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New Frontiers in the Legal Structure and
Legislation of Social Enterprises in Europe:
A Comparative Analysis

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Abstract

This paper aims at presenting and discussing policy issues regarding the legal structure and legislation of the social enterprise through the lenses of recent law reforms in Europe. The legislation of seven countries is analysed: Portugal, France, Poland, Belgium, the United Kingdom, Finland and Italy. National models are compared distinguishing them according to the legal form and the main rules concerning asset allocation, governance and responsibility. Aware about the specificity that the legal, social and economic context may entails in each legal system, the authors conclude that, in order to promote a distinctive role for social enterprise in Europe, the law should guarantee: a control mechanism over the social nature of the finality pursued by the organisation, as defined at least per broad principles by the law; the enforcement of a positive (although not total) assets lock to ensure the achievement of social goals; the possibility for the enterprise to sustain its own activity through remunerated financing; a certain degree of stakeholders' interests representation inside the governance of the enterprise, with specific but not necessarily exclusive representation with regards to beneficiaries and employees; the enforcement of a non-discrimination principle concerning the composition of membership, if any; the enforcement of a democratic principle inside the governing bodies which allows pluralism, fair dialogue and no emergence of controlling rights, unless in favour of non profit organisations which share the social goals and the democratic nature of the social enterprise; an adequate degree of accountability which allows sufficient information disclosure, also in favour of third parties, about the governance and the activity of the social enterprise.

Keywords

social enterprise - legal reform - non-profit constraint - stakeholders' representation – accountability - co-operative company.

Table of Contents

1. Regulating social enterprises in Europe: some key-questions
2. Recent reforms across some European countries: legal forms and organisational models
 - 2.1. The co-operative model: the cases of Italy, Portugal, France and Poland
 - 2.2. The company model: the cases of Belgium and the United Kingdom
 - 2.3. The “open form” model: the cases of Finland and Italy
3. Comparing the models and analysing some policy issues
 - 3.1. Defining the social finality
 - 3.2. Between affirmative and negative asset allocation: the non-distribution constraint and the asset-lock
 - 3.3. The governance structure: which rights for which stakeholders?
 - 3.4. Accountability and responsibility issues
 - 3.5. Back to the legal forms: co-operatives, companies or openly defined private actors?

*New Frontiers in the Legal Structure and Legislation of Social Enterprises in Europe: A Comparative Analysis**

Fabrizio Cafaggi and Paola Iamiceli

1. Regulating Social Enterprises in Europe: some Key-questions

This paper aims at presenting and discussing policy issues regarding the legal structure and legislation of the social enterprise through the lenses of recent law reforms in Europe¹. Although only in limited cases, legislators have regulated the social enterprise as such, the attention paid by scholars and policy makers to the opportunity of recognising a distinctive status to this type of enterprise has increased over the last decades. In some countries, this acknowledgement has developed with respect to specific forms of enterprises, especially co-operatives: while raising the question about the possible distinction among diverse phenomena (e.g., the growth of the co-operative sector and the emergence of the social enterprise), the attention paid to co-operatives with social purposes has itself significantly contributed to the debate on the social enterprise in Europe.

This paper will analyse some of the *contents* of possible legislation on social enterprises more than the issue regarding, preliminarily, the fundamental *reasons and scopes* of this legislation. In most cases, legislation comes into action in order to promote a form of enterprise that over the last decades has shown its potential in terms of efficiency and efficacy². In abstract terms, such promotion can be reached through different types of legislation; indeed, the law can be directed to *legitimate* a social phenomenon,

* A more comprising version of this paper is due to be published in *New Frontiers of Social Enterprises*, edited by Antonella Noya, Oecd, 2008.

1 This debate dates back 20 years. For a first overview see DIGESTUS, *Verso l'impresa sociale: un percorso europeo*, Roma, 1999

2 H.B. Hansmann, *The Role of Nonprofit Enterprise*, Yale Law Journal, 89, 1980, pp. 835-901; B.A. Weisbrod, *The Nonprofit Economy*, Harvard University Press, Cambridge (Mass.), 1988; H.B. Hansmann, *The Ownership of Enterprise*, Harvard University Press, Cambridge (Mass.), 1996; A. Ben-Ner, *Nonprofit Organizations: Why do They Exist in Market Economics*, in S. Rose-Ackerman (ed.), *The Economics of Nonprofit Institutions. Studies in Structure and Policy*, Oxford University Press, New York-Oxford, 1996; L.M. Salamon, and H.K. Anheier (eds.), *Defining the Nonprofit Sector: A Cross-National Analysis*, Manchester: Manchester University Press, 1997; G.P. Barbeta, *The Nonprofit Sector in Italy*, Manchester: Manchester University Press, 1997; H.K. Anheier, and A. Ben-Ner (eds.), *The Study of the Nonprofit Enterprise: Theories and Approaches*, New York: Kluwer Academic/Plenum Books, 2003; C. Borzaga, *L'analisi economica delle organizzazioni non profit: teorie, limiti e possibili sviluppi. 1*, in C. Borzaga and M. Musella (eds.), *Produttività ed efficienza nelle organizzazioni non profit. Il ruolo dei lavoratori e delle relazioni di lavoro*, Edizioni 31, Trento, 2003, pp. 23-48.

enlarging a legal concept (such as “enterprise”) and, deriving from this, the application of legal rules already provided for with respect to the more general form; secondly, the law can provide *incentives* for creating a particular type of enterprise (the social one), these incentives being monetary (through direct contributions or tax exemption) or non-monetary reduction of administrative costs (such as incorporation costs, registration costs and the like) may be one example³.

Legislators may also promote the role of social enterprises by defining organisational models apt for maximising enterprises’ efficiency and efficacy. In this case, legislation should predominantly be based on default rules. In the same domain and perspective, self – regulation, possibly promoted by the legislator itself, could also be an effective tool of framing the governance of social enterprise⁴.

What can be considered about the different functions of legislation on social enterprises is that, as a matter of fact, European legal systems tend to promote this type of entity relying on non-monetary incentives or regulating organisational models rather than providing monetary support, while the opposite could be said with respect to legislation on non-profit organisations as such⁵. Indeed, the need of organisational models which can adequately reflect a balanced mixture between sociality and entrepreneurship is what is mostly lacking within traditional legislation on the enterprise, on the one hand, and non – profit organisations, on the other. Whether it is the public regulator, an independent agency, private organisations representing social enterprises or the entrepreneurs themselves the ones who should more effectively contribute to provide this regulation is one the issues addressed by this paper through a comparative overview of some European laws in this field.

Within this perspective, four sets of questions will be considered as pivotal.

