

# The Law of Social Enterprises: Surveying a New Field of Research

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## Abstract

Social enterprises are becoming increasingly popular across the globe. They are seen particularly by younger generations as an exceptionally promising organizational model. However, their legal framework remains poorly developed. This article introduces the (corporate) law of social enterprises and takes stock of this gradually emerging field of research in Germany, Europe, and the United States.

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## The Law of Social Enterprises: Surveying a New Field of Research

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*Social enterprises are becoming increasingly popular across the globe. They are seen particularly by younger generations as an exceptionally promising organizational model. However, their legal framework remains poorly developed. This article introduces the (corporate) law of social enterprises and takes stock of this gradually emerging field of research in Germany, Europe, and the United States.*

### I. Introduction\*

Social entrepreneurship is a global trend. New initiatives, concepts, and organizational forms are constantly being developed by and for social enterprises.<sup>1</sup> The basic idea behind this movement – to tackle social challenges with entrepreneurial means – has meanwhile also been met warmly by policymakers.<sup>2</sup> In 2020, the European Commission dedicated to the topic a summary report of almost two hundred pages titled "Social Enterprises and their Ecosystems in Europe",<sup>3</sup> and in December 2021 the Commission presented an "Action Plan for the Social Economy".<sup>4</sup> At the international level, the OECD published a guide on the legal frameworks for the social and solidarity economy in March 2023.<sup>5</sup> In Germany, the current coalition agreement proclaims that a modern corporate culture should also include new organizational forms such as social enterprises and raises the prospect of developing a national strategy for

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\* For an earlier German version of this paper, see Holger Fleischer/Matthias Pendl, *Das Recht der Sozialunternehmen: Vermessung eines neuen Forschungsfeldes*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2023, 815.

<sup>1</sup> See Jacques Defourny/Marthe Nyssens (eds.), *Social Enterprise in Western Europe: Theory, Models and Practice*, 2021; see also Eric Bidet/Jacques Defourny (eds.), *Social Enterprise in Asia: Theory, Models and Practice*, 2019; Anne de Bruin/Simon Teasdale (eds.), *A Research Agenda for Social Entrepreneurship*, 2019; Jacques Defourny/Marthe Nyssens (eds.), *Social Enterprise in Central and Eastern Europe*, 2021; Luiz Inácio Gaiger/Marthe Nyssens/Fernanda Wanderley (eds.), *Social Enterprise in Latin America*, 2019; Geraldine Hall, *Virtue and Social Enterprise: Ethical Alternatives to Capitalism*, 2022; Maria Isabel Sánchez-Hernández/Carvalho/Luisa Rego/Maria Raquel Lucas/Adriana Noronha (eds.), *Entrepreneurship in the Fourth Sector*, 2021.

<sup>2</sup> For a good overview of the "Global Social Enterprise Lawmaking Phenomenon", see Carol Liao/Elsir U. Tawfik/Patrick Teichreb, *The Global Social Enterprise Lawmaking Phenomenon: State Initiatives on Purpose, Capital, and Taxation*, (2019) 36 Windsor Y B Access Just 84.

<sup>3</sup> European Commission, *Social Enterprises and their Ecosystems in Europe. Comparative Synthesis Report*, 2020.

<sup>4</sup> European Commission, Communication of 9 December 2021, *Building an economy that works for people: an action plan for the social economy*, COM (2021), 778 final.

<sup>5</sup> OECD, *Policy Guide on Legal Frameworks for the Social and Solidarity Economy*, 2023.

social enterprises to provide greater support for public-welfare-oriented economic activity and social innovation.<sup>6</sup>

Legal commentators committed to analysing and examining the subject matter can hardly keep pace with the developments. A recent monograph<sup>7</sup> and a handbook on the "Law of Social Enterprise"<sup>8</sup> deal mainly with the legal situation in the United States; a freshly published anthology provides a first international overview.<sup>9</sup> By comparison, studies from a German perspective have so far been extraordinarily rare.<sup>10</sup> Against this background, this article undertakes a tour through the "Social Enterprise Zoo"<sup>11</sup> from a corporate law perspective. For better orientation, it first outlines the multifaceted, real-world phenomenon of social enterprises in business practice and management research (II.). Thereafter, it explains the legal framework for social enterprises in Germany, Europe, and the United States (III.). Finally, it addresses research perspectives and open questions in the new field of social enterprise law (IV.).

## II. Social Enterprises in Business Practice and Management Research

Social enterprises come in numerous forms. The spectrum ranges from traditional associations aiming to integrate unemployed and disabled individuals into the workforce, to modern manufacturers of outdoor clothing attentive to the issue of sustainability.<sup>12</sup> To gain an impression of the multitude and diversity of actors, ideas, and forms of organization,<sup>13</sup> it is advisable to start chronologically with the figure of the social entrepreneur<sup>14</sup> and then to move on to the social enterprise. Along this path – and in this context – it is, however, important to

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<sup>6</sup> Explicitly stating as much, Coalition Agreement 2021-2025 "Mehr Fortschritt wagen" between SPD, Bündnis 90/Die Grünen and FDP, November 2021, pp. 24 et seq.; see most recently, Bundesministerium für Wirtschaft und Klimaschutz, Nationale Strategie für Sozialunternehmen und Soziale Innovationen, 11 January 2023.

<sup>7</sup> Dana Brakman Reiser/Steven A. Dean, *Social Enterprise Law*, 2017.

<sup>8</sup> Benjamin Means/Joseph W. Jockey (eds.), *The Cambridge Handbook of Social Enterprise Law*, 2018.

<sup>9</sup> Henry Peter/Carlos Vargas Vasserot/Jaime Alcalde Silva (eds.), *The International Handbook of Social Enterprise Law*, 2023.

<sup>10</sup> Meritorious treatment can, however, be found in Benjamin Momberger, *Social Entrepreneurship*, 2015; Florian Möslein, *Reformperspektiven im Recht sozialen Unternehmertums*, *Zeitschrift für Rechtspolitik (ZRP)* 2017, 175; Florian Möslein/Anne-Christin Mittwoch, *Soziales Unternehmertum im US-amerikanischen Gesellschaftsrecht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 80 (2016), 399; Anne-Christin Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, 2022, pp. 240 et seqq.; Gerald Spindler, *Social Purposes in German Corporate Law and Benefit Corporations in Germany*, in Peter/Vargas Vasserot/Alcalde Silva (note 9), pp. 585 et seqq.

<sup>11</sup> Dennis R. Young/Elizabeth A.M. Searing/Cassady V. Brewer (eds.), *The Social Enterprise Zoo*, 2016, subtitled "A Guide for Perplexed Scholars, Entrepreneurs, Philanthropists, Leaders, Investors and Policymakers".

<sup>12</sup> On Patagonia as a pioneer of a new economy and as an icon of the US sustainability movement, most recently Birgit Weitmeyer/Amadeus Waltz, *Patagonia – Vorreiter einer neuen Wirtschaft?*, *Zeitschrift für das Recht der Non Profit Organisationen (npOR)* 2022, 277.

<sup>13</sup> See Simon Teasdale, *Publ. Policy Adm.* 27(2) (2012), 99: "a fluid and contested concept constructed by different actors promoting different discourses connected to different organisational forms".

<sup>14</sup> Similarly, Momberger (note 10), p. 5.

keep in mind that the key terms of social entrepreneurship, social entrepreneur, and social enterprise are often associated with different meanings.

## 1. Social Entrepreneurs as Promoters in the United States and Asia

The start of the contemporary social entrepreneurship movement in the United States and Asia was characterized by the emergence of charismatic individuals, social entrepreneurs with sparkling ideas and an enormous drive to create positive change in society.<sup>15</sup>

### a) *Bill Drayton as a Visionary and Supporter*

Referred to reverently as the "Godfather of Social Entrepreneurship", *Bill Drayton* (USA) was a central figure in recognizing the importance of social entrepreneurs as key drivers of economic change and social innovation.<sup>16</sup> *Drayton* studied economics at Oxford, earned a law degree at Yale, and worked for McKinsey for a number of years before joining the US Environmental Protection Agency. In 1980, he and several like-minded people founded the non-profit organization Ashoka, based in Arlington, Virginia.<sup>17</sup> Ashoka is devoted to identifying visionary social entrepreneurs<sup>18</sup> around the world, nurturing these individuals with targeted support, and allowing them to proceed from small beginnings to greater success – in line with *Drayton's* favourite saying: "From little acorns do great trees grow".<sup>19</sup> The first Ashoka Fellow was *Gloria de Souza*, a 45-year-old primary school teacher from what was then Bombay, who introduced and disseminated new, interactive teaching methods that were more closely aligned with indigenous experiences.<sup>20</sup> Today, Ashoka operates in more than 95 countries on all continents.

### b) *Muhammad Yunus as a Pioneer and Idol*

The best-known Ashoka Fellow and at the same time the shining example for many social entrepreneurs is *Muhammad Yunus*, a Vanderbilt-educated economist from Bangladesh. In 1976, he founded the Grameen Bank, based in Dhaka, which provides collateral-free

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<sup>15</sup> For biographies of key social entrepreneurs, David Bornstein, *How to Change the World*, 2014 (a book considered "a bible in the field" according to the New York Times).

<sup>16</sup> For more information on Drayton, see Bornstein (note 15), pp. 11 et seqq.

<sup>17</sup> The name (Sanskrit for the "active absence of sorrow") derives from the Indian emperor Ashoka, who ruled in the 3<sup>rd</sup> century BC and is seen of one of the world's earliest great social entrepreneurs; see on this, Bornstein (note 15), p. 15: "Drayton considered Ashoka to be one of history's most tolerant, global-minded, and creative leaders."

<sup>18</sup> On the importance of visionary social entrepreneurs, Bill Drayton, *The Citizen Sector: Becoming as Entrepreneurial and Competitive as Business*, Cal. Mgmt. Rev. 44(3) (2002), 120, 123 et seq.: "First, there is no entrepreneur without a powerful, new, system change idea. The entrepreneur exists to make his or her vision society's new pattern. He or she is married to that vision, in sickness or in health, until it has swept the field. There are four other ingredients: creativity, widespread impact, entrepreneurial quality, and strong ethical fibre."

<sup>19</sup> See Bornstein (note 15), p. 15. In addition to the *visionary idea*, Ashoka demands *creativity*, *entrepreneurial quality*, *widespread social impact of the idea*, and *ethical fibre* from prospective fellows – on this and on the selection process, see <https://www.ashoka.org/en-us/program/venture-selecting-our-ashoka-fellows>.

