sup>43</sup> benefit report including: (a) A description of the ways in which the benefit corporation pursued a general public benefit during the year and the extent to which the general public benefit was created; the ways in which the benefit corporation pursued any specific public benefit that its charter

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<sup>42</sup> A benefit corporation shall post its most recent benefit report on the public portion of its Web site or shall provide a copy of its most recent benefit report on demand and without charge to any person who requests a copy.

<sup>43</sup> Within 120 days following the end of each fiscal year.

states is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and any circumstances that have hindered the creation by the benefit corporation of the public benefit; and b) An assessment of the societal and environmental performance of the benefit corporation prepared in accordance with a third-party standard<sup>44</sup> applied consistently with the prior year's benefit report or accompanied by an explanation of the reasons for any inconsistent application.

Washington's Social Purpose Corporations (SPCs)<sup>45</sup> just like benefit corporations, may pursue social and environmental goals alongside profit-driven operations. Any corporation may become or cease to be a social purpose corporation and if so, 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. In addition to the general social purpose, every SPC may have one or more specific social purposes for which the corporation is organized. In addition to the matters required to be set forth in the articles of incorporation of the SPC, the articles of incorporation of a social purpose corporation must set forth i.a. a provision that states: "The mission of this social purpose corporation is not necessarily compatible with and may be contrary to maximizing profits and earnings for shareholders, or maximizing shareholder value in any sale, merger, acquisition, or other similar actions of the corporation"<sup>46</sup>. The articles of incorporation of a social purpose corporation may at the same time contain the provisions requiring i.a. the corporation's directors or officers -only- to consider the impacts of any corporate action or proposed corporate action

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<sup>44</sup> "Third-party standard" means a standard for defining, reporting, and assessing best practices in corporate social and environmental performance that is developed by a person or entity that is independent of the benefit corporation; and is transparent because the following information about the standard is publicly available or accessible: the factors considered when measuring the performance of a business; the relative weightings of those factors; and the identity of the persons who developed and control changes to the standard and the process by which those changes were made.

<sup>45</sup> Chapter 23B.25 RCW "Social Purpose Corporations".

<sup>46</sup> RCW 23B.25.040

upon one or more of the social purposes of the corporation; or requiring the corporation to furnish to the shareholders an assessment of the overall performance of the corporation with respect to its social purpose or purposes, prepared in accordance with a third-party standard.

Even the state of Delaware, where the majority of companies in the US are registered, introduced a similar regulation in 2013. Delaware Public Benefit Corporation is a for-profit corporation that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall identify within its statement of business or purpose pursuant to §102(a)(3) of title 8 one or more specific public benefits to be promoted by the corporation; and state within its heading that it is a public benefit corporation. 'Public benefit' means a positive effect (or reduction of negative effects) on 1 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<sup>47</sup>.

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation<sup>48</sup>.

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<sup>47</sup> The Delaware Code, § 362. Cf. Michael R. Littenberg, Emily J. Oldshue, and Brittany N. Pifer, Ropes & Gray LLP, "Delaware Public Benefit Corporations—Recent Developments," Harvard Law School Forum on Corporate Governance (Monday, August 31, 2020), accessed November 10, 2022, <https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/>.

<sup>48</sup> The Delaware Code, § 365 b) and c) state that A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected

A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter. The corporations shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct<sup>49</sup>.

In total, at least 35 U.S. states and the District of Columbia have enacted regulations that allow the creation of companies which define their social purpose and require their management to take it into account in the company's management processes<sup>50</sup>.

Benefit corporations are also present in Europe. As of January 1, 2016, it is possible in Italy to create the so-called *Società Benefit*.<sup>51</sup> A *Società Benefit* is a company which combines the goal of profit with the purpose of creating a positive impact for society and the environment and which operates in a transparent, responsible and sustainable way.

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by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve. A director's ownership of or other interest in the stock of the public benefit corporation shall not alone, for the purposes of this section, create a conflict of interest on the part of the director with respect to the director's decision implicating the balancing requirement in subsection (a) of this section, except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a public benefit corporation. In the absence of a conflict of interest, no failure to satisfy that balancing requirement shall, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides.

<sup>49</sup> The Delaware Code, § 366.

<sup>50</sup> Among others, in New York State, where benefit corporations operate pursuing a 'general public benefit' and thus are created to generate a material positive impact on society and the environment" (Article 17 of the Business Corporation Law ("BCL"), §1702(b)).

<sup>51</sup> Decreto Legge 1882 del 17 Aprile 2015 sulle Società Benefit. L. 28-12-2015 n. 208, Commi 376-384, Pubblicata in Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016). Cf. Dario Carrera, Marco Meneguzzo and Alessandro Messina, "Solidarity-based Economy in Italy. Practices for Social Entrepreneurship and Local Development: The Experience of Rome," *Socioeco.org* (2007): 1-19, accessed November 10, 2022, [https://base.socioeco.org/docs/solidarity-based\\_economy\\_in\\_italy\\_dario\\_carrera\\_et\\_al.pdf](https://base.socioeco.org/docs/solidarity-based_economy_in_italy_dario_carrera_et_al.pdf).

This is not a new type of commercial company, but a specific legal status that any of the companies described in the Italian Civil Code (partnerships, corporations, but also cooperatives) may adopt to not only pursue the purpose of profit, but also the specific purpose(s) of common benefit that they have inserted in their articles of association for common good (*beneficio comune*).

The specific purposes shall be specifically identified within the benefit corporation's corporate purpose and shall be pursued through an administration finalized at balancing the interest of the shareholders and the interest of those that may be impacted by the company's business activity. The Italian law defines a common benefit as the creation of positive effects (or the reduction of negative ones) vis-à-vis individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other stakeholders.