1. *Social enterprises and non-profit organisations.* The first issue regards the definition of the social enterprise as distinctive with respect to the notion of non-profit organisation, on the one hand, and the status of the enterprise as such (either for-profit and not-for-profit), on the other. As mentioned above, the recognition of this specificity has increasingly spread through the European debate among scholars and policy makers, although the richness of the debate has not yet allowed a common approach to be taken. By contrast, in very few cases, legislators acknowledge the uniqueness of the social enterprise defining its legal status as distinctive. Where this happens, sometimes indirectly through the legislation of specific types of social enterprises, diverse connotations of sociality and entrepreneurship emerge across countries. Where this acknowledgement is still lacking, the issue is what legal definition of social enterprise,

3 On the diverse functions of legislation in the domain of social enterprises, see F. Cafaggi, *L’impresa a finalità sociale*, in *Pol. dir.*, 2000, p. 650 ff.; Id., *La legge delega sull’impresa sociale: riflessioni critiche tra passato (prossimo) e futuro (immediato)*, in *Impresa sociale*, 2005, 2, p. 70 ff.; L. Sacconi, *La legge sull’impresa sociale come selettore di organizzazioni con motivazioni necessarie all’efficienza: quasi un’occasione mancata*, in *Impresa sociale*, 2006, 3, p. 42 ff.

4 F. Cafaggi (ed.), *Modelli di governo, riforma dello stato sociale e ruolo del Terzo settore*, Il Mulino, Bologna, 2002.

5 This seems to be the case in Italy and the UK, at least if we consider, respectively, the social enterprise, as regulated in Italy in 2006, and the community interest company, as regulated in the UK in 2004.

if any, would serve the purpose of promoting the adoption of this efficient and effective operational tool in the social economy.

2. *Asset allocation.* The distinction between affirmative and negative asset partitioning has been fruitfully developed in the literature⁶. In the context of this paper, affirmative asset allocation is especially important. Indeed, pursuing social goals through a private organisation raises the issue of the allocation of assets according to entrepreneurial methods and certainly in accordance with the social nature of the enterprise. In the legal perspective this gives rise to a real “lock” on the assets: it limits the possibility of distributing profits and, in the case of dissolution, prevents resources from being directed towards scopes that differ from the social one. How strong should this lock be? Which kind of distribution or concurrent use of the assets should be allowed, if any, considering the entrepreneurial nature of the entity and its need for autonomous sustainability and financing in the first place? To what extent does this continuity prevent social and economic innovation while ensuring stability?

3. *Stakeholders and governance.* A third set of questions concerns the identification of the different represented interests (or due to be represented) within the social enterprise. In the current debate, the social enterprise is often defined as a multi-stakeholder entity, suggesting that different interests should have a voice and protection within its governance structure⁷. Which combination should be selected and by whom? Should this be equal or diversified according to the nature of the interest? Which rights should, in fact, be attributed to every stakeholder? The identification of stakeholders and the definition of their position *vis a vis* the organisation suggests that different boundaries of the enterprise may be drawn and these boundaries contribute to defining the role of corporate and contract law.

4. *Accountability and responsibility: principles and instruments.* As framed in these terms, the third set of questions leads to defining the governance structure (or the various models of governance) of the social enterprise. In this perspective a fourth issue is worthwhile considering: that of accountability and responsibility. Indeed, not only direct representation of interests within the governing body is significant to define the special status of the social enterprise, but also the ability of this organisation to be accountable to a certain community (regardless of the effective powers awarded to its members). Then, information duties come into action as well as the adoption of social balance sheets as a communication tool of the social enterprise towards its community. What should the legal effects of these practices be? How do social and legal responsibility interact from this perspective? Who is in charge of controlling social enterprises and enforcing their responsibility? Administrative authorities? Courts? Which remedies can be enforced by members and/or by third parties?

6 See Hansmann and Kraakman, Yale l. j. 2000.

7 C. Borzaga – L. Mittone, *The multistakeholder versus the non-profit organization*, Discussion paper # 7, University of Trento, 1997; A. Zoppini, *Relazione introduttiva a una proposta per la disciplina dell'impresa sociale*, in *Riv. crit. dir. priv.*, 2000, p. 359; J. Defourny, *Introduction: from third sector to social enterprise*, in C. Borzaga – J. Defourny (eds.), *The emergence of social enterprise*, London – New York, Routledge, 2001, p. 18; J.L. Laville – M. Nyssens, *The social enterprise: towards a theoretical socio-economic approach*, *ibidem*, p. 312 ff., part. p. 315 f.; L. Sacconi, *La legge sull'impresa sociale*, cit. On the opportunity of a non-mandatory connotation of social enterprises in terms of multistakeholder organisations: F. Cafaggi, *L'impresa a finalità sociale*, cit.

These being the main policy issues faced in this paper, the analysis will be particularly focussed on the law of Italy, France, Belgium, Portugal, Poland, United Kingdom and Finland, with particular attention paid to the most recent evolution of social enterprise legislation.

After briefly describing the main approaches in each legal system, an attempt will be made to identify common models of legislation across these countries. Moving from the conviction that legal forms, including different governance structures, influence modes and efficacy of policy goals, this paper will start by considering the alternative choice of legal forms: the co-operative, the more general company form and the even broader “open form” as an approach which does not select a specific organisational form within a given legal system. Of course, other models could be identified and examined among those that focus on a single specific form: the associative model, for instance, or the foundation model. Particularly the associative model plays, in fact, an important role in the social economy within some legal systems (like Italy, Belgium and France)⁸. However, even in these countries, legislators tend to consider associations as actors due, only marginally, to carry on entrepreneurial activities. As a consequence, legislation which clearly regulates social enterprises with specific regard to the associative model is not easy to identify. In some cases (like in Italy), the choice of the “open form model” represents a particular response to this issue.

With regard to the *positive* framework, the analysis will show that, while the choice of legal forms is significant to identify a certain governance structure and a certain type of social enterprise, some features may be shared by different models (the co-operative and “open form” models, for example) regardless of the form. Instead of suggesting the neutrality of the forms, this analysis will raise new questions about the effective extent of some governance rules within different types of social enterprise. Then, in *normative* terms, it will still be relevant to consider whether the future perspectives of social enterprises can be better improved by a law which focuses on a specific legal form or by a law which leaves this choice to social entrepreneurs among a larger set of forms statutorily provided for.

2. Recent Reforms Across some European Countries: Legal Forms and Organisational models

In the last twenty years, the debate on the social enterprise in Europe has stimulated a rich discussion concerning its specific functions and its place in the new mixed welfare systems.

The European Agenda for Entrepreneurship adopted by the European Commission in 2004⁹ as well as in the Communication on the promotion of co-operative societies in

8 See DIGESTUS, *Verso l'impresa sociale*, cit.

9 Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions, *Action Plan: The European agenda for Entrepreneurship*, COM (2004) 70 final (11.2.2004), p. 9 and p. 19.

Europe¹⁰ show the first results. The debate was also fed by the judiciary. In a series of cases, mainly focusing on the applicability of competition law, the European Court of Justice has highlighted the specific role of social enterprises operating within the market according to solidarity standards and, therefore, calling for the application of different legislations, at least in terms of competition law¹¹. No specific legislation currently exists at European Community level, although the directive and the legislation on European cooperative societies may represent a partially relevant starting point in this direction¹². Nevertheless, the circulation of legislative patterns and concrete experiences developed at national level could lead in the next future (and, in some cases, this is already happening¹³) to a partial convergence of models and common trends in Europe and allow the need to emerge for a more explicit harmonisation process through European law. This convergence is today limited since, even where a legal notion of the social enterprise emerges, legal systems balance entrepreneurship and sociality differently and rank stakeholders' interests differently within the governance structure of the organisation. These differences increase radically when Central and Eastern European countries are considered¹⁴.