<sup>20</sup> In greater detail, Bornstein (note 15), pp. 27 et seq.; for other early examples, Drayton (note 18), 125 et seq.

microcredit to poor micro-entrepreneurs, mostly women, in order to help them to escape abject poverty. As "Banker to the Poor" – the title of his autobiography<sup>21</sup> – *Yunus* received the Nobel Peace Prize together with the Grameen Bank in 2006. He has explained his concept of a "social business" in various books.<sup>22</sup>

## 2. Social Enterprises in Europe and Germany

In Europe, the idea of social entrepreneurship also took hold, albeit with a slightly different focus: It was not the individual social entrepreneur who was – and is – at the centre of interest here, but rather the social enterprise as a collective entity,<sup>23</sup> a structure deemed more impactful than individuals acting alone.<sup>24</sup> In the beginning, mainly associations and cooperatives aggregated under the collective term "Work Integration Social Enterprise" (WISE) emerged. They were products of the severe economic crisis witnessed at the end of the 1970s and the beginning of the 1980s, a dynamic which led to high structural unemployment in many European countries, and they primarily aimed to create employment opportunities for socially disadvantaged people.<sup>25</sup>

### a) Italy as a Forerunner

Social enterprises flourished first on Italian soil. Here, they emerged in the 1970s as a grassroots movement in response to serious weaknesses in the state welfare system.<sup>26</sup> Initially, in the

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<sup>21</sup> Muhammad Yunus, *Banker to the Poor*, 1999.

<sup>22</sup> Muhammad Yunus, *Creating a World without Poverty: Social Business and the Future of Capitalism*, 2009; Muhammad Yunus, *Building Social Business*, 2011, p. 1, with the following conceptualization: "[A social business is] a non-loss, non-dividend company devoted to solving a social problem and owned by investors who reinvest all profits in expanding and improving the business."

<sup>23</sup> See Jacques Defourny/Marthe Nyssens, *Social Enterprise in Europe: recent trends and developments*, Soc. Entrep. J. 4 (2008), 202, 203: "In Europe, on the contrary, the emphasis has been much more often put on the collective nature of the social enterprise [...]."

<sup>24</sup> Pointedly, Jacques Defourny/Marthe Nyssens, *Conclusion – Social Enterprise, Welfare Regimes and Policy Implications*, in Defourny Nyssens (note 1), p. 351, 354: "The founder's profile and the social innovation he or she brings in are presented as central pieces of such beautiful 'stories'. However, the bulk of theoretical and empirical literature demonstrates that social innovation is more often rooted in collective dynamics than in individual trajectories."; similarly, from an English perspective, Charles Leadbeater, *The social entrepreneur*, in Ralph Scott/David Goodheart (eds.), *Twenty Years of Ideals*, 2013, p. 75, 78: "The only really successful social ventures are built on teams not individuals. Entrepreneurship involves the combination of different skills, over time, to resolve the multiple challenges a venture will face. Social entrepreneurs only succeed when they are both charismatic but also team players"; for a different perspective, see the earlier discussion by Charles Leadbeater, *The Rise of Social Entrepreneurs*, 1997, pp. 11 et seqq.

<sup>25</sup> On this point, see the earlier treatment by Carlo Borzaga/Jacques Defourny, *Conclusions: social enterprises in Europe: a diversity of initiatives and prospects*, in Carlo Borzaga/Jacques Defourny (eds.), *The Emergence of Social Enterprise*, 2001, pp. 350, 351 et seqq.; see further, Jacques Defourny/Marthe Nyssens, *Conceptions of Social Enterprise and Social Entrepreneurship in Europe and the United States: Convergences and Divergences*, J. Soc. Entrep. 1 (1) (2010), 32, 34 et seq. and 37.

<sup>26</sup> For more information on this point, see Simone Poledrini/Carlo Borzaga, *Social Enterprise in Italy: A Plurality of Business and Organisational Models*, in Defourny/Nyssens (note 1), pp. 131, 134 et seqq.

1980s, a manner of cooperative served as a loose organizational model for them,<sup>27</sup> and this structure took on a more solid form as a social cooperative after legislation was passed in 1991.<sup>28</sup> The *cooperativa sociale* – as it is known – comes in two sub-forms: the WISE cooperatives for labour market integration (type B); and the new, broad-purpose cooperatives providing social welfare and/or educational services (type A), which explicitly pursue the general interests of the community.<sup>29</sup> In 2005, the legislature subsequently introduced the legal status (or label) of an *impresa sociale*, thereby giving social enterprises access to other organizational forms outside of the cooperative sector.<sup>30</sup> In 2017, the “third sector” was newly organized by a legislative decree.<sup>31</sup>

## b) Germany as a Latecomer

In Germany, social entrepreneurship was comparatively late in gaining a foothold,<sup>32</sup> despite the existence of certain historical models. Reference can be made in this regard to *Friedrich Wilhelm Raiffeisen*, one of the two fathers of the German cooperative movement together with *Hermann Schulze-Delitzsch*. As early as the middle of the nineteenth century, he had established cooperative loan funds that provided money to destitute farmers for operational resources – a social entrepreneur *avant la lettre* with a model that was not so dissimilar to that of *Muhammad Yunus*.<sup>33</sup> Subsequently, however, these early approaches petered out. In their place, and in the wake of *Bismarck's* social legislation of 1883-1889, there grew an entrenched expectation that the state and the church, together with their welfare associations, were responsible for the social good.<sup>34</sup> This assumption, along with an underdeveloped entrepreneurial culture, a weakly developed commitment to civil society, and the comparatively

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<sup>27</sup> Poledrini/Borzaga (note 26), p. 131, 133: "In those new, so-called social-solidarity cooperatives, in comparison to traditional cooperatives, elements of internal mutuality were attenuated, while those concerning solidarity were boosted".

<sup>28</sup> Legge no. 381/1991; on the rapid acceptance, Antonio Thomas, *The Rise of Social Cooperatives in Italy*, *Voluntas* 15(3) (2004), 243; from a comparative law perspective, Oscar Kiesswetter, *Genossenschaften Made in Italy - Ein Erfolgsbericht*, 2018, pp. 73 et seqq. and 86 et seqq.

<sup>29</sup> In retrospect OECD, *Designing Legal Frameworks for Social Enterprises*, Annex D: Case Study - Law on Social Cooperatives in Italy, 2022, pp. 75 et seqq.

<sup>30</sup> Andrea Zoppini, in Vincenzo Donativi (ed.), *Trattato delle società*, vol. 4, 2022, pp. 1089, 1098 et seqq.

<sup>31</sup> Decreto legislativo no. 112/2017 of 4 July 2017.

<sup>32</sup> Thomas Leppert, *Social Entrepreneurship in Deutschland*, 2013, p. 19: "In contrast to the Anglo-Saxon discussion, the discussion about social entrepreneurship in Germany is relatively young."

<sup>33</sup> Similarly, Weitemeyer, *Alternative Organisationsformen im Trend – Unternehmensstiftung, gemeinnützige GmbH, Benefit Corporation*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2022, 627, 630: "Thus, already in the middle of the 19th century, the founders of the cooperative movement, Friedrich Wilhelm Raiffeisen and Hermann Schulze-Delitzsch, acted in a socially entrepreneurial way according to today's understanding"; in detail on the "social-ethical content of the cooperative idea", *Beuthien*, *Genossenschaftsrecht: woher - wohin?*, 1989, pp. 12 et seqq.

<sup>34</sup> Achleitner/Heister/Stahl, *Social Entrepreneurship – Ein Überblick*, in Achleitner/Pöllath/Stahl (eds.), *Finanzierung von Sozialunternehmen*, 2007, pp. 3, 12 et seqq.



minimal willingness to donate money, led to an infertile breeding ground for privately initiated social enterprises.<sup>35</sup> Initial approaches with WISE organizations in the form of social enterprises as well as employment and qualification companies in the mid-1990s did not offer what they had promised.<sup>36</sup>

It was not until the end of the 1990s that social entrepreneurship gradually gained traction in Germany,<sup>37</sup> especially through external actors who dedicated themselves to the promotion of social enterprises. One of them is *Klaus Schwab*, the founder of the World Economic Forum, who founded the Schwab Foundation for Social Entrepreneurship together with his wife *Hilde* in 1999. The Schwab Foundation can in a certain way be seen as a German equivalent to *Bill Drayton's* Ashoka.<sup>38</sup> Ashoka itself has been active in Germany since 2003,<sup>39</sup> and further support is offered by the Social Enterprise Network Deutschland e.V. (SEND), founded in 2017. According to the latter's Social Entrepreneurship Monitor, social enterprises now exist in all sectors, most commonly in education, health, and social work, as well as in the areas of information and communication technology.<sup>40</sup> Clear statistics are lacking. One rough estimate puts the number of social enterprises between 2,000 and 70,000,<sup>41</sup> while others speak of 70,000.<sup>42</sup> According to a third source, there are as many as 154,000 German social entrepreneurs.<sup>43</sup> Most of them are still in the implementation and growth phase.<sup>44</sup> Typically,

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<sup>35</sup> Leppert (note 32), pp. 44 et seqq.; see also Nicole Göler von Ravensburg/Georg Mildenerer/Gorgi Krlev, *Social Enterprise in Germany: Between Institutional Inertia, Innovation and Cooperation*, in Defourny/Nyssens (note 1), p. 85, 93: "The likelihood that individuals set up a[n] SE venture is reduced by cultural predispositions in Germany, which tend to discourage social enterprise in three ways: entrepreneurial failure is viewed particularly critically, entrepreneurial culture is not very well developed in comparison to what is the case in other industrialised countries, and Germans are not overly apt to set up a business."

<sup>36</sup> Göler von Ravensburg/Mildenerer/Krlev (note 35), pp. 85, 89 et seqq.; on WISEs in Austria, see Maria Anastasiadis, *Work Integration Social Enterprises in Austria*, Nonprof. Pol. Forum 2016, 541.

<sup>37</sup> Achleitner/Heister/Stahl (note 34), p. 3, 13; see also Karina Cagarman/Jan Kratzer/Katharina Osbelt, *Social Entrepreneurship: Dissection of a Phenomenon through a German Lens*, Sustainability 2020, 12 (7764) at 2.3.3: "Since the beginning of the 21<sup>st</sup> century, however, the scene has also started to gain importance, [...] and, at the latest, when Muhammad Yunus was awarded the Nobel Peace Prize in 2006, the topic finally reached the centre of society."

<sup>38</sup> See Philip Marcel Karré, *Social Enterprise in Belgium, Germany and the Netherlands: Where the Old Meets the New*, in Defourny/Nyssens (note 1), p. 288, 293: "Especially two non-profit foundations played a role in this, namely Ashoka and the Schwab Foundation for Social Entrepreneurship."

