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 Social 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.

Keywords: Sustainability-Driven Hybrid Business Model; sustainable business model; benefit corporation; social enterprise; cooperative
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’. 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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1 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\(^2\) that reflect an ‘economic’ approach to the provision of broadly defined goods and services in the social interest\(^3\). Social economy entities


\(^3\) 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, labor cooperatives, including disabled cooperatives, operating under the Act of September 16, 1982 - Cooperative Law, 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 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, which, while carrying out economic activities (or other paid activities), 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. However, this activity has the characteristics of a typical business, carried out within a specific ownership structure corresponding to its mission, in an organized and continuous manner, and

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6 Journal of Laws 2022, item 1327, as amended, hereinafter: the Act on Activities of Public Interest and Voluntary Work.
7 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.
8 Therefore, paid public benefit activity (or ‘paid mission-related activity’ – see Ciepielew ska-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.
based on economic instruments\textsuperscript{11}, involving economic risks\textsuperscript{12}. The management of such an entity and the decision-making process of the enterprise are both autonomous and participatory\textsuperscript{13}.

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\textsuperscript{14}, 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\textsuperscript{15}. 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\textsuperscript{16}. Social enterprises con-

\textsuperscript{11} See in particular Eleanor Shaw and Sara Carter, “Social entrepreneurship: Theoretical antecedents and empirical analysis of entrepreneurial processes and outcomes,” \textit{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.


\textsuperscript{13} 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.

\textsuperscript{14} Cf. Article 2 of the Act on Social Cooperatives.


\textsuperscript{16} 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. \textit{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”17.

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 societies18, whose structure allows, on the one hand, to achieve certain social goals, and on the other hand, to achieve economic effects19. Cooperatives are autonomous associations of persons united to meet common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise20. At the normative level, they are designed to incorporate corporate social responsibility21.


19 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).


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, they role significantly diminished. Now again, as when the “shortcomings of the economic and social relations prevailing at the time” \(^{22}\) 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 \(^{23}\). 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 \(^{24}\) and con-

\(^{22}\) Piotr Zakrzewski, “Pozaprawne ujęcie spółdzielni, “ 162.


\(^{24}\) As a rule, cooperatives are for-profit entrepreneurs, within the meaning of Article 43\(^1\) 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\textsuperscript{25}, 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\textsuperscript{26}.

Cooperatives face a daunting task; surviving and competing in a globalized market without sacrificing their own character can be demanding\textsuperscript{27}.

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

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).


Like other organizations, they can only develop in a favorable institutional environment, in particular, with wider access to capital and favorable normative environment. However, studies conducted indicate that there is something to fight for; membership in a cooperative positively affects the economic status, financial security of cooperative members and allows for additional benefits of a general social nature, triggering a kind of developmental chain reaction in the area of environment, investments,
infrastructure or jobs\textsuperscript{35}. 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’\textsuperscript{36}. Solutions are being sought to improve the governance mechanisms of cooperatives\textsuperscript{37}, 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\textsuperscript{38}.

4. Benefit corporations

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

\textsuperscript{35} 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.

\textsuperscript{36} 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://copia-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.


\textsuperscript{38} 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)\(^{39}\).

The first to introduce a law allowing the creation of benefit corporations was the US state of Maryland in 2010\(^{40}\). The Maryland Benefit Corporations shall have the purpose of creating a ‘general public benefit’\(^{41}\), 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’

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\(^{39}\) 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.

\(^{40}\) The Maryland Annotated Code, Corporations and Associations Article, Section 6-C-01–08.

\(^{41}\) 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\(^\text{42}\) to each stockholder an annual\(^\text{43}\) 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

\(^{42}\) 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.