This circulation of national models has been significantly fostered by academics, scholars and international institutions (also other than the EC) for the last twenty years. In this context, a common understanding about the functions and forms of the social enterprise has emerged, although some differences exist as to its specific definitions¹⁵. In particular, the focus is (i) on the nature of the activity as professionally carried on for the supply of goods or services; (ii) on the explicit goal of producing benefits for the

10 Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe, COM (2004) 18 final (23.2.2004), part. p. 10.

11 See Opinion of Advocate General Jacobs, 23 March 2000, Joined Cases C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten; Court of Justice, 21 September 1999, Case C-67/96 Albany International v Stichting Bedrijfspensioenfonds Textielindustrie; Opinion of Advocate General Fennelly, 11 May 2000, Case C-222/98, Hendrik van der Woude v Stichting Beatrixoord; Opinion of Advocate General Jacobs, 17 May 2001, Case C-475/99, Ambulanz Glöckner v Landkreis Südwestpfalz, § 69. See also Liège (7e ch.) 17 novembre 2005, J.T. 2006 (abrégé), liv. 6218, 202; J.T. 2006 (abrégé), liv. 6231, 466, note GLANSDORFF, F.; *Annuaire Pratiques du commerce & Concurrence* 2005, 703; *Juristenkrant* 2006 (reflet BREWAEYS, E.), liv. 134, 1: "Dans la mesure où il est admis que les avantages légaux reconnus aux sociétés d'économie sociale d'intégration ne constituent pas des discriminations contraires aux articles 10 et 11 de la Constitution, et que la participation de ces entreprises à des procédures de passation de marchés publics ne constitue ni une violation du principe d'égalité de traitement des soumissionnaires, ni une discrimination déguisée, ni une restriction contraire au Traité C.E., malgré le fait que ces sociétés reçoivent des subventions leur permettant de faire des offres à des prix sensiblement inférieurs à ceux de leurs concurrents qui ne bénéficient pas de tels avantages, il ne peut être retenu en l'espèce que l'intimée ait commis un acte contraire aux usages honnêtes en matière commerciale en remettant des prix inférieurs à ceux de l'appelante dans les deux marchés litigieux du fait des aides et subsides reçus par elle en parfaite légalité."

12 Regulation (EC) No. 1435/2003, 22 July 2003; Directive 2003/72/EC, 22 July 2003. See also Communication on the promotion of co-operative societies in Europe, cit., as quoted below under footnotes ... 21 and 22.

13 See especially the case of Poland examined in § 2.1.

14 EMES, *Study on Promoting the Role of Social Enterprises in CEE and in the CIS*, Initial Overview Study, April 2006.

15 Cfr. DIGESTUS, *Verso l'impresa sociale*, cit.

community at large or for a specific category of individuals; (iii) on the assumption of risk by the entrepreneurs; (iv) on the autonomy of the organisation, especially with respect to the public sector; (v) on a certain presence of paid workers; (vi) on the collective nature of the initiative; (vii) on the democratic characterisation of the governance structure, where decision making powers are not based on capital share; (viii) on a (partial) limitation in distribution of profits¹⁶. A further elaboration of this approach, as carried out in the context of a project realised by the Organisation of Economic Cooperation and Development, has complementarily pointed out the relevance of economic sustainability, complexity of financial structure with a high degree of self-financing, orientation to work integration of disadvantaged people; it has also considered the plurality of legal forms that social enterprises may adopt across the countries, without infringing their intrinsic nature¹⁷. More recent contributions have reduced the attention paid to self-sustainability via commercial activities, while considering the relevance of public support and voluntary resources in their financial structure as well as the role of social enterprises in the development and shaping of institutions and public policies¹⁸.

If considered with a certain degree of flexibility¹⁹, this conceptual grid could orientate (and, in fact, has often orientated) comparative research of the main models of social enterprises as arisen in Europe²⁰. In the same perspective, this paper will focus on the relation between legal forms, governance structure and social finality in order to discuss some policy issues which are today at stake.

Moving from the analysis of legal forms, it is useful to distinguish between three different models developed in different legal systems:

- (a) the “co-operative model”, in which the social enterprise is regulated by law as a particular co-operative company characterised by social goals;
- (b) the “company model”, as derived from the form of a for-profit corporation though characterised by social finality and limited distribution constraints;
- (c) the “open form model”, as legally defined with respect to social finality without a specific legal form being selected.

16 With respect to the results of EMES' research, J. Defourny, *Introduction: from the third sector to social enterprise*, cit., p. 16 ff. See also the development of the comparative study into the Digestus Project 1999, DIGESTUS, *Verso l'impresa sociale*, cit.

17 OECD, *Social enterprises*, Paris, 1999, p. 11.

18 J. Defourny - M. Nyssens, *Defining social enterprise*, in *Social Enterprise*, edited by M. Nyssens, Routledge, London – New York, 2006, p. 3 ff., part. p. 12.

19 For example, it could be discussed whether the orientation to work integration should be considered as a definitory element of the social enterprise, or what the assumption of risk includes (whether exposure to financial loss, to bankruptcy, to the loss of non-financial investments, or to another type of risk).

20 See DIGESTUS, *Verso l'impresa sociale*, cit.; C. Borzaga – J. Defourny (eds.), *The emergence of social enterprise*, London, Routledge, 2001, cit.; OECD, *Social enterprises*, cit.; C. Borzaga – R. Spear (eds.), *Trends and challenges for Co-operatives and Social Enterprises in developed and transition countries*, Trento, Edizioni31, 2004; P. Iamiceli, *L'impresa sociale in Europa: alcuni spunti di comparazione*, in *Beni comuni. Quarto rapporto sulla cooperazione sociale in Italia*, edited by Centro studi Cgm, Edizioni Fondazione Giovanni Agnelli, Torino, 2005, pp. 425 ff.; A. Noya, E. Clarence (ed.), *Social economy: building inclusive societies*, Paris, 2007.

Not necessarily can each country examined here be associated with a single model, being possible that two different laws in the same legal system regulate, respectively, two types of organisation that are, in any case, consistent with the conceptual framework of a social enterprise. More than a comparison between legal systems, this paper is then directed towards comparing the various models as outlined here and, more specifically, the single laws considered therein.

2.1. The Co-operative Model: the Cases of Italy, Portugal, France and Poland

The particular nature of co-operative companies, as generally orientated towards pursuing social goals, was recognised by the European Commission in recent policy documents²¹. However, also in this context, it is clear that, not for this reason, all co-operatives represent social enterprises, while, among those, it is possible to distinguish organisations which are explicitly characterised by social finality²².

Italy has been a leading case in Europe. In 1991, a statute on social co-operatives was enacted, introducing a new category of enterprise totally subject to the legislation of co-operative companies except for the aspects specifically regulated in this special law²³. The law had a significant impact, generating an increase in the number of social co-operatives, although they already existed in the Italian landscape²⁴. The legislation on co-operatives was subsequently reformed in 2003. This legislation, affecting all co-operatives, has not had a great impact on social co-operatives. It should be mentioned at the outset that, in addition to the social co-operative statute, Italy has recently adopted a general statute on social enterprises which aims at providing a general framework. This legislation will be examined within the third model.