<sup>39</sup> See Göler von Ravensburg/Mildenerer/Krlev (note 35), p. 85, 91: "One of the milestones in the promotion of social entrepreneurship in the country was the foundation of Ashoka Germany, in 2003."

<sup>40</sup> Social Entrepreneurship Netzwerk Deutschland (SEND), *4<sup>th</sup> German Social Entrepreneurship Monitor 2021/2022*, pp. 23 et seq.

<sup>41</sup> Karré (note 38), p. 288, 295: "In Germany, estimates range from 2,000 to 70,000 social enterprises, based on either a stringent focus on social start-ups only or a more comprehensive approach that also counts traditional social enterprises."

<sup>42</sup> Göler von Ravensburg/Mildenerer/Krlev (note 35), p. 85: "Although the term social enterprise (SE) is not legally defined and no precise common understanding of the concept exists in Germany today, around 70,000 German entrepreneurial organisations aim to promote the common benefit rather than individual gain".

<sup>43</sup> Cagarman/Kratzer/Osbelt (note 37), at 2.3.3: "According to a study by Kreditanstalt für Wirtschaft (KfW), there were 154,000 young entrepreneurs in 2017 who described themselves as social entrepreneurs [...]."

<sup>44</sup> SEND (note 40), pp. 22 et seq.

these entities are founded by younger people in an urban milieu.<sup>45</sup> They are also referred to as "new-style social enterprises".<sup>46</sup> A frequently cited example from Hamburg is GoBanyo, an organization which operates a shower bus for homeless people that is financed through crowdfunding.<sup>47</sup> However, GoBanyo's entrepreneurial approach is not yet very developed.<sup>48</sup> A more suitable illustration might be Hinz&Kunzt, Germany's most widely distributed street magazine sold by homeless people.

### 3. Social Enterprises as an Object of Academic Research

Academic research into the new phenomenon did not take long to emerge. However, the discourse in the United States and Europe initially had only few intersections.<sup>49</sup>

#### a) The Discussion in the United States

In the United States, 1983 is considered a "watershed year":<sup>50</sup> In that year, two important papers<sup>51</sup> and a book publication<sup>52</sup> on the entrepreneurial activities of non-profit enterprises appeared. Ten years later, Harvard Business School launched its "Social Enterprise Initiative"<sup>53</sup> and soon found followers among other leading business schools. Subsequently, competing theories for a better understanding of social enterprise mushroomed.<sup>54</sup> These include the cross-subsidy model, which sees social enterprises as the commercial arm of non-profit organizations;<sup>55</sup> the innovation school, which places social entrepreneurs in the ranks of the Schumpeterian entrepreneur;<sup>56</sup> the hybridity approach, according to which social enterprises are combinations of various types of social and business entities;<sup>57</sup> the institutional view, which emphasizes the historical and institutional context in which different varieties of social

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<sup>45</sup> Göler von Ravensburg/Mildenberger/Krlev (note 35), p. 85, 97.

<sup>46</sup> Karré (note 38), p. 288, 292: "new-style social enterprises".

<sup>47</sup> For a portrait, see Helene Flachsensberg, *Wie sozial sind Sozialunternehmen?*, Spiegel-Online, 19 July 2022; on a prize awarded to co-founder *Dominik Bloh*, a former homeless person, see *Hamburger Abendblatt*, *Hamburger Duschbus-Gründer bekommt Bundesverdienstkreuz*, 6 December 2022, p. 11.

<sup>48</sup> See Flachsensberg (note 47), with the explanation of co-initiator *Gülray Ulas*: "In the medium term, it is our dream to finance the shower bus 100 per cent through our own product [...]. A shower gel of our own would be conceivable."

<sup>49</sup> Defourny/Nyssens (note 25), 32 et seqq.

<sup>50</sup> Young/Searing/Brewer (note 11), Preface, p. xiii.

<sup>51</sup> James, *How Nonprofits Grow: A Model*, *J. Policy Anal. Manage.* 2(3) (1983), 350; Skloot, *Should Not-for-Profits Go into Business?*, *Harv. Bus. Rev.* 61(1) (1983), 20.

<sup>52</sup> Crimmins/Keil, *Enterprise in the Nonprofit Sector*, 1983.

<sup>53</sup> In retrospect from today's perspective, Harvard Business School, *Social Enterprise*, <https://www.hbs.edu/socialenterprise/about/>: "Since 1993, HBS faculty have researched and written over 800 social enterprise books, cases and teaching notes."

<sup>54</sup> Summarized by Young/Brewer, in Young/Searing/Brewer (note 11), pp. 3, 8 et seq. under the subheading "Social Enterprise: Competing Intellectual Frameworks".

<sup>55</sup> Burton Weisbrod, *To Profit or Not to Profit, The Commercial Transformation of the Nonprofit Sector*, 1998.

<sup>56</sup> See, for example, Gordon Shockley/Peter M. Frank, *Schumpeter, Kirzner and the field of social entrepreneurship*, *J. Soc. Entrep.* 2(1) (2011), 6.

<sup>57</sup> David Billis, *Hybrid Organizations and the Third Sector*, 2010.

enterprises developed;<sup>58</sup> and the behavioural and evolutionary economics strand, which views social enterprises as a response over time to changing social needs and entrepreneurial motivations.<sup>59</sup>

## b) The European Discussion

An early point of scholarly crystallisation in Europe was the founding of the journal "Impresa sociale" on the initiative of the Centro Studi del Consorzio in 1990.<sup>60</sup> More recently, the EMES research group,<sup>61</sup> which was founded in 1996 with EC funds and led under the direction of the social economist *Jaques Defourny* from the University of Liège, has become a key source of impetus. The resulting EMES network is now one of, if not *the* leading institution in the field.<sup>62</sup> As a result of the "International Comparative Social Enterprise Models (ICSEM) Project", its researchers have recently published a four-volume series of books dedicated to social enterprises in Asia, Latin America, Central and Eastern Europe, and Western Europe.<sup>63</sup> The young discipline received further impetus from newly founded journals in the UK: the *Social Enterprise Journal* (since 2005, Cambridge)<sup>64</sup> and the *Journal of Social Entrepreneurship* (since 2010, Oxford).<sup>65</sup>

## 4. Definitional Dilemma

Despite the enormous growth in knowledge, there is still no generally accepted definition of a social enterprise: "The concept of social entrepreneurship continues to mean different things to different people and there is no clear understanding on where to locate it and how to qualify social entrepreneurs."<sup>66</sup> One article counted a total of 87 different definitions as early as 2009.<sup>67</sup>

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<sup>58</sup> See, for example, Janelle A. Kerlin, *Defining Social Enterprise Across Different Contexts: A Conceptual Framework Based on Institutional Factors*, *Nonprofit and Voluntary Sector Quarterly* 42(1) (2013), 84.

<sup>59</sup> See, for example, Carlo Borzaga/Ermanno Tortia, *The economics of social enterprises: an interpretative framework*, in Leonardo Becchetti/Carlo Borzaga (eds.), *The Economics of Social Responsibility*, 2010, p. 15.

<sup>60</sup> See the editorial in *Impresa Sociale* 1990, 3: "Impresa sociale: Area Tematica, Obiettivi, Linea editoriale. Perché una rivista?".

<sup>61</sup> The name comes from an acronym of the first research assignment: "L'Emergence des Entreprises Sociales".

<sup>62</sup> See EMES' own presentation at <https://emes.net/who-we-are>.

<sup>63</sup> Individual references are cited in footnote 1, above.

<sup>64</sup> Introductory essay by Helen Haugh, *A research agenda for social entrepreneurship*, *Soc. Enterp. J.* 1(1) (2005), 1.

<sup>65</sup> The opening editorial by *Nicholls*, *J. Soc. Enterp.* 1(1) (2010) includes the following assessment: "In a Kuhnian sense, social entrepreneurship is still in a pre-paradigmatic state of development as a legitimate field of 'scientific' study. There is little consensus as yet over the key research questions, appropriate methodologies, available data sets, or theoretical perspectives most suitable to identify and analyze social entrepreneurship."

<sup>66</sup> Giulia Galera/Carlo Borzaga, *Social Enterprise: An International Overview of its Conceptual Evolution and Legal Implementation*, *Soc. Enterp. J.* 5(3) (2009), 210.

<sup>67</sup> Thomas Martin Fojeik/Giordano Koch, „*Social Entrepreneurs*“ – *Fakt oder Fiktion? Eine kritische Untersuchung*, in Marianne Henkel/Jana Gebauer/Justus Leodemann et al. (eds.), *Social Entrepreneurship*, 2009, pp. 78 et seqq.; other compilations in *Cagarman/Kratzer/Osbelt* (note 37), under 2.2, with the addition: "This plethora of perspectives makes it difficult to find a common ground. Although the term

In a recent publication, the OECD characterizes social enterprises as providers of goods or services that fulfil a social objective and whose main purpose is not the maximization of profit for the owners but the reinvestment of profits generated for the continued attainment of its social goals.<sup>68</sup> A self-description elaborated by the German entity SEND reads as follows: "The primary goal of social entrepreneurship is to solve social challenges. This is achieved through the continuous use of entrepreneurial means and results in new and innovative solutions. Steering and control mechanisms ensure that social goals are lived internally and externally."<sup>69</sup>

The aforementioned EMES research group retreated quite early to the position that it was unrealistic to think that the essence of social enterprises could be captured in a concise and elegant definition and that it would in any event be preferable to identify and outline archetypal criteria – with EMES ultimately settling on four economic and entrepreneurial indicators and five that were social in nature.<sup>70</sup> More recently, EMES and many other researchers have emphasized that a uniform definition is impossible given the diversity of social enterprises.<sup>71</sup> Instead, actors in the field are shifting to an alternative research strategy that identifies different types of social enterprises and enquires as to the reasons for this diversity.<sup>72</sup> In a similar direction, from a US perspective, a well-received publication is guided by a taxonomical metaphor, with the Social Enterprise Zoo comprising six broadly conceived types of animals (or cross-breeds between them): "commercial nonprofits, social cooperatives, social businesses, sustainable businesses, public-private partnerships, and public sector social enterprises".<sup>73</sup>

## 5. Social Enterprises on a Spectrum of Organizational Forms

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has been used in scientific discourse for several decades and the number of published papers has increased tremendously, there is, as yet, no generally applicable definition."; also Rocío Aliaga-Isla/Benjamin Huybrechts, *From "Push Out" to "Pull In" together: An analysis of social entrepreneurship definitions in the academic field*, J. Cleaner Production 205 (2018), 645; Ajax Persaud/Manoi Chancra Bayon, *A Review and Analysis of the Thematic Structure of Social Entrepreneurship Research*, Int. Rev. Entrep. 17(4) (2019), 495.