The directors of a *Società Benefit* are responsible for managing the company with the aim of pursuing the common benefit, taking into consideration both the interests of shareholders, and also the interest of all stakeholders, and have the obligation to identify one or more individuals to be appointed as impact manager with the specific tasks of pursuing the common benefit and reporting regarding the activities of the company in a complete and transparent way<sup>52</sup>.

*Società Benefit* is required to produce and publish on the website an annual benefit report and to attach it to the annual financial statement. The annual benefit report includes the description of the specific objectives, modalities and actions implemented by the directors in order to pursue the aims of common benefit and the possible mitigating circumstances which have prevented, or slowed up, the achievement of the above aims; evaluation of the general impact of the company, using a third party evaluation and a specific section containing the description of the new objectives which the benefit corporation intends to pursue in the following fiscal year<sup>53</sup>.

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<sup>52</sup> Cf. *Società Benefit*, Legge 28 dicembre 2015, n. 208, accessed November 10, 2022, <https://www.societabenefit.net/wp-content/uploads/2017/03/Italian-benefit-corporation-legislation-courtesy-translation-final.pdf>.

<sup>53</sup> There are currently about 1,400 *Società Benefit* companies operating in Italy.



French “Plan d’Action pour la Croissance et la Transformation des Entreprises” (the so-called *Loi Pacte*) of 2019<sup>54</sup> introduced a number of mechanisms to facilitate business<sup>55</sup>. In particular, however, the purpose of this regulation was to promote corporate social responsibility. Thus, the amended Article 1835 of the Civil Code introduces the possibility of defining the company’s purpose (*le raison d’être*), which is a set of principles that have been adopted by the company and which it intends to follow in its activities<sup>56</sup>. In addition, for the first time since 1804, Article 1833 CC was also amended and now stipulates that a company may be formed for a legally permissible purpose in the common interest of the partners, but at the same time, it shall be managed in its own interest, taking into account the social and environmental effects of its activities<sup>57</sup>. Therefore, the regulation (Article L225–35) of the *Code de commerce* has also been changed, which requires company managers to take into account the specific purpose of the company<sup>58</sup>.

*Loi Pacte* also introduced the possibility of applying for the status of *Société à mission*<sup>59</sup> as long as the company: (1) incorporates into its articles

<sup>54</sup> Le Plan d’action pour la croissance et la transformation des entreprises (PACTE), May 22, 2019.

<sup>55</sup> Among other things, a special on-line portal has been developed, where it is possible to register any French company without submitting even a single paper document.

<sup>56</sup> “Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l’objet, l’appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d’être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité.”

<sup>57</sup> “Toute société doit avoir un objet licite et être constituée dans l’intérêt commun des associés. La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité”. Cf. also Alain Pietrancosta, “Intérêt social et raison d’être. Considérations sur deux dispositions clés de la loi PACTE amendant le droit commun des sociétés,” *Annales des Mines - Réalités industrielles*, 4(2019): 55, DOI:10.3917/rindu1.194.0055.

<sup>58</sup> Cf. Aleksandra Szczęśna and Anne-Marie Weber, „Zrównoważony ład korporacyjny en français,” *Przegląd Prawa Handlowego*, 7(2022): 20–21.

<sup>59</sup> Articles L. 210–10 to L. 210–12 Code de Commerce. As at 3 October 2022, 751 sociétés à mission were registered – see *La plateforme de référence des sociétés à mission en France*, accessed November 10, 2022, <https://www.observatoiredessocietesamission.com/>. Cf. Blanche Segrestin, Kevin Levillain, Stéphane Vernac and Armand Hatchuel, *La <<Société à Objet Social Étendu>>, Un nouveau statut pour l’entreprise* (Paris: Presses des Mines, 2015): 15 et seq.

of association a specific objective; (2) incorporates into its articles of association specific social or environmental objectives it intends to achieve by conducting business activity; (3) describes the terms and conditions for evaluating (overseeing) its activities in the areas described, mandatorily invoking the so-called ‘commitment committee’, and (4) establishes rules for auditing the performance of the company’s objectives by an independent third party.

## 5. Sustainability- Driven Hybrid Business Models

The reasons for the formation of the movement to broaden a company’s purpose to include social and environmental factors, which led to the emergence of Sustainability-Driven Hybrid Business Models<sup>60</sup>, also referred to as fourth sector, benefit corporations, L3C, Blended Value, ForBenefit, Values Driven, Mission Driven or Hybrid Organizations, are quite complex.

Never before has it been so obvious that growth may not be unlimited in a finite system<sup>61</sup>. This social attitude has changed consumer behavior<sup>62</sup>, the labor market as well as beliefs about how business should be conducted, and promoted a new vision of capitalism, described as a green or hybrid economy<sup>63</sup>, including the assumption that the basis for development is sus-

<sup>60</sup> Cf. Nardia Haigh and Andrew J. Hoffman, “Hybrid Organizations: The Next Chapter of Sustainable Business,” *Ross School of Business Paper No. 1347, Organizational Dynamics*, 41(2)(2012): 126 et seq., accessed November 10, 2022, <https://ssrn.com/abstract=2933616> or <http://dx.doi.org/10.2139/ssrn.2933616>.

<sup>61</sup> To paraphrase Massimo Mercati, CEO of Aboca. Cf. Joseph Stiglitz, “Growth with Exhaustible Natural Resources: Efficient and Optimal Growth Paths,” *The Review of Economic Studies*, 41(1974): 123 et seq., <https://doi.org/10.2307/2296377>.

<sup>62</sup> Cf. the research on socially conscious consumers LOHAS Market™ Report. It is estimated that in 2010. LOHAS in the U.S. was about \$290 trillion; in 2022 it will be nearly \$473 trillion. See also William H. Clark Jr. and Elizabeth K. Babson, “How Benefit Corporations Are Redefining the Purpose of Business Corporations,” *William Mitchell Law Review* Vol. 38: Iss. 2, Article 8(2012): 817 et seq., accessed November 10, 2022, <http://open.mitchellhamline.edu/wmlr/vol38/iss2/8>.