Social finality and activities. What distinguishes a social co-operative from an ordinary co-operative company is primarily the social finality: according to the law, these co-operatives aim at satisfying the community's general interest in human promotion and social integration. Such a finality may be pursued in two different ways: by providing educational, social and health-care services (then the co-operative is known as “type A – co-operative”) or by carrying other types of entrepreneurial activities with a scope of integrating disadvantaged people into working life (“type B – co-operative”). In the latter case, the disadvantaged workers are preferably but not necessarily members of the co-operative. This means that, by definition, the social co-operative is not a mutual organisation, like an ordinary co-operative²⁵, but it is generally directed towards

21 Communication on the promotion of co-operative societies in Europe, cit., p. 15 (“co-operatives are an excellent example of company type which can simultaneously address entrepreneurial and social objectives in a mutually reinforcing way”).

22 Communication on the promotion of co-operative societies in Europe, cit., p. 4: “All co-operatives act in the economic interests of their members, while some of them in addition devote activities to achieving social, or environmental objectives in their members’ and in a wider community interest.”.

23 Law 8 november 1991, No. 381.

24 With special respect to B-type co-operatives, see C. Borzaga – M. Loss, *Multiple goals and multi-stakeholder management in Italian social enterprises*, in *Social Enterprise*, edited by M. Nyssens, cit., p. 72 ff., p. 76, where quantitative data elaborated by INPS are reported. According to these data, B-type co-operatives have increased from 287 (in 1993) to 1915 (in 2000).

25 In fact, also for ordinary co-operatives, co-operative mutuality has been significantly re-shaped within the reform of capital companies in 2003; this reform allows the existence of a category of co-

providing benefits to external beneficiaries, different from its members. These features significantly affect the governance structure and, in particular, the costs of governance.

Non profit constraint and asset allocation. Like in all social enterprises, distribution of profits does not qualify the purpose of the organisation. However, it is not totally prohibited by law, being allowed a limited distribution of profits. With the reforms of ordinary co-operatives, applicable also to social co-operatives from this respect, the possibility of issuing financial instruments with special distribution rights has increasingly been recognised, although limits and thresholds have been confirmed in order to preserve the intrinsic nature of the co-operative company²⁶. In fact, organisations have not taken significant advantages of these opportunities, probably due to the organisational costs related to the presence of this different class of “stakeholders” or the tendency to access more traditional financing resources, which are quite familiar to co-operatives (like shareholders’ loans or public subcontracting)²⁷.

On the other hand, the existence of a “capital lock” is also shown by constraints concerning (1) the devolution of yearly profits to legal reserves beyond the limits ordinarily applicable to all the companies and (2) the allocation of the assets in case of liquidation: being allowed the return of capital shareholders’ contributions, the residual value is devoted to so called “mutual funds” constituted for the promotion of co-operatives.

Stakeholders and governance. Like ordinary co-operatives, the governance structure of social co-operatives is characterised by democratic rules directed towards decentralizing the decision making power within the community of members and towards avoiding the emergence of controlling single members. At the same time, particular attention is paid to plurality of interests as differently represented within the governance structure for the organisation.

Then, on the one hand, the decision making process is still substantially governed by the “one member, one vote rule”, which breaks the correlation between capital investment and control generally characterising for-profit corporations. Exceptions exist for members qualifying as legal entities (they can be entitled to a maximum of five votes) and financing members, as outlined below.

On the other hand, even more than ordinary co-operatives, the governance structure of social co-operatives is apt to represent the interests of different classes of stakeholders: not only (like in all co-operatives) co-operative members and financing members²⁸, but also voluntary working members²⁹. The multi-stakeholder nature may increase transaction costs and instability but is often counterbalanced by a more structured and

operatives with a minor characterisation in terms of mutuality (see articles...). Then social co-operatives would represent a distinct category, being by law considered within the group of “major mutuality” but still characterised by social finality (which, in fact, denies the mutuality feature).

26 See the Law of 31 January 1992, No. 59 and the reform of 2003 under article 2526 of the Civil Code.

27 On the impact of these novelties on the governance structure, see below.

28 See articles 4 and 5, l. 59/92, cit., with regard to financing shareholders provided with limited voting powers and, separately, to financing shareholders without voting powers but entitled to special rights to profits. In fact, these provisions, although not abrogated, were put aside by the reform of 2003: see article 2526 of the Civil Code and, more specifically, article 2538, § 2, and article 2541 for, respectively, shareholders provided and not provided with voting rights.

29 Art. 2, l. 381/91, cit.

less market oriented corporate governance. The market for corporate control is almost non-existent and management inefficiencies are tackled through non-market devices. Often these co-operatives are members of larger groups which are organised at territorial level in two or three layers up to the national level or beyond.

Inside the co-operative, the major power is attributed to co-operative members, who will be part of the board of directors, at least for its majority. Specific limits are provided either for financing members (who cannot be entitled to voting powers, if any, which amount to more than one third of those attributed to ordinary members and cannot nominate more than one third of the board of directors) and for voluntary working members (whose number cannot amount to more than half of the total number of shareholders).

The multi-stakeholder nature of the social co-operative is then made clear by the possibility of nominating directors who represent special classes of interests (article 2542 of the Civil Code), or by the institution of separate assemblies for different categories of members (article 2540 of the Civil Code). Although not shaped with specific reference to social co-operatives, this structure could be profitably used to reinforce democracy and stakeholders' protection inside the organisation. In fact, also before the reform, social co-operatives adopted different mechanisms of stakeholders' interests representation, like beneficiaries' committees, family groups and the like. It seems that self-regulations more than legislation is enriching the social connotation of this particular co-operative model, while legislation increasingly tends to look at the for-profit model of entrepreneurship also in the co-operative domain.

The relationship between the general meeting and the board of directors is shaped differently according to the governance model chosen by the organisation within those provided by the corporate law reform of 2003. In all cases, the board of directors holds full management powers and, in all cases, as seen above, the majority of directors is represented by co-operative members, who are also part of the general meeting. However, only in the "ordinary administrative model", the general meeting keeps the usual powers of nominating the directors and approving the annual balance sheets, while in the so-called "dualistic model", these decisions may be deferred to or are shared with an intermediate body (*consiglio di sorveglianza*), which is also entitled to monitoring powers with respect to directors; in the so-called "monistic model", monitoring of directors is delegated to an internal body within the same board of directors.

Another aspect of the reform is also relevant: the mandatory institution of a monitoring body in the dualistic and in the monistic model, but not in the ordinary model. In fact, when the ordinary administrative model is adopted, the introduction of a monitoring body is mandatory only if the co-operative issues financial instruments without voting rights and if some thresholds related to the amount of capital, revenues, or workers, are exceeded by the company. In these cases, external auditing concerning accounting and balance sheets is requested if the company does not attribute this task to the internal monitoring body. Differently, external auditing is always mandatory if dualistic or monistic models are adopted.