<sup>68</sup> OECD (note 5), p. 13.

<sup>69</sup> SEND (note 40), p. 17.

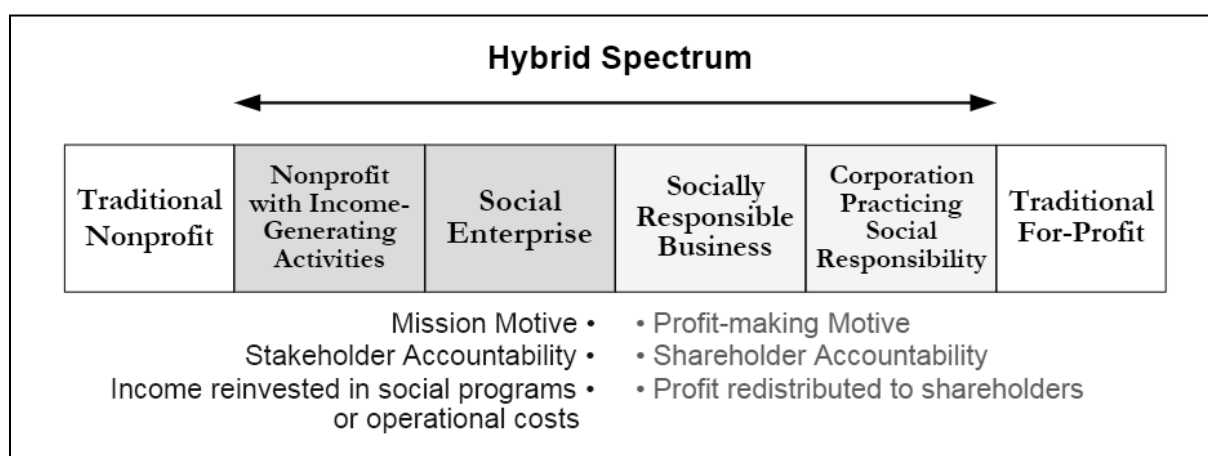
<sup>70</sup> See Jacques Defourny, *Introduction: from third sector to social enterprise*, in Borzaga/Defourny (note 25), pp. 1, 16-18, where the author states: "Let us begin with the economic and entrepreneurial dimensions for which four criteria have been put forward: a continuous activity producing goods and/or selling services; a high degree of autonomy; a significant level of economic risk; a minimum amount of paid work. To encapsulate the social dimensions of the initiative, five criteria have been proposed: an explicit aim to benefit the community; an initiative launched by a group of citizens; a decision-making power not based on capital ownership; a participatory nature, which involves various parties affected by the activity; limited profit distribution." (The respective individual explanations have been omitted without notation.)

<sup>71</sup> Jacques Defourny/Marthe Nyssens/Sophie Adams, *Documenting, Theorising, Mapping and Testing the Plurality of SE Models in Western Europe*, in Defourny/Nyssens (note 1), *Social Enterprise in Western Europe*, p. 1: "In spite of all these efforts, it is today acknowledged, to a large extent, that the SE field is too wide and too diversified to be embraced by a single definition which would be unanimously accepted".

<sup>72</sup> In this sense, Defourny/Nyssens/Adams (note 71), p. 1.

<sup>73</sup> Cassidy Brewer, *The ongoing evolution in social enterprise legal forms*, in Young/Searing/Brewer (note 11), pp. 33, 34.

A valuable heuristic tool for locating social enterprises within the overall framework of business organizations is the approach of the *spectrum school*.<sup>74</sup> According to this approach, all organizational forms can be drawn on a spectrum with two endpoints: one end is marked by traditional non-profit organizations that yield a high social return and are financed exclusively by charitable donations; the other end is marked by classic for-profit companies that strive solely for a high financial return. In the middle range, various mixed forms having a "blended value" can be found: non-profit companies generating income, for-profit companies that carry out CSR activities, and finally – and very centrally – social enterprises with a social mission whose income is distributed to investors only to a lesser extent (if at all) and to a greater extent is reinvested or used completely for social purposes.<sup>75</sup>



## 6. Social Enterprises and the "Fourth Sector" of the National Economy

According to a common classification, three sectors are distinguished in an economy: the state (first sector),<sup>76</sup> private for-profit enterprises (second sector), and the social economy (third sector).<sup>77</sup> The latter traditionally includes foundations, non-profit associations, non-profit limited liability companies, and various kinds of charitable corporations,<sup>78</sup> which are often also

<sup>74</sup> J. Gregory Dees, *The Social Enterprise Spectrum: Philanthropy to Commerce*, 1996; Dees, *Enterprising Nonprofits*, *Bus. Rev.* 76(1) (1998), 54; see also the summary of Hall (note 1), p. 90: "The social enterprise spectrum theory asserts that a range of organisations have a combination of social purpose and profit orientation, which can all be considered when using the spectrum approach."

<sup>75</sup> Figure taken from Kim Alter, *Social Enterprise Typology*, 2007, p. 14; similarly, Achleitner/Heister/Stahl (note 34), p. 3, 8 with Fig. 1; Millán Díaz-Foncea/Carmen Marcuello, *Social Enterprises: Conceptual Debates and Approaches*, in Peter/Vargas Vasserot/Alcalde Silva (note 9), p. 133, 136 with Fig. 1.

<sup>76</sup> For example, Ewald Nowotny/Martin Zagler, *Der öffentliche Sektor. Einführung in die Finanzwissenschaft*, 6<sup>th</sup> ed., 2022.

<sup>77</sup> Brewer (note 73), p. 33, 35: "[...] conventional legal forms generally assume that all organizations fall within and fulfill the legal purposes of one of the three sectors of the economy: government ("public"), for-profit ("private"), and nonprofit ("voluntary"). Any given legal form is primarily adapted to survive and thrive within its associated sector."

<sup>78</sup> See, internationally, OECD (note 5): "The SSE is typically made up of entities such as associations, non-profit organisations, cooperatives, mutual societies, foundations, and, more recently, social enterprises."

referred to as non-profit organizations.<sup>79</sup> This classic three-sector model might prove too narrow given the further rise of social entrepreneurs and social enterprises: A negative delimitation alone ("non-profit") is no longer sufficient.<sup>80</sup> Rather, such entities follow an institutional logic of their own that seeks to combine a public interest orientation with profit-making. Nationally and internationally, it is therefore increasingly common to speak of an emerging "fourth sector".<sup>81</sup>

### III. Regulatory Framework for Social Enterprises under Company Law

#### 1. Absence of Special Regulations in Germany

In Germany, there is neither a legal definition nor a particular legal form for social enterprises. Rather, company founders can (and must) choose between the generally available company forms,<sup>82</sup> each of which has its advantages and disadvantages for social enterprises.<sup>83</sup> Of not least importance for this choice is whether the founders seek a non-profit status, which carries with it tax advantages but also organizational and financial restrictions.<sup>84</sup>

According to surveys of the Social Enterprise Monitor, almost half of the social enterprises in Germany have non-profit status.<sup>85</sup> Notwithstanding, there is great heterogeneity with regard to the organizational forms chosen: 22.8% are organized as a profit-making limited liability company ("GmbH"), 19.5% as a non-profit limited liability company ("gGmbH"), 18.4% as a non-profit association, 10.6% as an entrepreneurial company with limited liability

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<sup>79</sup> See, for example, Michael Simsa/Ruth Meyer/Christoph Badelt (eds.), *Handbuch der Non-Profit-Organisationen: Structures and Management*, 6<sup>th</sup> ed., 2023.

<sup>80</sup> Sánchez-Hernández/Carvalho/Rego/Lucas/Noronha (note 1), p. 7, 9: "The traditional division of economic sectors into first, second, and third sectors is slightly out of date. The new socioeconomic landscape is characterized by entrepreneurial ecosystems looking for sustainability, and new goals emerge such as eradication of poverty, gender equality, social justice, and environmental protection. Accompanying this trend, new business models appear that are difficult to classify into a traditional sector."

<sup>81</sup> Through the German lens, see Weitemeyer (note 33), 627, 630 et seq.; similarly, Mittwoch (note 10), p. 240: "[...] it already makes them appear as a new and emerging economic sector that expands and at the same time frays the traditionally modelled triad of market, state and non-profit enterprises."; internationally, e.g., Sánchez-Hernández/Carvalho/Rego/Lucas/Noronha (note 1), p. 7: "The fourth sector can be defined as the group of organizations, models, and practices whose objective is to solve the great problems of the twenty-first century, combining elements from the traditional sectors: the public, the private, and the nongovernmental."

<sup>82</sup> See Bundesministerium für Wirtschaft und Energie, *Praxisleitfaden Soziales Unternehmertum*, 2018, p. 32: "The topic of choosing an organizational form regularly plays a central role in start-up seminars. However, there is no general recommendation on the question of the right organizational form for social enterprises – just as in traditional entrepreneurship. Rather, the appropriate organizational form depends on a variety of factors."

<sup>83</sup> See SEND, *Rechtsformen für Social Enterprises. Ein Ratgeber zu Rechtsformen und Gemeinnützigkeit von Social Enterprises*, 2021, pp. 5 et seqq. and 14 et seqq.; see, further, Wissenschaftliche Dienste des Deutschen Bundestages, *Geeignete Rechtsformen für Sozialunternehmen in Deutschland*, Az. WD 7 - 3000 - 148/16 of 12 October 2016.

<sup>84</sup> Reinhard Pöllath, in Achleitner/Pöllath/Stahl (note 34), pp. 44, 45 et seqq. (entrepreneurial organizational forms), 49 et seqq. (organizational forms oriented towards the common good); Momberger (note 10), pp. 67 et seqq.

<sup>85</sup> SEND (note 40), pp. 16, 50.