<sup>63</sup> The author of the term “the hybrid economy”, which describes an economy that is the opposite of the capitalist, market, neoliberal economy, is Jon C. Altman, who came to his conclusions by conducting research in communities in Samoa and Australia – cf. Jon C. Altman, “Sustainable development options on Aboriginal land: The hybrid economy in the twenty-first century,” *Centre for Aboriginal Economic Policy Research Publications*, Discussion Paper No. 226(2001): 4, accessed November 10, 2022, <https://openresearch-repository.anu>.

tainable economic growth and a high level of protection and improvement of environmental quality, and it all contributed to a growing awareness of corporate social responsibility, with an emphasis on responsibility understood as accountability for the actions taken and the impact the company has on society and the environment<sup>64</sup>. Therefore, I have an impression that, right on our doorstep, the debate about sustainability in corporate law is still taking place and initiatives are sprouting up like mushrooms after the rain to facilitate the harmonious linking of social and environmental goals with the value building and business profit generation. The idea is that economic activity should serve something greater than profit, meaning the well-being of society as a whole, the planet and future generations<sup>65</sup>.

The hybrid business model is based on an approach that differs from the traditional one in three areas: addressing of the social and environmental issues in terms of the goals of the organization, relationships with suppliers, employees and customers, and integration with the market, competitors and industry institutions<sup>66</sup>.

Benefit corporations are an attempt to respond to rising social inequalities, unfair distribution of wealth, and environmental degradation, for which corporations are blamed - largely rightly so. It may be said that

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edu.au/bitstream/1885/40104/2/2001\_DP226.pdf. Cf. also Ricardo Abramovay, *Beyond the Green Economy* (London: Routledge 2015); Geoff Buchanan, "From Samoa to CAEPR via Mumeka: The Hybrid Economy Comes of Age," in *Engaging Indigenous Economy: Debating Diverse Approaches*, ed. Will Sanders (Australian National University Press, Centre for Aboriginal Economic Policy Research (CAEPR), vol. 35(2016)), 15 et seq., accessed November 10, 2022, <http://www.jstor.org/stable/j.ctt1d10hpt.8>; Jeremy Rifkin, *Spoleczeństwo zerowych kosztów krańcowych. Internet przedmiotów. Ekonomia współdzielenia. Zmierzch kapitalizmu [Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism]*, transl. Anna Dorota Kamińska (Warszawa: Studio Emka, 2016).

<sup>64</sup> Cf. Edward R. Freeman, *Strategic Management: A Stakeholder Perspective* (Cambridge: Cambridge University Press, 1984, 2010) and proposed by the Author the concept of Company Stakeholder Responsibility.

<sup>65</sup> Klaus Schwab and Peter Vanham, *Kapitalizm interesariuszy: Globalna gospodarka a postęp, ludzie i planeta [Stakeholder Capitalism: A Global Economy that Works for Progress, People and Planet]*, transl. Michał Lipa (Warszawa: OnePress, 2022), 184.

<sup>66</sup> Cf. Nardia Haigh and Andrew J. Hoffman, "Hybrid Organizations: The Next Chapter of Sustainable Business," 126 et seq.

they lost their social legitimacy at some point<sup>67</sup>. A feeling that corporations should not only produce money, but also create social values became firmly established in the public mind<sup>68</sup>.

Convincing research, including empirical studies, confirms that corporate mainstreaming of social and environmental issues in its commercial activities and stakeholder relations<sup>69</sup>, with management in the spirit of the triple bottom line (people, planet, and profits) is much more responsive to changing social needs<sup>70</sup> than value-based management, which recognizes shareholders as economic owners of the company (corporate ownership)<sup>71</sup>,

<sup>67</sup> Cf. especially Joseph L. Bower, Herman B. Leonard and Lynn Paine Sharp, *Capitalism at Risk: Rethinking the Role of Business* (Boston: Harvard Business Review Press, 2011), 1 et seq.

<sup>68</sup> Cf. David Millon, “Theories of the Corporation,” *Duke Law Journal* 1990, no. 2(1990): 201 et seq., <https://doi.org/10.2307/1372611>; Joshua D. Margolis and James R. Walsh, “Misery Loves Companies: Rethinking Social Initiatives by Business,” *Administrative Science Quarterly*, 48, no. 2(2003): 268 et seq., <https://doi.org/10.2307/3556659>. See also the study of researchers at Stanford and the University of California, Santa Barbara who polled 759 students graduating from Master of Business Administration (MBA) programs in both the U.S. and Europe about their job preferences. The researchers found that nearly 9 out of 10 students would take a pay cut if it meant they could work for a fair and ethical firm – see Nick Carbone, “Would You Sacrifice Pay to Work for An Ethical Company?,” *Time*, May 22, 2011, accessed November 10, 2022, <https://newsfeed.time.com/2011/05/22/would-you-sacrifice-pay-to-work-for-an-ethical-company/>.

<sup>69</sup> European Commission, *Green Paper: Promoting a European framework for Corporate Social Responsibility* (Brussels, 18 July 2001), accessed November 10, 2022, [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_01\\_9](https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_9).

<sup>70</sup> Cf. i.a. Paddy Ireland, “Company Law and the Myth of Shareholder Ownership,” *The Modern Law Review*, 62, no. 1(1999): 51, accessed November 10, 2022, <http://www.jstor.org/stable/1097073>; Paddy Ireland, “Shareholder Primacy and the Distribution of Wealth,” *The Modern Law Review* 68, no. 1(2005): 49 et seq., accessed November 10, 2022, <http://www.jstor.org/stable/3699112>.