Conclusively, the institutionalisation of a monitoring function within the organisation is not a general feature of the (social) co-operatives but it is reinforced when the new

models of governance and finance come into question, as provided by the reform of 2003.

Accountability and responsibility. As seen above, most rules concerning the governance structure of social co-operatives are derived from the law on ordinary co-operatives and, more generally, from corporate law as such. The same applies to transparency requirements, information duties and accountability towards members and third parties. The main information duties regard the activity and decisions of internal bodies and the annual balance sheets. While the former are accessible only to members³⁰, the latter are deposited at the Enterprises' Register Office, whose access by the public is regulated by law³¹.

Apart from the general liability rules applicable to all companies (and their directors) towards third parties, no specific remedies are foreseen for beneficiaries who are not members. The enforcement of duties concerning the implementation of social finality is basically ensured through members' participation in governing bodies. However, as for all co-operatives, an external control is provided by the Ministry of Economic Development with the main purpose of monitoring compliance with mutuality requirements³². The auditing function can be concurrently performed by associations promoting and representing the co-operatives' interests, previously recognised by the Ministry: then a mix between public and private control takes place. Co-operatives which violate the mutuality principles can be cancelled from the Registry, submitted to receivership, or liquidated, depending on the gravity of the infringement. Although specifically concerning the co-operatives' mutuality, this system implies a general monitoring activity over the administrative and accounts structure, the participation of members, and the distribution of profits. Then, only indirectly, it can be said that this type of control allows checks on whether social finalities are in fact (correctly) pursued. The application of co-operative and for-profit company law to social co-operatives is definitively important in terms of the complexity and richness of governance rules, especially considering the opportunities introduced by the reform. However, it should be examined to what extent this framework could be more profitably developed or complemented for promoting the social nature of the enterprise. Indeed, there is a potential tension between the development of the co-operative model that is ever closer to the for-profit company and the specificity of the goals pursued by social enterprises. This potential conflict can only be solved by ensuring that the forms of governance pay due attention to the social goals and, in particular, to the beneficiaries' rights and legitimate expectations. At least partially, this is one of the results of the new Italian law on social enterprises, as will be outlined below.

The co-operative model has been chosen in **Portugal** as well. Although already in the 80's, the law recognised some fields of social interest as eligible operational fields for co-operatives (e.g., social solidarity or special education and integration), only in the

30 See art. 2545-*bis* of the Civil Code.

31 See art. 2435 of the Civil Code. On public access to the Enterprises' Registry, see D.P.R. 7 December 1995, No. 581, and article 8, Law of 29 December 1993, No. 580.

32 See Legislative Decree 220/2002.

late 90's, the Co-operative Code (Law No. 51/96) was integrated by special legislation on Social Solidarity Co-operatives (Law of 22 December 1997)³³.

Social finality and activities. These co-operatives are defined as those which, by means of co-operation and self-help of their members, subject to co-operative principles and without a view to profit, work for the satisfaction of social needs and for the promotion and integration of disadvantaged people. Main fields of activity include support to disadvantaged people, handicapped and aged persons, children, severely poor families and the like; their social and economic integration; support to Portuguese persons in need when resident abroad or returning to Portugal; education and professional training of disadvantaged people.

Non profit constraint and asset allocation. Unlike the Italian social co-operatives, these social goals are promoted by a total allocation of the assets to the institutional activity: no distribution of profits is allowed and the residual assets in case of liquidation are totally devolved to a social solidarity co-operative, preferably in the same municipality and according to the view of the federation representing the interests related to the main activity of the co-operative in liquidation.

Stakeholders and governance. The governance structure is based on the distinction between effective members and honorary members. The former may include direct and indirect beneficiaries (then, particularly, direct users and/or their family members) and professional workers: the inclusion of beneficiaries as institutional members represents an important difference with respect to the Italian legislation. Honorary members are those who contribute to the co-operative's activity through the supply of goods and services of social volunteership. Their admission is processed on the basis of a judgement by the General Assembly, which will evaluate the relevance of their liberal support for the activity of the co-operative.

This distinction is also important in terms of participation: while all members have the same information rights and will attend the meetings of the General Assembly, only the effective members may appoint and be appointed as members of the governing bodies and have the right to vote in the General Assembly, where the "one member, one vote rule" applies.

If compared with the structure of the Italian social co-operatives (where, for examples, volunteers and financiers may be entitled to vote, although with limitations), the Portuguese approach shows a more clear cut divide between beneficiaries and professional workers (effective members) and voluntary workers and supporters (honorary members).

However, honorary members' rights do not include only information. Indeed, besides the board of directors and a supervisory board, which is in charge of internal audit, the governance structure of the co-operative may also be composed of a consulting body, the General Council, where either members of the board of directors and all honorary members will have a chair.

Accountability and responsibility. A further element of distinction with respect to Italian legislation regards accounting duties: besides the ordinary balance sheets required for

33 Canaveira do Campos, *Cooperative di solidarietà sociale nel Portogallo*, in *Impresa sociale*, 1998, p. 38 ff.

all co-operatives, social solidarity co-operatives are obliged to report about the way they meet their social goals and to send the social balance sheets to the Ministry of Labour and the Association which is responsible for supervision over co-operatives (Incoop). In fact, this requirement has been enforced only for co-operatives with more than 100 workers³⁴. Unlike other legal systems, the Portuguese statute on Social Solidarity Co-operatives does not include any specific provision on responsibility towards members and third parties, nor does it establish a specific mechanism of administrative control over these organisations.

A third example of the social enterprise regulated as a co-operative company is that introduced in **France** in the form of the Société Co-opératif d'Intérêt Collectif (Scic) by the Law of 17 July 2001, No. 624.

Social finality and activities. These co-operatives produce or deliver general interest goods or services of collective interest which can be appreciated in terms of social utility. Such an assessment is given having regard to the ability to satisfy emerging needs, help social and professional inclusion, social cohesion and increase access to goods and services³⁵. Third parties (as non members) are expressly included among the potential beneficiaries of the co-operative³⁶.

Non profit constraint and asset allocation. In accordance with such finality, a number of constraints are provided in terms of allocation of assets within a framework more similar to the Italian rather than the Portuguese model.

A limited profit distribution is allowed, provided that either legal and statutory reserves are maintained according to legal thresholds³⁷ and all public contributions and subsidies are excluded in this calculation. In any case, like for all co-operatives, the interest rate paid to members may not exceed the average rate of remuneration of private companies as published by the Ministry of Economy.

Also applicable to Scics are the rules provided for all co-operatives regarding the possibility of awarding contributions to other co-operatives or for initiatives of general or professional interest, either at the end of the year and in case of dissolution. However, all constraints outlined above are to be respected preliminarily and, in case of dissolution, members' contributions of capital will be reimbursed.

Apart from the limited remuneration of capital to members considered above, the financial contribution to social solidarity co-operatives is promoted through the legislation on co-operative investment certificates and co-operative certificates for members: unlike ordinary co-operative shares, both these certificates give rights to profits in correlation to the contribution to capital, but the former are deprived of voting

34 See CECOP European Seminar, Manchester, 9 November 2006, *Social enterprises and worker cooperatives: Comparing models of corporate governance and social Inclusion*, Comparative table of existing legislation in Europe.