(“Unternehmergeellschaft”, or “UG”), and 9.5% as a sole proprietor.<sup>86</sup> The two already mentioned companies, GoBanyo and Hinz&Kunzt, are both non-profit and use the form of a gGmbH. As a second option, the GoBanyo founders had considered choosing a registered association.<sup>87</sup>

## 2. Organizational Forms Available in Selected European Jurisdictions

In Europe, the range of organizational forms specifically tailored to social enterprises is broad. This is due to different political, social and economic contexts, but also to path dependencies and historical contingencies. Ground-breaking research has been done, above all, by the above-mentioned "International Comparative Social Enterprise Models" project of EMES, which involved 250 researchers from 55 countries all over the world.<sup>88</sup> From a legal perspective, it is appropriate to single out the comparative work by Italian law professor *Antonio Fici*<sup>89</sup> as well as the EU study on social enterprises and their ecosystems in Europe, mentioned at the beginning of this article.<sup>90</sup>

### a) New Variants of the Cooperative

The most common organizational form for social enterprises in Europe is a further-developed version of the classic cooperative: the so-called social cooperative. It first appeared in Italy with the law of 8 November 1991 on *cooperative sociali*.<sup>91</sup> The main innovation is that the purpose of the cooperative is no longer limited to facilitating mutual self-help among the members, instead also including general social goals.<sup>92</sup> In practice, this modification of the cooperative was quickly adopted; today there are about 15,500 of them.<sup>93</sup> Following the Italian example, many neighbouring countries have introduced variants of the social cooperative under different names, such as the *cooperativa de soliedaridade social* in Portugal (1997), the *cooperativa de*

<sup>86</sup> On this and on the other organizational forms, SEND (note 40), p. 25.

<sup>87</sup> See the co-founder *Gülay Ulas* in Flachsenberg (note 47): "In an association, however, you have to do many more loops, coordinate every big step with the general meeting. That would have been too slow for us as a founding team."

<sup>88</sup> For details, see Defourny/Nyssens/Adams (note 71), pp. 1, 2 et seqq.

<sup>89</sup> Antonio Fici, *Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective*, Eur. Bus. Law Rev. 27 (2016), 639; Fici, *Social Enterprise Laws in Europe After the 2011 "Social Business Initiative"*, 2020; Fici, *Social Enterprises and Social Cooperatives in the New Italian Legal Framework for Third Sector Organizations*, in Willy Tadjudje/Ifgeneia Douvitsa (eds.), *Perspectives on Cooperative Law, Festschrift In Honour of Professor Hagen Henrj*, 2022, p. 77; Fici, *Models and Trends of Social Enterprise Regulation in the European Union*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), p. 153.

<sup>90</sup> Note 3.

<sup>91</sup> Legge no. 381/1991.

<sup>92</sup> See Art. 1 para. 1 L. no. 381/1991: "Le cooperative sociali hanno lo scopo di perseguire l'interesse generale della comunità alla promozione umana e all'integrazione sociale dei cittadini [...]."

<sup>93</sup> Figures according to Fici, *Models and Trends*, (note 89), pp. 153, 155 et seqq.

*iniciativa social estatal* in Spain (1999), or the *société coopérative d'intérêt collectif* in France (2001).<sup>94</sup>

There are several reasons for the popularity of the cooperative system in the social economy, these including the historically grown importance of cooperative structures in Southern European countries and the legal anchoring of the cooperative in the constitutions of, for example, Italy, Portugal, and Spain,<sup>95</sup> and the participatory elements of cooperative law in the form of voting done according to headcount instead of capital shares. Against this background, the cooperative has been described as the "natural" legal form for social enterprises.<sup>96</sup>

## **b) Special Company Forms**

Alongside Italy, the United Kingdom has emerged as an early promoter of social enterprises.<sup>97</sup> The UK Industrial and Provident Societies Act introduced the Community Benefit Society as early as 1965, but comparative research has hardly noticed it.<sup>98</sup> By contrast, the Community Interest Company (CIC), which was launched in 2005 as a special form of a company limited by guarantee or a company limited by shares, has received greater attention.<sup>99</sup> The British legislature designed it as an organizational subtype specifically for social enterprises.<sup>100</sup> Politically, its codification during the so-called New Labour government under *Tony Blair* was embedded in a larger strategy (the "Third Way"<sup>101</sup>) that had as its aim a more intense privatization of public services as well as state social welfare measures.<sup>102</sup> The CIC is

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<sup>94</sup> Daniel Hernández Cáceres, *Social Enterprises in the Social Cooperative Form*, in Peter/Vargas Vasserot/Alcalde Silva (note 9), p. 173, 175 ff., with further references.

<sup>95</sup> For more on this development, see Ifgeneia Douvitsa, *National Constitutions and Cooperatives: an Overview*, *Int. J. Coop. Law* 1 (2018), 128.

<sup>96</sup> For example, Hernández Cáceres (note 94), pp. 173, 174: "European legislators found the cooperative model to be the most appropriate, or the most natural, for framing the phenomenon of social enterprises [...]"; similarly, Fici, *Models and Trends*, (note 89), pp. 153, 163: "the idea that the cooperative form is the 'most natural' for a social enterprise".

<sup>97</sup> See Brewer (note 73), pp. 33, 48: "Although Italy may be regarded as the first country to identify social enterprises as unique, the United Kingdom arguably provides the strongest government support to such organizations."

<sup>98</sup> Industrial and Provident Societies Act, 1965, c. 12, § 52 (U.K.); viewing this institution negatively, Stephen Lloyd, *Transcript: Creating the CIC*, 35 *Vt. L. Rev.* 31, 33 (2010): "these old-fashioned industrial and provident societies - the law for which has not been updated since 1965".

<sup>99</sup> From the internal perspective of the spiritual father, Lloyd (note 98), p. 33.

<sup>100</sup> See UK Cabinet Office, *Social enterprise action plan: Scaling new heights*, 2006, p. 10: "A social enterprise is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners."

<sup>101</sup> Anthony Giddens, *The Third Way: The Renewal of Social Democracy*, 1998.

<sup>102</sup> More closely, J. S. Liptrap, *British Social Enterprise Law*, *J. Corp. L. Stud.* 21 (2021), 595, 628: "Policymakers originally introduced the CIC to spin off some level of centralised public responsibility to non-state actors for the implementation and financing of social welfare policy."; from a comparative perspective, Holger Fleischer, *Ein Rundflug über Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht*, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2022, 827, 834: "Interaction between the political and legal subsystem".



considered a success, with around 19,000 now to be found. Throughout Europe, however, social enterprises in the form of special subtypes of companies or corporations have remained rare, despite enjoying significant comparative advantages in terms of financing.<sup>103</sup>

### c) Legal Status for Different Organizational Forms

A third regulatory approach consists of assigning the label of “social enterprise”, and at present such a legal status is accessible to entities associated under a variety of organizational forms once certain requirements are met.<sup>104</sup> In Italy, this includes qualification as an *impresa sociale*, originally introduced by a 2006 legislative decree.<sup>105</sup> For tax reasons, the prospect of obtaining this status had little impact initially, but subsequently a 2017 legislative decree has revised the designation such that it is linked to the pursuit of civil societal, charitable, and socially beneficial goals without the intention of making a profit.<sup>106</sup> In general, all private organizational structures, including corporations as well as cooperatives, can acquire this status.<sup>107</sup> Furthermore, the same regulatory technique was also used by the Italian legislature when it created the *società benefit*, which was introduced in 2016. However, this status does not follow the tradition of Italian social enterprises as it was instead inspired by the US benefit corporation.<sup>108</sup> Nevertheless, with its dual purpose of profit and public benefit, it can also be adopted by all partnerships and corporations as well as cooperatives.<sup>109</sup>

In France, since 2014, all commercial enterprises may acquire the status of *économie sociale et solidaire* (ESS).<sup>110</sup> This gives rise to advantages, for example in public procurement procedures and in securing financing from the state investment bank, but it also entails significant restrictions on profit distribution, with the result that there has thus far been only sparse use of the ESS in practice. In 2019, a further status was added to French law with the *société à mission*, which was inspired by the US benefit corporation.<sup>111</sup> All commercial entities can obtain the

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<sup>103</sup> See Fici, *Models and Trends*, (note 89), pp. 153, 163: "Furthermore, SEs in the company form might be more effective in fulfilling their objectives, given their greater financial capacity compared with SEs established in other legal forms. [As their structure is] based on the capital individually held (one share, one vote), these companies should potentially attract more investors than other types of organizations, such as cooperatives, in which capital held is irrelevant to governance (one member, one vote)."

<sup>104</sup> In general, Sophie Cools, *Social Entrepreneurship: The Choice Between Labels, Variants, Dedicated and Conventional Corporate Forms*, ECFR 2023, 85, 98; Fici, *Models and Trends*, (note 89), pp. 153, 165 et seqq.; Fleischer (note 102), 827, 831; Liao/Tawfik/Teichreb (note 2), 84, 97 et seqq.; OECD (note 5), pp. 45 et seqq.

<sup>105</sup> See Art. 2 para. 1 D.L. no. 112/17.

<sup>106</sup> See art. 1 para. 1 Decreto legislativo no. 112/17.

<sup>107</sup> Art. 1 para. 1 Decreto legislativo no. 112/17: "Possono acquisire la qualifica di impresa sociale tutti gli enti privati, inclusi quelli costituiti nelle forme di cui al libro V del codice civile [...]."

<sup>108</sup> On this organizational form, III 3 c, above.

<sup>109</sup> See Marco Cian, *Diritto delle società*, 2020, p. 50.

<sup>110</sup> Loi n° 2014-856 of 31 July 2014; in more detail, Maurice Cozian/Alain Viandier/Florence Deboissy, *Droit des sociétés*, 35th ed., 2022, para. 51 et seq.

<sup>111</sup> Cozian/Viandier/Deboissy (note 110), para. 63.

status if certain statutory requirements are fulfilled<sup>112</sup> – legal benefits do not flow from this status, but it does offer possible reputational advantages.<sup>113</sup>

#### **d) Characteristics of the European Model**

In searching for a common denominator of the special European organizational forms for social enterprises, which allow the use of a corresponding designation when doing business, we find one in the prioritization of the social objective. To ensure the pursuit of a social mission, which is (at least in part) being pursued with entrepreneurial means, particularly statutory distribution restraints are foreseen.<sup>114</sup> Admittedly, they vary in strength from jurisdiction to jurisdiction. An Italian *cooperativa sociale* must use at least 50% of its profits to achieve its statutory objectives or to increase its assets.<sup>115</sup> A French *société coopérative d'intérêt collectif* is required to allocate at least 15% of its profits to a statutory revenue reserve and at least 50% of the remaining profits to a statutory development fund.<sup>116</sup> The British CIC is characterized by two safeguards, an asset lock on its shareholders<sup>117</sup> and a dividend cap: It is allowed to distribute a maximum of 35% of the profit to its shareholders.<sup>118</sup>

Another common feature is regular reporting requirements on those activities undertaken by a social enterprise to promote the common good. However, the specific reporting requirements and their form similarly vary from jurisdiction to jurisdiction.<sup>119</sup> For example, a CIC must submit annual community interest company reports,<sup>120</sup> and a *société coopérative d'intérêt collectif* has to integrate corresponding information into its financial statements and annual reports.<sup>121</sup>

Differences in voting rights, on the other hand, depend on the basic organizational form: While the Italian and French variations of the social cooperative follow the basic cooperative model of "one member – one vote", the British company subtype does not vote according to headcount

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<sup>112</sup> From a comparative perspective, Holger Fleischer/Yannik Chatard, *Gesetzliche Zertifizierung nachhaltiger Unternehmen: Die französische "société à mission"*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2021, 1525.