<sup>71</sup> Cf. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: The Macmillan Company, 1932). In Poland i.a. Michał Romanowski, “Znaczenie sporu o metodę odczytywania pojęcia <<interes spółki kapitałowej>>,” *Przegląd Prawa Handlowego*, 7(2015): 10. See House of Lords, the Judgement of July 29, 1948, Short v. Treasury Commissioners [1948] 1 KB 116 122, where the court stated that “shareholders are not, in the eyes of the law, part owners of the company”, see also The High Court Of Justice (King’s Bench Division) Court Of Appeal, the Judgement of March 27, 1908, Gramophone & Typewriter Ltd v Stanley [1908] 2 KB 89 and more judgements referred by Lynn A. Stout, “The Shareholder Value Myth,” *Cornell Law Faculty Publications*, Paper 771(2013):

residual creditors of the company<sup>72</sup>, and draws on agency theory, and, most importantly, is oriented toward building shareholder value added (SVA<sup>73</sup>) in the short term ('short-terminism'<sup>74</sup>).

It is fair to agree, however, that corporate social responsibility is sometimes used to whitewash a company's reputation, and that high-sounding corporate commitments are sometimes part of a well-thought-out marketing and public relations effort, if not just plain green- or fair-washing.

It is also for this reason that many researchers are coming to the belief that corporations are not adapted to the realization of social goals, and in order to achieve real and valuable change, leaving aside the mechanisms of supervision and independent audit of corporate social activities, it is necessary to radically modify their organizational structure, including its purpose and management principles<sup>75</sup>. Therefore - in addition to the rebuilding of organizations from the so-called third sector, the reuse of DMOs - benefit corporations, new hybrid-type organizations are also being created, which are neither a social enterprise nor a non-profit organization, but rather an evolution of the concept of for-profit business to take on the challenges of the 21 century and bring about common benefits

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I et seq., accessed November 10, 2022, <http://scholarship.law.cornell.edu/facpub/771>, who rightly argues that what shareholders own is not the company but its shares only.

<sup>72</sup> Especially Michael C. Jensen and William H. Meckling, in one of the most cited scholarly articles to this day, titled "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," *Journal of Financial Economics*, vol. 3, Issue 4(October 1976): 305 et seq., [https://doi.org/10.1016/0304-405X\(76\)90026-X](https://doi.org/10.1016/0304-405X(76)90026-X).

<sup>73</sup> The term seems to have been coined by Alfred Rappaport, *Creating Shareholder Value, A Guide for Managers and Investors* (New York: Free Press 1986, updated edition 1997).

<sup>74</sup> The value of an enterprise in this context is the sum of the value of debt and equity, while shareholder value is the difference between the value of an enterprise and the value of its debt. Critical about shareholder value see i.a. Joseph L. Bower and Lynn Paine Sharp in their article entitled "The Error at the Heart of Corporate Leadership," *Harvard Business Review Magazine* (May-June 2017), accessed November 10, 2022, <https://hbr.org/2017/05/the-error-at-the-heart-of-corporate-leadership>.

<sup>75</sup> Cf. Subhabrata Bobby Banerjee, "Corporate Social Responsibility: The Good, the Bad and the Ugly," *Critical Sociology* 34, vol. 1(2008): 51 et seq., <https://doi.org/10.1177/0896920507084623>; Blanche Segrestin, Kevin Levillain, Stéphane Vernac and Armand Hatchuel, *La "Société à Objet Social Étendu", Un nouveau statut pour l'entreprise* (Paris: Presses des Mines, 2015); Clark Jr., and Babson, "How Benefit Corporations Are Redefining the Purpose," : 817 et seq.

both for society and the environment. The emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by J. Schumpeter<sup>76</sup>.

## 6. Advantages and disadvantages associated with the benefit corporations

What benefits may the introduction of regulations on benefit corporations bring? Obtaining such status allows the principles of corporate social responsibility to be permanently embedded in the concept of an entrepreneur. The above, in turn, translates into the achievement of benefits in the form of a good reputation of the company, building or strengthening the competitive

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<sup>76</sup> Cf. Joseph A. Schumpeter, *Kapitalizm. Socjalizm. Demokracja* [*Capitalism. Socialism. Democracy*], transl. Michał Rusiński (Warszawa: Wydawnictwo Naukowe PWN 1995, second edition 2009): 1 et seq.; Hugo Reinert and Erik S. Reinert, “Creative Destruction in Economics: Nietzsche, Sombart, Schumpeter,” in *Friedrich Nietzsche (1844–1900)*, ed. Jürgen Backhaus and Wolfgang Drechsler, *The European Heritage in Economics and the Social Sciences*, vol. 3. (Boston, MA: Springer, 2006), 55 et seq., [https://doi.org/10.1007/978-0-387-32980-2\\_4](https://doi.org/10.1007/978-0-387-32980-2_4), who argue that the term itself is first used by German economist Werner Sombart, but the idea of ‘creative destruction’ enters the social sciences by way of Friedrich Nietzsche. See also Richard Foster and Sarah Kaplan, *Creative Destruction: Why Companies That Are Built to Last Underperform the Market—and How to Successfully Transform Them* (New York: Currency/Doubleday, 2001), who show the need to change at the pace and scale of capital markets as well as cultural barriers that make it hard to change corporate cultures even in the face of clear market threats and prove that redesigning the corporation to change at the pace and scale of the capital markets is inevitable for corporations to survive over the long haul. See also an equally interesting proposal for capturing the described process presented by Israel M. Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1973), 1 et seq. and other works of that Author i.a. *Discovery and the Capitalist Process* (Chicago: University of Chicago Press, 1985); “Uncertainty, Discovery, and Human Action,” in *Discovery and the Capitalist Process* (Chicago: University of Chicago Press, 1985) and “Creativity and/or Alertness: A Reconsideration of the Schumpeterian Entrepreneur,” *The Review of Austrian Economics*, vol. 11(1999): 5 et seq. <https://doi.org/10.1023/A:1007719905868>, where the Author proposes a concept different from Schumpeter’s innovating entrepreneur, whom not only is responsible for creating disequilibrium, but recognizes a disequilibrium situation; it is so called “entrepreneurial alertness”. It remains an open question for now whether Schumpeter was right when he predicted that it was through the growth of large corporations that the transformation of capitalism into socialism would occur.

position of the company, better use of resources<sup>77</sup>, a decrease in business risk and the cost of both own and foreign capital of the company<sup>78</sup>. Examples of many hybrid companies show how they have developed commercially viable business models for creating positive social and environmental impact<sup>79</sup>. An additional advantage is the normative status of the company and, depending on the jurisdiction, the tax or, more broadly, public law benefits that such status may entail.