35 Article 19-*quinques*, l. No. 47-1775 of 10 September 1947, as modified by the Law No. 2001-624, 17 July 2001, and article 3, Decree No. 2002-241, 21 February 2002. On the definition of social utility see A. Margado, *A new co-operative form in France: Société Coopérative d'Intérêt Collectif (SCIC)*, in C. Borzaga – R. Spear (eds.), *Trends and Challenges for Co-operatives*, cit., p. 147 ff., part. p. 153 f.

36 Article 19-*sexies*, l. No. 47-1775, cit.

37 The statutory reserve shall amount to 50% of the residual resources once the legal reserve is integrated.

rights. They provide rights to access the company's documentation on the same conditions to all members, however. All these certificates may not represent more than 50% of the co-operative's capital.

Stakeholders and governance. Financing members and financiers who hold certificates without voting rights represent relevant stakeholders within the co-operative. However, a major value is attached to other interests and categories.

More specifically, membership includes beneficiaries (both users who pay or who do not pay for the goods and services they get) and workers. In addition to these, at least another category of members has to be included, this one representing: volunteers, public entities and/or other individuals or entities that somehow contribute to the activity of the co-operative. Then, unlike the other form of co-operatives, as outlined for Italy and Portugal, the multi-stakeholder feature is a mandatory requirement here. Plurality of represented interests is required, but interests are also ranked in accordance with the social finality of the organisation and its entrepreneurial nature. Entrepreneurship and autonomy from the public sector are characteristics that explain why local public bodies may not hold more than 20% of the capital of a single Scic.

The multi-stakeholder feature is also reflected in the governance structure of the co-operative. In general terms, the "one member, one vote rule" is applied within the General Assembly (so that the number of members for each category will be relevant). Concurrently, the co-operative may introduce separate assemblies for each category of interests. As a default rule, each separate assembly is entitled to the same voting rights in the General Assembly. However, the co-operative's articles may regulate differently, provided that each assembly may not encompass members who as a total hold more than 50% and less than 10% of the voting rights in the General Assembly.

Accountability and responsibility. With regard to accountability and monitoring, the law provides members and holders of investment certificates with information rights with respect to the company's documents. It also introduces a general duty of giving the public authority in charge of control all relevant information and documentation necessary to assess compliance with the law. Special penalties, also at a criminal level, are imposed in case of false declarations or violation of rules concerning the allocation of resources and assets. All these provisions apply indistinctively to ordinary and collective interest co-operatives, while no specific provisions concern the co-operative's and directors' responsibility towards third parties. Nor does the social finality of the co-operative imply any specific integration of the administrative control function in favour of beneficiaries or workers. Indeed, their protection is ensured more via membership (voice) than external control.

The **Polish** legislation on social co-operatives dates back to 2004, when the Act on the promotion of employment and on institutions of the labour market of April 20, 2004, amended the Act of September 16, 1982 known as the Co-operative Law. However, only on April 27, 2006, a new law on social co-operatives was passed with the purpose of regulating this form outside of the Co-operative Law. This legislation is known as mostly "imported" from Italy (with respect to type-B social co-operatives) but hardly

rooted within a general legal framework where impediments for the effective growth of social enterprises still exist³⁸.

Social finality and activities. The Polish social co-operatives are structured as work – co-operatives, established by unemployed and disadvantaged persons (namely, identified as homeless, alcoholics, drug addicts, mentally ill persons, former prisoners, refugees). These co-operatives are devoted to the social and/or professional re-integration of their members: the “mutual” feature of this type of co-operative is then much more visible than within the other legal systems presented above.

What is also peculiar is the qualification of the co-operative’s statutory activity as non-economic. Although critical in terms of a social enterprise, this approach is consistent with the general legal framework concerning other non-profit organisations in Poland, where the law considers economic activities as a “necessary evil” brought into the organisation by financial needs and fails to consider the economic activity as a means for the social project conducted by the social enterprise³⁹. In the case of social co-operatives, these “non economic” statutory activities include social, educational, cultural activities and any other activity directed towards social and professional reintegration.

Non profit constraint and asset allocation. The non-profit characterisation is also clearly marked: no profit can be distributed among members; no merger or division can indirectly result in transferring assets to entities which are not a social co-operative; in case of liquidation, only 20% of the residual assets after paying back debts can be divided among members, while the remaining resources will be directed to a so called “Work Fund”.

Stakeholders and governance. With regard to governance structure, membership is quite important. At least 80% of members (generally amounting to a number between five and fifty) include beneficiaries like those listed above (unemployed, drug addicts and so on) provided that they have legal capacity. In addition, within the threshold of 20%, other members may be admitted if the social co-operative requires specific qualifications which the remaining members do not have. Within the same limit, people who are potential beneficiaries, as above listed, but partially lack legal capacity, may become members of the social co-operative. The co-operative’s statute may also allow non-governmental organisations to become members.

The role of beneficiaries within the general meeting is even more important in small co-operatives. Indeed, when the company does not exceed fifteen members, not only the general meeting as a body but each member has a monitoring power over the co-operative. In bigger co-operatives, such a role is played by a supervisory board.

38 See EMES, *Study on Promoting the Role of Social Enterprises in CEE and in the CIS*, cit., part. p. 44 and 51; M. Gumkoswa – J. Herbst - K. Wyagnaski, *The Role of Social Enterprises in Employment Generation in CEE and in the CIS. Case of Poland*, October 2006, part. p. 50 ff. On the political and cultural constraints affecting the success of the co-operative model see also E. Les, *Co-operatives in Poland: from state-controlled institutions to new trends in co-operative development*, in C. Borzaga – R. Spear (eds.), *Trends and challenges for Co-operatives*, cit., p. 185 ff.

39 See M. Gumkoswa – J. Herbst - K. Wyagnaski, *The Role of Social Enterprises*, cit., p. 51. For a comparative overview with regard to CEE countries, see also: D. Rutzen – M. Durham – D. Moore, *Overview of NPO Legislation in Central and East Europe*, 2004, www.icnl.org

Accountability and responsibility. While considering the monitoring issue at internal level (see previous paragraph), the Polish statute on Social Co-operatives does not include specific provisions concerning external monitoring mechanisms (either public and private): the law on ordinary co-operatives will then be applicable. However, a certain degree of social accountability is ensured by the duty to draft a separate account concerning the different (social, i.e., “non economic”) statutory activities with specific regard to their income, costs and results.

Although quite recent, this legislation has already been criticised as a legal transplant which cannot determine an effective growth of the social enterprise if other conditions are not met. More specifically, a prior recognition of the role of entrepreneurship in the social economy should take place. This should bring a major change in the qualification of the social enterprise’s activity as economic and in the process of professionalisation of its members and workers, today perceived as lacking a proper sense of entrepreneurship. Significant effects could be derived from these changes on taxes, public procurement and private contributions⁴⁰.