<sup>113</sup> See Cozian/Viandier/Deboissy (note 110), para. 66.

<sup>114</sup> With further details, Giulia Neri-Castracante, *The Governance Patterns of Social Enterprises*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), pp. 47, 62 ff.

<sup>115</sup> Decreto 112/2017, art. 3 para. 3.

<sup>116</sup> Loi n° 47-1775 of 10.9.1947, art. 16 and art. 19 nonies.

<sup>117</sup> Companies (Audit, Investigations and Community Enterprise) Act 2004, s. 30(1).

<sup>118</sup> Companies (Audit, Investigations and Community Enterprise) Act 2004, s. 30(3), in conjunction with the Community Interest Company Regulation, reg. 19.

<sup>119</sup> See Fici, *Social Enterprise Laws in Europe After the 2011 "Social Business Initiative"*, 2020, p. 24; Neri-Castracante (note 114), pp. 47, 56 ff.

<sup>120</sup> Companies (Audit, Investigations and Community Enterprise) Act 2004, s. 34; for details, see Community Interest Company Regulation, reg. 26 et seq.

<sup>121</sup> Loi n° 47-1775 of 10 September 1947, Art. 19 terdecies in conjunction with Décret n° 2015-1381 du 29 octobre 2015.

but rather according to capital shares. Where social entrepreneurs assume a specified legal status, the voting rights follow the organizational model on which the status is based.

### 3. Organizational Forms Offered in the United States

Just as in Europe, the legal landscape for social enterprises has changed considerably in the United States in recent times.<sup>122</sup>

#### a) Low-profit Limited Liability Companies

First of all, the low-profit limited liability company (L3C) was introduced in Vermont in April 2008 and later in seven other states.<sup>123</sup> Conceived by *Robert Lang*,<sup>124</sup> the organizational form had – like social entrepreneurship in the United States in general – close links to the third sector: It was, owing to the legal purpose of social and sustainable enterprises, supposed to allow such entities to receive special grants (programme-related investments) from charitable foundations,<sup>125</sup> where such grants would otherwise be reserved for purely non-profit enterprises.<sup>126</sup> The new laws were, however, inadequately drafted and therefore failed to achieve their purpose.<sup>127</sup> Today, the L3C seems to have led to a dead end.<sup>128</sup>

#### b) Social Purpose Corporation

Another variant is the Social Purpose Corporation (SPC).<sup>129</sup> It was introduced in California in 2011 under the name Flexible Purpose Corporation (FPC); it then appeared one year later in

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<sup>122</sup> For more details on what follows, see Holger Fleischer, *Die US-amerikanische Benefit Corporation als Referenz- und Vorzeigemodell im Recht der Sozialunternehmen*, Die Aktiengesellschaft (AG) 2023, 1 margin no. 26 et seqq., with further references.

<sup>123</sup> In greater detail Brakman Reiser/Dean (note 7), p. 61 et seqq; J. Haskell Murray, *The Social Enterprise Law Market*, 75 Md. L. Rev. 541, 543 et seqq. (2016).

<sup>124</sup> See Robert Lang in Robert Lang/Elizabeth Carrott Minnigh, *The L<sup>3</sup>C, History, Basic Construct, and Legal Framework*, 35 Vt. L. Rev. 15 (2010): “I first conceived of the L3C business organization form in 2005. That name has created some issues. It does not mean that L3C cannot make a substantial profit or that the investors cannot make a substantial profit. The name comes from the basis for the 1969 law that authorized Program-Related Investments (PRIs).”

<sup>125</sup> Lang (note 123), 15: “PRI was designed to provide capital to those enterprises that operated in the space between the nonprofit and the place where traditional for-profits existed. That space is the low-profit-zone. In that space, the profit earned is insufficient to meet the risk/reward parameters of normal for-profit-investors. It is that space for which I designed the L3C.”

<sup>126</sup> In greater detail, Murray (note 123), 541, 543 et seq. (2016).

<sup>127</sup> Carter G. Bishop, *The Low Profit LLC (L3C)*, 63 Ark. L. Rev. 243, 246 (2010).

<sup>128</sup> Along these lines, Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. Rev. 604, 607 n. 9 (2019).

<sup>129</sup> See Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporation*, 2 Am. U. Bus. L. Rev. 55 (2012); Christoph Clarke, *California’s Flexible Purpose Corporation: A Step Forward, a Step Back, or No Step at All?*, 5 J. Bus. Entrepreneurship & L. 301 (2012).

Washington and two years later in Florida. However, it failed to establish itself on the market of organizational forms<sup>130</sup> and can therefore be neglected here.

### **c) Benefit Corporation**

In current US practice, the choice of an organizational structure for social entrepreneurs focuses almost exclusively on the so-called benefit corporation.<sup>131</sup> Its intellectual authorship lies with three student friends from Stanford who, after successful careers in business and investment banking, developed an increasingly strong aversion to the relentless pursuit of short-term profit.<sup>132</sup> With the help of a lawyer, they drafted a model law for a benefit corporation.<sup>133</sup> According to the model's provisions, a benefit corporation must commit itself in its articles of association to creating a general public benefit.<sup>134</sup> The first version of this organizational form was introduced in Maryland in 2010.<sup>135</sup> Today, a total of 36 states and Washington D.C. allow the formation of a benefit corporation, among them Delaware with a slightly different version that is called a public benefit corporation. According to rough estimates, there are now between 7,000 and 10,000 benefit corporations in the United States.<sup>136</sup>

### **d) Characteristics of the US Model**

The US organizational forms for social enterprises are characterized by an anchoring of the pursuit of "social purpose" or "general public benefit" in their articles. The model legislation (MBCL § 301(a)(1)) obliges the directors of a benefit corporation to consider the impact of their conduct not only on shareholders but also on their employees, on suppliers, on the local and global environment, on the beneficiaries of their public-benefit efforts, and – not least – on the corporation itself in terms of its ability to achieve its public benefit goals. Furthermore, the mandatory "benefit report" is intended to provide transparency by reporting on the company's performance regarding its public purpose.

In a remarkable contrast to their European counterparts, the US models are not subject to any distribution restrictions, neither in the form of a dividend distribution constraint nor in the form

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<sup>130</sup> For greater detail, see Alicia E. Plerhoples, *Social Enterprises and Benefit Corporations in the United States*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), pp. 903, 910 et seqq.

<sup>131</sup> For a good overview, James Cox/Thomas Hazen, *Business Organizations Law*, 5th ed. 2020, pp. 71 et seqq.

<sup>132</sup> In this regard, see the self-assessment of Bart Houlahan/Andrew Kassoy/Jay Coen Gilbert, *Berle VIII: Benefit Corporations and the Firm Commitment Universe*, 40 Seattle U. L. Rev. 299 (2017); in detail, Christopher Marquis, *Better Business. How the B Corp Movement is Remaking Capitalism*, 2020.

<sup>133</sup> Reprinted in Frederick Alexander, *Benefit Corporation Law and Governance. Pursuing Profit with Purpose*, 2014, Appendix A.

<sup>134</sup> § 201(a) Model Benefit Corporation Legislation.

<sup>135</sup> In greater detail Marquis (note 132), p. 90 et seqq.

<sup>136</sup> For a compilation of the available data, Fleischer (note 122), margin no. 17 et seq., with further references.

of an asset lock. Although this is not explicitly regulated, it follows from the blanket reference to the general provisions of corporate law. For example, § 362a Delaware General Corporation Law clarifies that a public benefit corporation is a "for-profit corporation". Unlike non-profit corporations in Germany, a prohibition on profit distribution is considered unnecessary for the benefit corporation also because it does not enjoy any tax benefits or other privileges.<sup>137</sup> Further, the general principles for corporations apply to voting rights: voting is not based on headcount but on capital shares. The basic democratic features of European social cooperatives are alien to the US benefit corporation.

Generally, the US legal understanding is based on a broader conception of a social enterprise than the continental European model of a social cooperative.<sup>138</sup> This is because the benefit corporation evolved from the notion of profit-oriented corporations, and the form remains available to enterprises of the opinion that financial returns should not fall short of social returns. Neither the Model Benefit Corporation Legislation nor the individual acts of state legislation require a prioritization of the social mission.

#### **4. Definitions under European Union Law**

At EU level, various proclamations deal with social enterprises, starting with a Commission Communication of October 2011.<sup>139</sup> The first definition in a binding legal act can be found in the EuSEF Regulation of 2013.<sup>140</sup> An updated definition is contained in the Regulation establishing the European Social Fund Plus (ESF+) of 2021.<sup>141</sup> According to its Article 2 para. 1 no. 13, a "social enterprise" is "an undertaking, regardless of its legal form, including social economy enterprises, or a natural person which:

(a) in accordance with its articles of association, statutes or with any other legal document that may result in liability under the rules of the Member State where a social enterprise is located, has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes,

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<sup>137</sup> On this point, Möslein/Mittwoch (note 10), 399, 427.

<sup>138</sup> Livia Ventura, *The Social Enterprise Movement and the Birth of Hybrid Organisational Forms as Policy Response to the Growing Demand for Firm Altruism*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), p. 9, 10: "In Europe, social enterprise is traditionally considered an alternative to charities, while the United States has embraced a broader view of SE, including profit-oriented business organisations involved in socially beneficial activities, hybrid dual-purpose businesses mediating profit goals with social objectives, and non-profit organisations engaged in mission-supporting commercial activity".

<sup>139</sup> European Commission, *Social Business Initiative - Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation*, COM(2011) 682 final, p. 2 f.

<sup>140</sup> Art. 3(1)(d) of Regulation (EU) No 346/2013 on European Social Entrepreneurship Funds, OJ No. L 115/18, 25.4.2013.

<sup>141</sup> Regulation (EU) 2021/1057, OJ No. L 231/21, 30.6.2021.

and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives;

(b) uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective;

(c) is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact".