On a macro level, the use of such entities in the economy affects the perception of the market itself, the rules of doing business, the place and social role of corporations, and shatters the old belief that ‘it may not be done otherwise’.

Benefit corporations are at the same time a response to the doubts that may arise from a deeper analysis of the activities of not-for-profit entities and the already mentioned social enterprises and cooperatives. Will they be able to fulfill their role by entering the market<sup>80</sup>, will they lose their identity

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<sup>77</sup> Cf. Manuel Castelo Branco and Lúcia Lima Rodrigues. “Corporate Social Responsibility and Resource-Based Perspectives,” *Journal of Business Ethics* 69, no. 2(2006): 111 et seq., accessed November 10, 2022, <http://www.jstor.org/stable/25123942>.

<sup>78</sup> Cf. Sadok El Ghouli, Omrane Guedhami, Chuck C.Y. Kwok and Dev R. Mishra, “Does corporate social responsibility affect the cost of capital?,” *Journal of Banking & Finance* 35, Issue 9(2011): 2388 et seq., accessed November 10, 2022, <https://ssrn.com/abstract=1546755>; Phillip Krüger, “Corporate Goodness and Shareholder Wealth,” *Journal of Financial Economics (JFE)*, Forthcoming (July 7, 2014): 1 et seq., accessed November 10, 2022, <https://ssrn.com/abstract=2287089> or <http://dx.doi.org/10.2139/ssrn.2287089>.

<sup>79</sup> Cf. Haigh, and Hoffman, “Hybrid Organizations,” 127 et seq.; Nardia Haigh and Andrew J. Hoffman, “The New Heretics: Hybrid Organizations and the Challenges They Present to Corporate Sustainability,” *Ross School of Business Paper No. 1344, Organization & Environment* 27, vol. 3(2014): 223 et seq., <http://dx.doi.org/10.2139/ssrn.2932327>.

<sup>80</sup> Cf. Philip Selznick and Jonathan Simon (introduction), *TVA and the Grass Roots: A Study of Politics and Organization* (Quid Pro, LLC, 2011):1 et seq. Philip Selznick writes about TVA grass-roots policy (administration) which means incorporation of certain local and national interests into the organization, considers an organization as an adaptive social structure. What is especially interesting is the *coöptation* process described by the Author as the process of absorbing new elements into the organizational structure as a means of survival.

in doing so<sup>81</sup>, how will they be able to compete in the market<sup>82</sup>? Although numerous operational shortcomings and barriers to the development of such organizations are recognized, the growing number of social enterprises and cooperatives worldwide gives hope that such a socio-economic marriage is possible and, moreover, brings the expected results<sup>83</sup>.

Although there have been numerous conceptual, theoretical and empirical studies relating to stakeholder theory, proving the operation of firms in society is becoming more complex and it is apparent that a new framework is required to manage stakeholders' needs, very little has been done to integrate the theory into practical process models which could be effectively implemented by the corporations. Benefit corporations are thus supposed to introduce a mechanism for liberation from the mandate, sometimes enforced by law, sometimes by legal tradition, and sometimes simply by the approach of the judiciary, to manage in the spirit of short-term shareholder value maximization and move toward the long-term interests of the company - governance<sup>84</sup>.

Nonetheless, this peculiar liberation of management from shareholders and their expectations as well as the threat that managers may not be held accountable for taking actions contrary to shareholders' interests raises concerns. Is it possible for such companies to persevere in a competitive

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<sup>81</sup> Cf. the case of Facebook, that as Mark Zuckerberg himself wrote, "(...) was not originally created to be a company", but "(...) was built to accomplish a social mission — to make the world more open and connected".

<sup>82</sup> Cf. especially about microfinance Roy Mersland and Øystein R. Strøm, "Microfinance Mission Drift?," *World Development*, vol. 38(1)(2010): 28 et seq., <https://doi.org/10.1016/j.worlddev.2009.05.006>.

<sup>83</sup> Cf. Francisca Castilla-Polo and M. Isabel Sánchez-Hernández, "International orientation: An antecedent-consequence model in Spanish agri-food cooperatives which are aware of the circular economy," *Journal of Business Research*, vol. 152(2022): 231 et seq. <https://doi.org/10.1016/j.jbusres.2022.07.038>.

<sup>84</sup> Cf. the relevance in this regard of the B corp certification assumptions see "Benefit Corporations", B Corp, accessed November 10, 2022, <https://usca.bcorporation.net/benefit-corporation/>.



market “serving two masters”?<sup>85</sup> It is stressed that stakeholderism in its pure form may lead to a reduction in the accountability of the company’s managers and negatively affect the company’s financial performance, which may also harm its stakeholders<sup>86</sup>. Is the Sustainability-Driven Hybrid Business Model suitable for a company of any size and shareholding structure? There are also doubts as to whether the creation of companies with special status may cause a certain division of the companies in the eyes of the public into good, sustainable enterprises and bad enterprises that do not care about the environment, with such evaluation made solely on the basis of a certain legal status. However, such a solution allows for a fairly straightforward identification of companies respecting social responsibility standards, and the competition thus created may have positive effects, since it may also lead to changes in traditional corporations wishing to match the standards of companies with a mission.