Even within the same co-operative models, the legislation of the countries examined above present different features in terms of the definition of social interest, identification and prioritisation of relevant interests within the co-operative, corporate governance and accountability. However, within these differences, a general balance emerges between the need for a pluralistic representation of interests and the priority attributed to workers and beneficiaries: it can be questioned whether this characterises the co-operative model with respect to the others, as outlined below.

2.2. The Company Model: the Cases of Belgium and the United Kingdom

A different approach to social enterprise legislation emerges in those legal systems which employ the company model. Then the link with for-profit company legislation is stronger, although the social finality leads the legislator to define a number of exceptions to rules generally applicable in the for-profit sector.

This model mostly emerges in those contexts in which previous initiatives of social economy have been developed in the non-profit sector through the adoption of traditional non-lucrative forms, mostly associations. In this context, a stronger entrepreneurial connotation is needed by social enterprises in order to compete with other organisations, either from the for-profit or the public sector. The evolution towards the company model is perceived as a possible reply to this need.

In **Belgium**, legislation on social finality companies (*sociétés à finalité sociale*) was introduced by the reform of Companies’ Code in 1995 (Law of 13 of April 1995). Before 1995, the main actors of the social economy within the non-profit sector were associations, operating for work integration and providing “community services” for the elderly, children, disadvantaged people and the like. Although the law on associations does not allow commercial activity as their main activity⁴¹, the operation of these

40 See M. Gumkoswa – J. Herbst - K. Wygnanski, *The Role of Social Enterprises*, cit., p. 55; E. es, *Co-operatives in Poland*, cit., p. 193.

41 See article 1, Law of 27 June 1921, as modified by Law No. 51/2002: “L’association sans but lucratif est celle qui ne se livre pas à des opérations industrielles ou commerciales, et qui ne cherche pas à procurer à ses membres un gain matériel”. On this aspect as an important premise for the reform

associations is commonly perceived as consistent with the concept of the social enterprise⁴². In fact, these organisations are still operational; the evolution towards the company form, as envisaged by the reform, has not really taken place, probably due to the burden of the requirements imposed by the law or the lack of substantial tax incentives⁴³.

Social finality and activities. According to the reform, any company (including co-operatives) may adopt the statute of a social finality company if it commits not to pursue lucrative goals in favour of its shareholders (although a limited distribution of profits is admitted) and complies with a number of requirements as stated by the law (and examined below).

Non profit constraint and asset allocation. The social finality is not defined in the Code but will be qualified in the articles of the company, provided that no direct or indirect economic benefit is provided for the members. Profits and reserves are to be employed in accordance with such finality as well as the company's assets in case of liquidation. Payment of dividends to shareholders can take place below a cap represented by a fixed interest rate established by the King on the basis of a consultation with the National Co-operative Council (today this rate amounts to 6% of the capital).

Stakeholders and governance. No special provisions define the governance structure of the social finality company; so, ordinary company legislation will apply, depending on the specific legal forms. However, three requirements must be complied with:

- workers, who have been hired for more than one year, have the legal right to become members; this right expires in case of termination of the employment contract;
- although the correlation between the decision making power and financial participation into capital is not derogated, a limit is imposed so that no shareholder is allowed to vote in the general meeting expressing a number of votes representing more than 10% of the capital (this percentage decreases to 5% if workers are shareholders within the company);
- directors must annually issue a special report concerning the way the social finality has been pursued (social balance sheets).

Accountability and responsibility. Stricter constraints than those traditionally applied to ordinary companies are imposed on social finality companies in terms of sanctions and control.

First, directors will be liable, in terms of restitution and payment of damages, for any allocation of the reserves to finalities different from the social goals as stated in the articles of the company. Restitution may be claimed against the receivers as well, if it is proved that they knew or should have known about the irregularity of the distribution. Not only shareholders may sue directors and receivers, but also third parties, if they

concerning SFS, Solidarité des Alternatives Wallonnes ASBL, *La société à finalité sociale. Volets juridiques, fiscaux, sociaux et aides publiques*, November 2000, p. 3.

42 J. Defourny – M. Nyssens, *Belgium: social enterprises in community services*, in C. Borzaga – J. Defourny (eds.), *The emergence of social enterprise*, cit., p. 55 f..

43 J. Defourny – M. Nyssens, *Belgium: social enterprises*, cit., p. 48.

prove they have a relevant interest in the case⁴⁴. Provided that third parties can be informed about irregular behaviour, this provision seems to establish quite a high burden on the company and its directors.

Secondly, the company may be dissolved by an order of the court following a request filed by shareholders, public prosecutor or (again) third parties who have a special interest in the case, if the company's articles do not comply (or do not comply any more) with legal requirements or if, although complying, they are violated by the company⁴⁵.

Unlike other legal systems (but probably similarly to for-profit company law, also outside of Belgium), the control function over the social finality is substantially attributed to the courts and not to administrative authorities. However, at least in principle, an important role may be played by interested third parties, provided that they are informed about relevant facts concerning the management of the social enterprise (see below, § 3.4).

Especially looking at the governance requirements, it seems that, although within the more general "company model", this legislation tends to move towards the co-operative type of company (e.g., with respect to voting rights' limitation and workers participation). In fact, it is held that the co-operative form is, amongst all, the most apt for constituting an Sfs⁴⁶.

Perspectives of reform. The legislation on Sfs is currently under discussion. A proposal for reform has been presented, mainly concerning members' remuneration, workers' participation in the governance structure, the social report and judicial control. Three changes seem quite relevant in the perspective of this paper.

First, with respect to members' remuneration, it would be allowed to go beyond the legal dividends' "cap" during the first seven years of activity of the company, provided that the average rate during those seven years does not reach the limit established by the statute. This flexibility could offer the opportunity of attracting additional capital investments in the company during its start up. However, it seems also to be true that this is a phase in which material investments in the activity should be encouraged more than dividend distribution.

Second, with regard to workers' participation, the proposal would include a non-membership participation along with a membership participation by workers: in other

44 Article 663, § 2, Code des sociétés: "Á défaut, le tribunal condamne solidairement, à la requête d'un associé, **d'un tiers intéressé** ou du ministère public, les administrateurs ou gérants au paiement des sommes distribuées ou à la réparation de toutes les conséquences provenant d'un non-respect des exigences prévues ci-dessus à propos de l'affectation desdites réserves. Les personnes visées à l'alinéa 2 peuvent aussi agir contre les bénéficiaires si elles prouvent que ceux-ci connaissent l'irrégularité des distributions effectuées en leur faveur ou ne pouvaient l'ignorer compte tenu des circonstances".

45 Article 667, Code des sociétés: "Á la requête soit d'un associé, **soit d'un tiers intéressé**, soit du ministère public, le tribunal peut prononcer la dissolution: 1° d'une société qui se présente comme société à finalité sociale alors que ses statuts ne prévoient pas ou ne prévoient plus tout ou partie des dispositions visées à l'article 661; 2° d'une société à finalité sociale qui, dans sa pratique effective, contrevient aux dispositions statutaires qu'elle a adoptées conformément à l'article 661".