In this definition, it is noteworthy, on the one hand, that the early catalogue of EMES criteria<sup>142</sup> has left deep traces and that the prioritization of the social objective is bindingly prescribed in the tradition of the European model. On the other hand, it is striking that some of the organizational forms or statuses for social enterprises in the Member States have already incorporated the requirements of EU law, presumably also to benefit from corresponding EU funding.<sup>143</sup>

#### **IV. Open Questions and Research Perspectives in the Law of Social Enterprises**

Social entrepreneurship is not merely a trend; rather, it will most likely remain a "growth industry" also in the medium-term.<sup>144</sup> There are at least three reasons for this: First of all, there are numerous overlaps with the key theme of sustainability, even if social and sustainable enterprises are not fully congruent.<sup>145</sup> Secondly, in the emerging ESG era, the social component will soon be spelt out in more detail alongside the environmental component. Thirdly, social entrepreneurship fits well into the socio-political zeitgeist that – rightly or wrongly<sup>146</sup> – sees the basic structures of capitalism subjected to fundamental criticism.<sup>147</sup> Considering this, the law of social enterprises will also gain in importance. Fundamental discussions at the national and international level will likely focus on the overarching legal framework, alternative regulatory techniques, and organizational forms for social enterprises.

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<sup>142</sup> See note 70 as well as the corresponding text.

<sup>143</sup> See Fici, *Social Enterprise Laws in Europe After the 2011 "Social Business Initiative"*, 2020, p. 9: "This definition [of 2013] has strongly influenced the development of the national legislation on SE, both encouraging its adoption and shaping its features and contents"; see also Fici, *Models and Trends*, (note 89), pp. 153, 157.

<sup>144</sup> As previously and accurately assessed by Möslein (note 10), 2017, 175.

<sup>145</sup> On both aspects, see Mittwoch (note 10), pp. 240 et seqq.

<sup>146</sup> See the worthwhile treatise by Werner Plumpe, *Das Kalte Herz: Kapitalismus. Geschichte einer andauernden Revolution*, 2019.

<sup>147</sup> See, for example, Katharina Pistor, *The Code of Capital*, 2019; who is criticized, however, by Hans-Bernd Schäfer, *Nationalreichtum und private Armut durch Zivilrecht? – Eine Besprechung des Buchs "The Code of Capital" von Katharina Pistor*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 85 (2021), 854.

## 1. A Framework Regulation for the Social Economy in Germany?

On a fundamental level, a first question is whether a framework regulation for the social economy is advisable. So far, such framework laws have been encountered particularly in countries of the Romanistic legal family. The Spanish law on the social economy from 2011 is of a pioneering character in this regard.<sup>148</sup> It creates a common legal framework for all social economy institutions (Art. 1), provides them with various guiding principles (Art. 4), and contains a catalogue of organizational forms found in the social economy (Art. 5). The French law on the social and solidarity economy of 2014 follows a similar approach.<sup>149</sup> Its introductory provision sets out various requirements that private enterprises must fulfil to belong to the "économie sociale et solidaire". The main impetus for this law came from a thriving social economy and a new generation of entrepreneurs who seek to combine economic efficiency with social justice under the slogan "entreprendre autrement".

From the point of view of legal policy, the arguments in favour of such a framework are that it (a) creates definitional clarity about the specific features of social enterprises and thus facilitates their visibility and recognition, (b) offers political leverage to promote social enterprises in tax and public procurement law or with regard to corporate financing, (c) improves the identification of social enterprises in the entrepreneurial continuum and distinguishes them from both non-profit enterprises without entrepreneurial activities and purely profit-oriented enterprises.<sup>150</sup> On the other hand, there are potential disadvantages in the form of considerable definitional difficulties and there is also the risk of future developments and innovations being cut off by premature codification.<sup>151</sup> In addition, there might be possible distortions of competition to the detriment of ordinary private sector enterprises. Furthermore, there are different assessments as to whether the social economy as such warrants such a degree of support.<sup>152</sup> Moreover, it is questioned whether a further commercialization and privatization of the welfare state would be useful.

## 2. A Special Organizational Form for Social Enterprises in Germany?

From a comparative law perspective, the question arises as to whether an independent organizational form for social enterprises makes sense or is even necessary in Germany. After

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<sup>148</sup> Ley 5/2011, de 29 de marzo, de Economía Social.

<sup>149</sup> Loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire.

<sup>150</sup> In detail, OECD (note 29), pp. 27 et seq.

<sup>151</sup> See Karré (note 38), p. 288, 296; OECD (note 5), p. 21.

<sup>152</sup> Karré (note 38), p. 288, 296: "The main question here is whether social businesses can or should be seen as a group or subset of organisations that differ so significantly from more traditional organisations operating in social-welfare provision and have such a big beneficial impact on society that a special treatment is warranted".

all, 21 of 28 Member States in the European Union have (at least) one specific organizational form for social enterprises.<sup>153</sup> In the United States, the benefit corporation is available in 36 states and Washington D.C.

In a recent German survey, about 55% of the social enterprises surveyed were in favour of a special form.<sup>154</sup> The network organization SEND advocates, among other things, a reform of the cooperative.<sup>155</sup> *De lege ferenda*, this would require a dilution of the legal tradition according to which cooperatives are, by virtue of their funding purpose, member-benefit institutions.<sup>156</sup> Other voices in academic literature, on the other hand, promote the introduction of a hybrid organizational form situated between profit motive and public welfare orientation, following the example of the US benefit corporation and/or the British CIC.<sup>157</sup> Opposing views doubt that there is such need because the German GmbH as well as the German joint-stock corporation are all-purpose vehicles and have, therefore, been sufficiently flexible to adapt to the concepts of social entrepreneurs.<sup>158</sup> The traditional forms, though, cannot emulate the signalling effect that could be achieved by an additional organizational form indicating the social mission of the enterprise.

In further discussions, it seems important to distinguish more strongly than before between different models for a new legislative creation. On the one hand, one can think of a social enterprise form in a narrow sense, with priority given to the social mission, far-reaching restrictions on profit distributions, and equal participation of all members, which is based on the Romanistic model of the social cooperative. On the other hand, a domestic version of the benefit corporation with a stronger capitalist flavour and greater leeway in balancing profit motive and public welfare orientation could be considered. The two regulatory models are not necessarily mutually exclusive; rather, they can coexist in the same legal system. In Italy, for example, we find both the *cooperativa sociale* and the *società benefit*, and in France the *société coopérative d'intérêt collectif* exists alongside the *société à mission*.

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<sup>153</sup> Fici, *Models and Trends*, (note 89), pp. 153, 155.

<sup>154</sup> SEND (note 40), p. 16 with footnote 14.

<sup>155</sup> SEND (note 40), p. 16; from an academic perspective, see also Momberger (note 10), pp. 307 et seqq.

<sup>156</sup> In general, Beuthien in Beuthien (ed.), *Genossenschaftsgesetz*, 16th ed., 2018, Einl. Rn. 2: "They [= German cooperatives] therefore (unlike the French *économie sociale*) do not pursue public service objectives; charitable activities may only be a secondary purpose for them"; see also Momberger (note 10), pp. 79 f.

<sup>157</sup> See, for example, Momberger (note 10), pp. 312 et seqq. and *passim*; on the state of the debate most recently, Fleischer (note 122), margin no. 46 et seqq., with further references.

<sup>158</sup> See, for example, Mathias Habersack, *Gemeinwohlbindung und Unternehmensrecht*, AcP 220 (2020), 594, 646 et seq.; Spindler (note 10), p. 585, 595.



### 3. Regulatory Techniques for New Organizational Forms and other Frameworks of Association

If a legislative reform impulse with regard to social enterprises is deemed sensible, then at least three regulatory approaches can be considered: a completely new version of a company, a mere organizational subtype, or a legal status; fourthly also private certification can be considered an alternative.<sup>159</sup>

#### a) Creation of a New Organizational Form

A large-scale solution would be to develop a completely new version of a company, comparable to the invention of the cooperative, which was conceived in the Prussian GenG of 1867 and the later German GenG of 1889 as a special-purpose form falling between a commercial partnership (OHG) and a commercially operating joint-stock corporation (AG).<sup>160</sup> Most recently, the German *Stiftung Verantwortungseigentum* has indeed been pursuing a new organizational form with its project of a “corporation with tied assets” (“Gesellschaft mit gebundenem Vermögen, GmgV”),<sup>161</sup> whereas the two draft laws of an independent expert group from June 2020 and February 2021 were still conceived as special subtypes of the GmbH.<sup>162</sup> However, the choice of a social or non-profit purpose is not a “constitutive condition”<sup>163</sup> for a GmgV; thus it cannot be classified as a form for social enterprises.<sup>164</sup>

A new company form can make sense or even be necessary if its core elements differ significantly from those found in existing organizational forms or if one wants to leave behind their ballast and damaged reputation and instead initiate a legislative “fresh start”.<sup>165</sup>

#### b) Subtypes of Existing Organizational Forms

As a small-scale solution, a subtype of an existing organizational form can be targeted, one which builds on the foundations of an established form and adds some special rules to it.<sup>166</sup> This

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<sup>159</sup> On what follows, see already Holger Fleischer, *The Menagerie of Organizational Forms in German Company Law*, ECGI Working Paper N° 735/2023, under V.

<sup>160</sup> Beuthien (note 33), p. 11, with further references.

<sup>161</sup> Stiftung Verantwortungseigentum, Eckpunktepapier of 1 March 2023, p. 1; see also FAZ of 14 March 2023: “Enterprises without dividends”.

<sup>162</sup> See Anne Sanders/Barbara Dauner-Lieb/Simon Kempny/Florian Möslein/Rüdiger Veil, *Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen*, partly reprinted in *GmbHR* 2021, 285; see also Vera Obernosterer, *Die GmbH mit gebundenem Vermögen – eine GmbH mit beschränkter Niederlassungsfreiheit?*, *GmbHR* 2023, 434 Rn. 10 et seqq.

<sup>163</sup> Stiftung Verantwortungseigentum (note 157), p. 2.

<sup>164</sup> This is clarified by Anne Sanders, *Binding Capital to Free Purpose: Steward Ownership in Germany*, *ECFR* 2022, 622, 628.

<sup>165</sup> Fleischer (note 102), 827, 830.

<sup>166</sup> Jan Lieder, *Rechtsformvariante und Rechtsscheinhaftung – Ein Beitrag zur Institutionenbildung im Gesellschaftsrecht*, *Festschrift 25 Jahre Notarinstitut*, 2018, p. 503.

was the approach taken, for example, by the Italian legislature with the *cooperativa sociale*, which is a special version of the cooperative. The same is true for the English CIC, which is based on the existing rules for companies,<sup>167</sup> and for the benefit corporation, which is a "subtype of the corporation".<sup>168</sup> In Germany, organizational subtypes have been introduced at various occasions in recent times,<sup>169</sup> but not in the area of social enterprises.