Opponents of benefit corporations also point out that regulations pertaining to these “pseudo-social enterprises” are leaky, lack mechanisms to enforce the responsibilities of the management board of the company, and create room for abuse and green-washing<sup>87</sup>.

<sup>85</sup> Cf. Haigh and Hoffman, “Hybrid Organizations,” 131 et seq.

<sup>86</sup> Cf. Lucian Ayre Bebchuk, “The Case for Increasing Shareholder Power,” *Harvard Law Review* 118, no. 3(2005): 833 et seq., accessed November 10, 2022, <http://www.jstor.org/stable/4093350>. Martin Friedman in the 1970 essay in the *New York Times*, *September 13, 1970, 17* wrote that the great virtue of private competitive enterprise is that “it forces people to be responsible for their own actions and makes it difficult for them to ‘exploit’ other people for either selfish or unselfish purposes.” About the definition of a “stakeholders” see Edward R. Freeman and David L. Reed, “Stockholders and Stakeholders: A new perspective on Corporate Governance,” *California Management Review* 25(3)(1983): 88 et seq., DOI:10.2307/41165018 (“the groups without whose support the organization would cease to exist”). In “Strategic Management: A Stakeholder Perspective” (Pitman, 1984) Martin Friedman wrote that an individual or group qualifies as a stakeholder if it affects or is affected by the organization’s objectives. Cf. also Thomas Donaldson and Lee E. Preston. “The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications,” *The Academy of Management Review* 20, no. 1(1995): 65 et seq., accessed November 10, 2022, <https://www.jstor.org/stable/258887> adding there are persons or groups with *legitimate interests* participating in the activities of the organization.

<sup>87</sup> Cf. Kennan El Khatib, “The Harms of the Benefit Corporation,” *American University Law Review* 65, Issue 1 Article 3(2015): 154, accessed November 10, 2022, <https://digitalcommons.wcl.american.edu/aulr/vol65/iss1/3>.

## 7. Should benefit corporations be implemented in Poland?

Should benefit corporations be introduced in Poland? Certainly, the issue is worth considering.

On one hand, the answer is ‘no’, as there is no justification why only certain companies should be subject to changes based on the need for a more balanced approach to doing business. The overarching goal of every corporation (which is not to say - in the same way) should be to operate a legitimate, ethical, profitable and sustainable business to ensure its success and increase in value over the long term<sup>88</sup>.

On the other hand, the answer might be ‘yes’, since the formula combines the pursuit of profit with the goal of making a positive impact on society and the environment. It forces operations to be conducted in a transparent, responsible and sustainable manner.

Or *perhaps* there is no need to do so, in the sense that the legal regulations already in force in Poland allow social and environmental factors to be woven into business activities. This applies in particular to the purpose and interest of the company, which should be defined in the context of the regulations pertaining to the company, including financial reporting, certain reporting standards<sup>89</sup>, remuneration policy, and especially the system of uniform classification of sustainable activities, through which it would be possible to determine whether an investment is environmentally sustainable

<sup>88</sup> Cf. Martin Lipton, Steven A. Rosenblum, William Savitt and Karessa L. Cain, “On the purpose of the corporation,” *Harvard Law School Forum on Corporate Governance* (May 26, 2020), accessed November 10, 2022, <https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/>. See also The World Economic Forum, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, accessed November 10, 2022, [https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/?DAG=3&gclid=EAI-aIQobChMIs9DhrdSj-wIVkqkYCh0s8gEJEAAYASAAEgIY2PD\\_BwE](https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/?DAG=3&gclid=EAI-aIQobChMIs9DhrdSj-wIVkqkYCh0s8gEJEAAYASAAEgIY2PD_BwE), *proclaiming that* “The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company”.

<sup>89</sup> Directive 2014/95/EU of the European Parliament and of the Council of October 22, 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1–9).

to redirect capital flows towards sustainable investments<sup>90</sup>, confirming and creating at the same time a certain axiology of the entire Community commercial law<sup>91</sup>.

Shareholder primacy is a choice of managers and not an obligation under the law<sup>92</sup>. In the United States, too, where managers are subject to ‘fiduciary duties’ and hence the obligation to act in the interests of

<sup>90</sup> EU taxonomy for sustainable activities: Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, that complements non-financial disclosure by companies in accordance with the requirements of Directive 2014/95/EU and Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Non-Financial Reporting Directive, NFRD) (OJ L 182, 29.6.2013, p. 19–76). The scope of entities obliged to non-financial disclosure will be substantially extended as soon as the Corporate Sustainability Reporting Directive, CSRD enters into force (see: Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final, accessed November 10, 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0189>).

<sup>91</sup> Cf. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM(2022) 71 final, 2022/0051(COD), accessed November 10, 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>. The Directive will set out a horizontal framework to foster the contribution of businesses operating in the single market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end. The aim of the Directive is to, i.a., improve corporate governance practices to better integrate risk management and mitigation processes of human rights and environmental risks and impacts, including those stemming from value chains, into corporate strategies; avoid fragmentation of due diligence requirements in the single market and create legal certainty for businesses and stakeholders as regards expected behavior and liability; increase corporate accountability and improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behavior.

<sup>92</sup> Cf. Lynn A. Stout, “The Mythical Benefits of Shareholder Control,” *Virginia Law Review* 93, no. 3(2007): 789 et seq. <http://www.jstor.org/stable/25050361>.

shareholders as trustees, beneficiaries of ‘entrusted’ assets<sup>93</sup>, this is already being recognized. The jurisprudence of the state of Delaware, which is orthodox in this area, increasingly emphasizes the advantage of value creation in the long term over profits in the short term<sup>94</sup>. Most states have enacted regulations that allow the interests of the company’s stakeholders (other constituencies) to be considered as part of the decision-making process by the management (constituency statutes)<sup>95</sup>.