\(^{43}\) 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\footnote{“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.} 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)\footnote{Chapter 23B.25 RCW “Social Purpose Corporations”.} 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”\footnote{RCW 23B.25.040}. 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
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 pur-
poses, 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 sus-
tainable 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 incorpo-
ratio

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 corpo-
ration; 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 na-

The board of directors shall manage or direct the business and affairs of
the public benefit corporation in a manner that balances the pecuniary in-
terests 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.48

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

48 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.\(^49\)

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.\(^50\)

Benefit corporations are also present in Europe. As of January 1, 2016, it is possible in Italy to create the so-called Società Benefit.\(^51\) 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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\(^49\) The Delaware Code, § 366.

\(^50\) 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)).

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. 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.


53 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 \(^{54}\) introduced a number of mechanisms to facilitate business\(^{55}\). 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\(^{56}\). 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\(^{57}\). 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\(^{58}\).

*Loi Pacte* also introduced the possibility of applying for the status of *Société à mission*\(^{59}\) as long as the company: (1) incorporates into its articles

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\(^{54}\) Le Plan d’action pour la croissance et la transformation des entreprises (PACTE), May 22, 2019.

\(^{55}\) 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.

\(^{56}\) “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.”


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, 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. This social attitude has changed consumer behavior, 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, including the assumption that the basis for development is sus-


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. 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.

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.

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

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


residual creditors of the company\textsuperscript{72}, and draws on agency theory, and, most importantly, is oriented toward building shareholder value added (SVA\textsuperscript{73}) in the short term (‘short-terminism\textsuperscript{74}).

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\textsuperscript{75}. Therefore - in addition to the rebuilding of organizations from the so-called third sector, thereuse 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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\textsuperscript{73} The term seems to have been coined by Alfred Rappaport, \textit{Creating Shareholder Value, A Guide for Managers and Investors} (New York: Free Press 1986, updated edition 1997).

\textsuperscript{74} 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,” \textit{Harvard Business Review Magazine} (May-June 2017), accessed November 10, 2022, https://hbr.org/2017/05/the-error-at-the-heart-of-corporate-leadership.

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. Schumpeter76.

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

76 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, 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\textsuperscript{77}, a decrease in business risk and the cost of both own and foreign capital of the company\textsuperscript{78}. Examples of many hybrid companies show how they have developed commercially viable business models for creating positive social and environmental impact\textsuperscript{79}. 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\textsuperscript{80}, will they lose their identity?


\textsuperscript{80} Cf. Philip Selznick and Jonathan Simon (introduction), \textit{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\textsuperscript{81}, how will they be able to compete in the market\textsuperscript{82}? 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\textsuperscript{83}.

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\textsuperscript{84}.

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 environment?

\textsuperscript{81} 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”.


\textsuperscript{84} 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”? 85 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. 86 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. 87

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.

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, 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.

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88 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=EAIaIQobChMI9DhrdSj-wIVqVYch0s8gEJEAYAYASAEgIY2PD_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.”

to redirect capital flows towards sustainable investments\(^{90}\), confirming and creating at the same time a certain axiology of the entire Community commercial law\(^{91}\).

Shareholder primacy is a choice of managers and not an obligation under the law\(^{92}\). In the United States, too, where managers are subject to ‘fiduciary duties’ and hence the obligation to act in the interests of


\(^{91}\) 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.

shareholders as trustees, beneficiaries of ‘entrusted’ assets\textsuperscript{93}, 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\textsuperscript{94}. 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)\textsuperscript{95}.


\textsuperscript{94} Cf. Court of Chancery of Delaware, Judgement of March 7, 2014, \textit{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]).”

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\(^{96}\), 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\(^{97}\), 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\(^{98}\) and jurisprudence, according to which the com-


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. 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. In Poland, the new regulation of the principle of business judgment differs from the BJR in the US, where it consists in a presumption, including procedural

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101 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. 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 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 should be reconsidered, since the corporation as an economic institution also has a social function and is placed outside the company, in society.

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103 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.

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Review of European and Comparative Law | 2022 | Vol. 51, No. 4 | 69
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? In my view, what is crucial in these considerations is to accept that “management is clearly a social process”, 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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