The charm of a subtype lies both in its regulatory efficiency for the legislature and in advantages for legal practitioners: the latter have lower learning costs and can – at least in part – continue to draw on the wealth of experience they have accumulated from court decisions and contractual practice.<sup>170</sup>

### c) Legal Status

Adjacent to these two regulatory techniques lies a third, which is referred to internationally as legal status,<sup>171</sup> legal qualification,<sup>172</sup> or legal certification<sup>173</sup>. With such legal status, the legislature provides for certain special rules that are available as a regulatory option open to several or all forms of companies and associations. Early manifestations of this approach can be found in Belgium, where the *société à finalité sociale*, which is also open to corporations, was created in 1995,<sup>174</sup> and in the 2003 Finnish law on work-integrative social enterprises.<sup>175</sup> A better-known example is the Italian *società benefit* of 2016, which, unlike the US benefit corporation, is not an organizational subtype,<sup>176</sup> but with its dual purpose is available to all partnerships and corporations as well as cooperatives. The same applies to the French *société à mission* of 2019 – a status that all commercial companies can acquire.<sup>177</sup> Since 2017, there also

<sup>167</sup> See Lloyd (note 98), p. 33: "[...] the CIC piggybacks on existing company legislation."

<sup>168</sup> Manesh (note 126), 603, 610.

<sup>169</sup> See Fleischer (note 102), 827, 830 f.

<sup>170</sup> See Holger Fleischer, *Internationale Trends und Reformen im Recht der geschlossenen Kapitalgesellschaft*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, 1081, 1089, with further references.

<sup>171</sup> J.S. Liptrap, *The Social Enterprise Company in Europa: Policy and Theory*, J. Corp. L. Stud. 20 (2020), 495, 496 with footnote 1; OECD, *Policy Guide on Legal Frameworks for the Social and Solidarity Economy*, 2023, pp. 45 et seqq.; see also Cools (note 104), 85, 98 et seqq.

<sup>172</sup> Fici, *Models and Trends*, (note 89), pp. 153, 165 et seqq.

<sup>173</sup> Liao/Tawfik/Teichreb (note 2), 84, 97 et seq.

<sup>174</sup> Loi du 13 avril 1995; on this law see Hiez, *The Suitability of Belgian Law to B Corp*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), pp. 441, 445 et seqq., with further references. However, this legal status was abolished in 2019 in the course of the reform of Belgian company law and replaced by a cooperative variant, the *société coopérative comme entreprise sociale*. For more details, see Aydogdu/Nickels, in Aydogdu/Caprasse (eds.), *Le Code des sociétés et des associations. Introduction à la réforme du droit des sociétés*, 2018, pp. 98 et seqq.; Cools (note 104), 85, 98.

<sup>175</sup> Law No. 1351/2003 of 31 December 2003; in more detail, Harri Kostilainen/Eeva Houtbeckers/Pekka Pättiniemi, *A New Typology of Social Enterprise in Finland: Capturing the Diversity*, in Defourny/Nyssens (note 1) pp. 52, 55 et seqq.

<sup>176</sup> See Cian (note 109) p. 50: "non un nuovo tipo societario".

<sup>177</sup> See Jean-Noel Guerini, in Rapport Lescure et al., N° 1237, Assemblée Nationale, Enregistré à la Présidence de l'Assemblée nationale le 15 septembre 2018, Tome II, p. 127: "[Ce] statut se cumulera avec les statuts existants:

exists in Luxembourg the *société d'impact sociétal* as a legal status for joint-stock corporations, limited liability companies, and cooperatives,<sup>178</sup> and since 2022 Spain allows joint-stock corporations and limited liability companies to be designated *sociedades de beneficios e interès comun*,<sup>179</sup> though this status awaits further elaboration through a regulation. In Germany, although functioning from a slightly different perspective, companies can enjoy a non-profit tax status and be titled a gGmbH (§ 4 GmbHG), a gUG,<sup>180</sup> a gAG<sup>181</sup> and, according to the prevailing opinion, a geG,<sup>182</sup>; there is, however, no similar designation for a non-profit partnership.<sup>183</sup> At the European Union level, the European Parliament has recommended the introduction of a label for social and solidarity-based enterprises.<sup>184</sup>

The main advantage of a legal status is its holistic and universal approach to business association: it is open to all forms of businesses equally or at least to several of them.<sup>185</sup> As a result, the company founders can choose the legal form that seems most suitable for their purposes.<sup>186</sup> This makes a prior change of form unnecessary, and it also eliminates the need for further conversion processes if the status requirements are no longer met at some point in the future.<sup>187</sup>

#### d) Private Certification

Finally, one could consider private certification mechanisms for social enterprises. The international prototype is the Certified B Corporation (in short: B Corp), a private certificate from the non-profit organization B Lab, headquartered in Pennsylvania.<sup>188</sup> This certificate is awarded after successful completion of a standardized private certification process (B Impact

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société anonyme à mission; société par actions simplifiée (SAS) à mission; société à responsabilité limitée (SARL) à mission; entreprise unipersonnelle à responsabilité limitée (EURL) à mission. Il ne s'agit pas de créer un statut d'entreprise supplémentaire."; from a comparative perspective, Fleischer/Chatard (note 112), 1525.

<sup>178</sup> Loi of 12.12.2016.

<sup>179</sup> Ley no. 18/2022 of 28.9.2022.

<sup>180</sup> BGH Neue Zeitschrift für Gesellschaftsrecht (NZG) 2020, 781.

<sup>181</sup> Iris Rozwora, *Die gemeinnützige Aktiengesellschaft als Akteurin der Zivilgesellschaft*, 2021.

<sup>182</sup> Lena Oldemeier/Björn Seeck, *Genossenschaft und Gemeinnützigkeit*, Zeitschrift für das Recht der Non Profit Organisation (npoR) 2023, 16.

<sup>183</sup> Manfred Orth, *Gemeinnützige Personengesellschaften*, Deutsches Steuerrecht (DStR) 2022, 864; for amendments de lege ferenda Frauke Wedemann, *Gemeinnützige Personengesellschaften?* Neue Zeitschrift für Gesellschaftsrecht (NZG) 2016, 645.

<sup>184</sup> European Parliament resolution of 5 July 2018, 2016/2237(INL); on this, see, for example, J.S. Liptrap, *A Social Enterprise Company in EU Organisational Law?*, Cambridge Yearbook of European Legal Studies 23 (2021), 193; Carlos Vargas Vasserot, *Social Enterprises in the European Union: Gradual Recognition of Their Importance and Models of Legal Regulation*, in Peters/Vargas Vasserot/Alcalde Silva (note 9), p. 27, 33.

<sup>185</sup> See Fleischer/Chatard (note 112), 1525, 1531; Karsten Engsig Sørensen/Mette Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, EBOR 2014, 267, 281.

<sup>186</sup> Fici, *A European Statute for Social and Solidarity-Based Enterprise*, 2017, p. 21.

<sup>187</sup> Fleischer/Chatard (note 112), 1525, 1531; Sørensen/Neville, (note 181), 267, 277 f.

<sup>188</sup> See the monograph by Chris Marquis, *Better Business. How the B Corp Movement is Remaking Capitalism*, 2020.

Assessment) and should not be confused with the benefit corporation as an organizational form, even though the same idea founders stand behind both.<sup>189</sup> Today, B Corp is a globally established certificate of quality, and there are over 5,000 certified B Corporations in more than 70 countries across 150 different sectors.<sup>190</sup> For Germany, the B Corp directory now includes roughly 50 entries from 12 different business sectors. In addition, interested companies can also make use of domestic certification mechanisms: TÜV Rheinland, for example, offers several sustainability management certificates,<sup>191</sup> and non-profit organizations can obtain the "PHINEO Wirkt!" seal.<sup>192</sup>

An advantage of private certification is that it relies solely on market forces and does not require any legislative involvement.<sup>193</sup> In addition, competition between rival certifiers could serve to promote tailor-made certification criteria and effective autonomous control mechanisms.<sup>194</sup>

#### 4. Enforcement of the Social Mission and Prevention of Social Washing

A key legislative task in the design of a new regulatory regime is to ensure compliance with the stated social mission and prevent social washing. A central building block in this regard is the anchoring of the social purpose in the association's statutes. The legal requirements for this can be strict or more forgiving and may concern not only the entity's purpose but also its objects. Other options include provisions against a transfer of assets and a distribution of profits. In addition, carefully calibrated duties of board members as well as reporting and transparency requirements are suitable for counteracting "mission drift".

With regard to enforcement of the social mission, both private and public enforcement can be considered. The spectrum of private law instruments includes rights and remedies granted to minority shareholders, stakeholders, and third-party beneficiaries, and it ranges on to the possibility of competitor claims for unfair competition. Public enforcement can be carried out by a specific authority, such as the UK Regulator of Community Interest Companies, or by a general competition authority such as the Italian *Autorità Garante delle Concorrenza e del Mercato* for the *società benefit*. As for Germany, reference should be made to the tax authorities

<sup>189</sup> In greater detail, *Fleischer* (note 122), margin no. 3 et seq., with further references.

<sup>190</sup> In closer detail, <https://www.bcorporation.de>.

<sup>191</sup> <https://www.tuv.com/landingpage/de/certification-and-auditing/>.

<sup>192</sup> <https://www.phineo.org/wirkt-siegel>.

<sup>193</sup> Spindler (note 10), p. 585, 595.

<sup>194</sup> See Florian Möslein, *Zertifizierung nachhaltiger Kapitalgesellschaften: Regimevergleich und flankierende Maßnahmen*, in Martin Burgi/Florian Möslein (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021, p. 3, 11.

as concerns non-profit corporations and to the foundation oversight authorities with regard to foundations.

## **V. Conclusion**

In social-economic literature, the task of surveying social enterprises has been compared to the mapping of stars and constellations in the galaxy.<sup>195</sup> The same applies to the law of social enterprises, a field whose systematic study has only just begun in Germany and abroad. From a company law perspective, the various regulatory techniques for new organizational forms and other frameworks of association deserve particular attention. When it comes to concrete design, it is of particular importance to adopt suitable safeguards so as to enforce adherence to the social mission and to prevent "social washing".

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<sup>195</sup> Jacques Defourny/Melinda Mihály/Marthe Nyssens/Sophie Adams, *Documenting, Theorising, Mapping and Testing the Plurality of SE Models in Central and Eastern Europe*, in Defourny/Nyssens (note 1), *Social Enterprise in Central and Eastern Europe*, 2021, p. 6.

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