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<sup>93</sup> See Maryland Annotated Code, Corporations and Associations Article, 2–405.1; John Armour, Henry Hansmann and Reinier Kraakman, in: Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe and Edward Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford: Oxford University Press, 2017), 29.

<sup>94</sup> Cf. Court of Chancery of Delaware, Judgement of March 7, 2014, *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014) “shareholder primacy does not prohibit directors from considering the interests of constituencies other than shareholders, but those other constituencies may be considered only instrumentally to advance [shareholders’ best interests]”.

<sup>95</sup> Pennsylvania (in 1983) was the first US state to introduce above mentioned regulation. As of today 41 states have incorporated constituency statutes - cf. Kathleen Hale, “Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes,” *Arizona Law Review*, 45(2003): 823 et seq., accessed November 10, 2022, <https://arizonalawreview.org/pdf/45-3/45arizlrev823.pdf>. In particular, constituency statutes have never been introduced in Delaware, although in 2018 r. the Certification of Adoption of Transparency and Sustainability Standards Act was implemented. It establishes a voluntary disclosure regime to foster dialogue around sustainability and responsibility among participating Delaware business entities and their various stakeholders. Cf. Court of Chancery of Delaware, Judgement of October 29, 2009, *eBAY Domestic Holdings, Inc. v. Newmark*, Civil Action No. 3705-CC (Del. Ch. Oct. 29, 2009) where the court pointed out that “rational judgments about how promoting non-stockholder interests — be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture — ultimately promote stockholder value”. The trend is less visible in M&A transactions - cf. especially Supreme Court of Delaware, Judgement of September 9, 2010, *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 66 A.L.R.4 157, Fed. Sec. L. Rep. (CCH) P92,525 (Del. Mar. 13, 1986) (the Revlon rule). See also Leo Strine, “Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America’s Future,” *U of Penn, Inst for Law & Econ Research Paper* No. 19–39, *Harvard John M. Olin Discussion Paper* No. 1018(2019): 1 et seq., accessed November 10, 2022, <https://ssrn.com/abstract=3461924> or <http://dx.doi.org/10.2139/ssrn.3461924>.

Nevertheless, in the United States, but - paradoxically - also in France, Italy where, as in Poland, board members are not burdened with a fiduciary duty to maximize shareholder value<sup>96</sup>, legislators have decided to regulate benefit corporations, *Società Benefit* and *société à mission*. Although taking into account the long-term sustainability goals of the corporation is justified from an economic point of view and may have a positive impact on the efficiency of the company's activities, resulting in an increase in corporate value<sup>97</sup>, certain *solutions* are still being introduced to identify the managers of the company against any liability for decisions made contrary to the assumptions of 'shareholder value'.

Why is this the case? Again, it is crucial to point out the view, well-established in the doctrine<sup>98</sup> and jurisprudence, according to which the com-

<sup>96</sup> Cf. Michigan Supreme Court, Judgement of February 7, 1919, *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668 (1919), which represents a kind of censorship marking the moment in the US when shareholder value became a binding legal doctrine ("a business corporation is organized and carried on primarily for the profit of the stock-holders" and the board members cannot according to law, "conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others"); U.S. Supreme Court, Judgement of February 28, 1927, *Tyson v. Bant*, 273 U. S. 418 (1927) and equally well-known, controversial U.S. Supreme Court, Judgement of June 30, 2014, *Burwell v. Hobby Lobby Stores, Inc.* No. 13–354, 723 F. 3d 1114, affirmed; No. 13–356, 724 F. 3d 377 („Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not”). Cf. Lynn A. Stout, “Corporations Don’t Have to Maximize Profits,” *New York Times*, April 16, 2015, <https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/corporations-dont-have-to-maximize-profits>.

<sup>97</sup> Cf. i.a. Alex Edmans, *Grow the Pie. How Great Companies Deliver Both Purpose and Profit* (Cambridge: Cambridge University Press, 2020); Angeloantonio Russo and Francesco Perrini, “Investigating Stakeholder Theory and Social Capital: CSR in Large Firms and SMEs,” *Journal of Business Ethics* 91, no. 2(2010): 207 et seq., accessed November 10, 2022, <http://www.jstor.org/stable/27749791>; Nancy E. Landrum, “Stages of Corporate Sustainability: Integrating the Strong Sustainability Worldview,” *Organization & Environment* 31(4) (2018): 287 et seq., <https://doi.org/10.1177/1086026617717456>.

<sup>98</sup> Cf. only some of the publications Przemysław Bryłowski and Andrzej Kidyba, “Kategoria interesu w kodeksie spółek handlowych,” *Przegląd Prawa Handlowego* 10(2005): 4 et seq; Adam Opalski, “O pojęciu interesu spółki handlowej,” *Przegląd Prawa Handlowego* 11(2008): 16 et seq.; Paweł Błaszczuk, “Pojęcie interesu spółki handlowej. Gloss to the decision of the Polish Supreme Court of November 5, 2009, I CSK 158/09,” *Głosa* 3(2012): 29 et seq.; Aleksander Kappes, “Interes spółki a interes wspólników/akcjonariuszy” in *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi*

pany is perceived through its interests, which determine its actions and outlines the scope of responsibility of its managers. Following an analysis of the views in Polish literature and jurisprudence, the conclusion may be drawn that, so far, the prevailing opinion is that the interest of the company is the same as the interest of its shareholders, which could be brought down to participation in the company's profit and increase in the value of shares as well as to the idea that the inclusion of the interests of other entities in the company's activities may negatively affect its financial performance<sup>99</sup>. This assumption is supported by expectations from investors, especially institutional investors.

The interests of the company are affected by the liability of members of the bodies towards the company for non-performance of improper performance of their duties. This is especially clear in the context of the business judgment rule, which means, or at least should mean, that board members have no obligation to increase shareholder value only<sup>100</sup>. In Poland, the new regulation of the principle of business judgment<sup>101</sup> differs from the BJR in the US, where it consists in a presumption, including procedural

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A. Strzępce, ed. Piotr Piniór, Paweł Relidzyński, Wojciech Wyrzykowski, Ewa Zielińska, Mateusz Żaba (Warszawa: C.H. Beck, 2019), 163 et seq.; Iwona Gębusia, *Interes spółki w prawie polskim i europejskim* (Warszawa: C.H. Beck, 2017) and the Polish Supreme Court, Judgment of 5 November 2009, Ref. No. I CSK 158/09, reported in: OSNC Journal 2010, No. 4, Pos. 63.

<sup>99</sup> Cf. especially Lucian Arye Bebchuk, "The Case for Increasing Shareholder Power," 833 et seq. Apart from the fact that there is no such thing as a single common interest of shareholders, it is a misconception that these interests are limited to the desire to make a profit. Cf. Daniel J.H. Greenwood, "Fictional Shareholders: For Whom is the Corporation Managed; Revisited," *Southern California Law Review*, vol. 69(1996): 1021 et seq., accessed November 10, 2022, <https://ssrn.com/abstract=794745> or <http://dx.doi.org/10.2139/ssrn.794745>; Lynn A. Stout, "The Shareholder Value Myth," (2013), stressing that benefit to the members is a result of the success of the company rather than a measure of that success; Thomas Clarke, "The Contest on Corporate Purpose: Why Lynn Stout was Right and Milton Friedman was Wrong," *Accounting, Economics, and Law: A Convivium* 10, no. 3(2020): 20200145. <https://doi.org/10.1515/ael-2020-0145>.

<sup>100</sup> Cf. the case-law of the Delaware Supreme Court cited by Kennan El Khatib, "The Harms of the Benefit Corporation," 154.

<sup>101</sup> Cf. 483 § 3 of the Law of September 15, 2000 – the Commercial Companies Act (Journal of Laws 2022, item 1467, as amended) and the German regulation - § 93 ust. 1 zd. 2 AktG, § 93 ust. 2 zd. 2 AktG.

presumption, of acting lawfully and in the interests of the company, based on the assumption that liability may only be linked to real discretionary decision-making up to a certain degree. If the board members do not have a conflict of interest, have exercised due diligence and acted in good faith, their decisions may not be evaluated on their merits, let alone challenged in court. This includes actions that ‘sacrifice’ profit of shareholders for the sake of the interests of ‘other constituencies’, and thus the long-term interests of the company itself<sup>102</sup>. The above raises the additional question that even despite the adoption of the Integrative Corporate Purpose, the actions of board members undertaken in the long-term interest of the company will be open to challenge by Polish courts.

I have dedicated another publication<sup>103</sup> to the issue of the interest of the company and how it may be understood. Without repeating the arguments outlined therein, I will only say that the view that the interest of the company is an intra-corporate category<sup>104</sup> should be reconsidered<sup>105</sup>, since the corporation as an economic institution also has a social function and is placed outside the company, in society<sup>106</sup>.

<sup>102</sup> Cf. Kennan El Khatib, “The Harms of the Benefit Corporation,” 154.

<sup>103</sup> Justyna Dąbrowska, “Growth or development, welfare or well-being? Considerations on the corporate interest in the light of institutional economics,” *Studia Prawa Prywatnego* (2022) (in the process of publication) and the literature cited therein.

<sup>104</sup> Michał Romanowski, “Znaczenie sporu o metodę odczytywania pojęcia <<interes spółki kapitałowej>>,” 10.

<sup>105</sup> Cf. E. Merrick Dodd, Jr., “For Whom Are Corporate Managers Trustees?,” *Harvard Law Review* 45, no. 7(1932): 1145 et seq. <https://doi.org/10.2307/1331697>; John L. Campbell, “Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility,” *The Academy of Management Review* 32, no. 3(2007): 946 et seq., accessed November 10, 2022, <https://www.jstor.org/stable/20159343>; Daniel J.H. Greenwood, “Fictional Shareholders: ‘For Whom is the Corporation Managed,’ Revisited,” 1021.

<sup>106</sup> Cf. David Steingard and William Clark, “The Benefit Corporation as an Exemplar of Integrative Corporate Purpose (ICP): Delivering Maximal Social and Environmental Impact with a New Corporate Form,” *Business & Professional Ethics Journal* 35, no. 1(2016): 73 et seq., accessed November 10, 2022, <https://www.jstor.org/stable/44074870> in which Authors define benefit corporation as “ethically superior model for promoting the common good”.

## 8. Conclusions

Is the regulatory interference, then, the only way to introduce modern corporate governance in Poland in the spirit of the triple bottom line? If so, would it be sufficient to impose an obligation, at the statutory level, to outline major assumptions of the company's activity setting its purpose, without reducing such purpose to the sole object of economic activity of the company and with defining the interest of the company that goes beyond the interest of the shareholders themselves? It is also worth considering the French concept, where, notwithstanding the possibility of adopting the *société à mission* status, the revised commercial legislation allows the purpose of the company to be defined and, additionally, requires the social and environmental effects of the company's activities to be considered by the management? Or should benefit corporations appear in Poland?

This calls for a deeper and broader debate, but it is basically a question of what this new *Unternehmergeist* is supposed to be, and whether capitalism will survive?<sup>107</sup> In my view, what is crucial in these considerations is to accept that “management is clearly a social process”<sup>108</sup>, and then to understand social entrepreneurship (social or civic entrepreneurship) not so much as a mechanism for arranging anew the subjective architecture of business forms, but more as a principle of participation in the market, a type of attitude, an approach to social problems, so that old or new enterprises could be seen as expressions of socially accepted values.

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<sup>107</sup> Schumpeter, *Kapitalizm. Socjalizm. Demokracja*, 75.

<sup>108</sup> Wygnański and Frączak, “Ekonomia społeczna w Polsce,” 4.



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