46 Solidarité des Alternatives Wallonnes ASBL, *La société à finalité sociale. Volets juridiques, fiscaux, sociaux et aides publiques*, November 2000, p. 4.

terms, workers would alternatively be entitled to become members or to generally take part in the governance (“*politique de gestion*”) of the company also representing workers’ interests in its governing bodies: as it is clear in other legal systems, membership is not the only way to involve stakeholders in the governance of a social enterprise.

Third, the dissolution of the enterprise would not be the only sanction provided in case of default; the loss of Sfs status could be alternatively imposed: this could be quite important in cases in which, although not complying with the Sfs statute, it is reasonable (and efficient) for the enterprise to continue its activity under the ordinary regime. Of course, unless the Sfs *status* is connected with very favourable advantages in terms of tax treatment or public benefits, the dissolution would remain by far the most severe sanction, considering the mandatory allocation of assets in case of liquidation, as seen above.

The proposal seems to be directed towards reducing the burden of some requirements, probably in order to encourage the use of the Sfs form. An indirect effect would be to make the boundaries more blurred between ordinary and social enterprises, especially considering that, already today, the connotation of Sfs in terms of governance and social finality is not so marked as in other legal systems. It could be questioned whether more successful perspectives might be offered by legislation which, also by the means of default rules, would try to define governance and operational models more precisely for this specific type of enterprise.

The experience of the **United Kingdom** is similar only under certain respects. The legislation on the Community Interest Company (Cic) came into force in 2005 with the main purpose of recognising and promoting entrepreneurship in the field of the social economy⁴⁷. Indeed, the existing legislation on charities, although supporting many important initiatives in this area, especially thanks to a favourable tax regime, does not address relevant aspects like financing or economic reporting. The application of corporate law to social interest enterprises would then provide some answers to this need⁴⁸.

The English model is also interesting because the Act attributes significant regulatory powers to a public independent officer (the so called “Regulator”). Not only shall this officer, appointed by the Secretary of State, issue guidance and provide assistance about any matter related to the Cics as requested by the Secretary of State, but s/he may exercise these functions on his/her own initiative, provided that these are based on good regulatory practices⁴⁹. This regulatory approach allows a certain degree of flexibility

47 See Companies (Audit, Investigations and Community Enterprise) Act 2004, Part 2 and Schedules 3 to 8, and Community Interest Company Regulations 2005 and Schedules 1 to 3. Both have been amended by the Companies Act 2006 (Commencement No. 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, Statutory Instrument 2007 No. 1093 (C. 49).

48 On the political and cultural background of the reform, see R. Spear, *From co-operative to social enterprise: trends in European experience*, in C. Borzaga – R. Spear (eds.), *Trends and Challenges for Co-operatives*, cit., p. 99 ff., part. p. 108 ff.

49 More specifically, under § 27(4), Companies Act, cit.: “The Regulator must adopt an approach to the discharge of those functions which is based on good regulatory practice, that is an approach adopted having regard to: (a) the likely impact on those who may be affected by the discharge of those functions; b) the outcome of consultations with, and with organisations representing, community

which can be useful in adapting legislation to concrete needs and taking into account possible problems in the application of the rules. As we show below, the same Regulator is also in charge of monitoring and sanctioning with respect to Cics: at least in principle, this allows quite strict control over the implementation of the Statute. In practice, this role is framed as the one of a “light touch regulator”, more directed to assist Cics in order to encourage their birth and success than to sanction any defaulting behaviour⁵⁰.

Social finality and activities. Under the Companies Act 2004, both companies limited by shares and companies limited by guarantees can adopt the statute of a Community Interest Company. Their registration as a Cic is subject to the approval of the Regulator in the light of the so called ‘community interest test’. This test is directed towards verifying if, in the view of a reasonable person, the company’s activities can be considered as carried on for the benefit of the community. Activities which are incidental to these are also deemed as eligible. By contrast, political parties and similar organisations are explicitly deemed as non eligible in this respect. It is important to underline that beneficiaries may also represent a “section of a community”: this happens when a group of individuals share an identifiable characteristic not shared by other members of the same community. On the contrary, an organisation may not comply with the legislative requirement if it only benefits its members or the employees of an employer.

Non profit constraint and asset allocation. The Cic is qualified as a “locked body” with respect to its assets. Indeed, the assets may not be transferred (unless for full consideration) or distributed on winding up to any organisation different from a community interest company, a charity or a body established outside Great Britain that is equivalent to any of these legal persons. Normally the Cic may not distribute profits as well to its members or subscribers. However, if the company’s articles provide for this, the Cic may distribute assets on winding up and, if limited by shares, dividends to shareholders, provided that this is done below the limit established by the Regulator (today 5% above the Bank of England base lending rate). Then, the Cic may adopt a partial (only) distribution constraint in order to attract financing and investment with limited remuneration. Remuneration of debt is also allowed, the interested rate being capped as well.

It is important to underline that distribution to “asset-locked bodies” is exempted by this limitation and the “cap” does not apply in this case⁵¹: this means that a Cic, a charity or an equivalent organisation operating in a country different from the UK may constitute or participate in a Cic and retain profits to finance its own activity. The formation of networks of non-profit and social enterprises may be encouraged in this way.

Stakeholders and governance. The possibility of issuing debt and equity instruments which entitles to a limited remuneration affects the governance structure of the organisation. Unlike equity holders, debt holders do not become members of the Cic. This prevents them from appointing (or removing) the majority of directors: indeed,

interest companies and others with relevant experience, and (c) the desirability of using the Regulator’s resources in the most efficient and economic way”.

50 See Guidance, Chapter 12, p.1.

51 See Community Interest Company Regulations 2005, cit., part 6.

their appointment is reserved only to members⁵². Although this rule does not apply to equity holders as well, it tends to limit somehow the influence of financiers in the governance of the company.

The Act on Cics does not design a specific governance structure for these companies. However, some rules have to be taken into account in accordance with the scope of the organisation. Indeed, the Regulatory Guidance explains that either the role of members and the one of directors should be defined having regard to the community interest and the goals pursued by the company. Certainly, directors are in a position of trust towards the company (and duties imposed by general company law apply to them). However, members as well should ensure that the company in fact pursues the community interest; they play an important monitoring role with respect to directors, so facilitating the supervisory task of the Regulator⁵³.

No specific provision is stated with regard to the allocation of powers among members, limitation of control, democracy, differentiation of rights per classes of interest. It is then assumed that ordinary company law will apply and, therefore, the usual correlation between capital investment and decision making power: more particularly, this is the case of companies limited by shares, while companies limited by guarantees follow the "one member, one vote" rule⁵⁴.

As to stakeholders' rights, they are outlined more in the Guidance than stated in the law. The Act itself requires a minimum information and consultation standard in favour of stakeholders, whose compliance has to be documented in the community annual report⁵⁵. The Guidance illustrates the possible modes of stakeholder consultation and participation, including circulation of newsletters, open forums, information and consultation facilities which are web based, or, more significantly, the constitution of stakeholder advisory groups or some forms of mandatory consultation in case of relevant decisions⁵⁶.

Apart from members, directors, employees and customers, the major stakeholder is considered the community as such, as beneficiary of the Cic's activity. In this respect, the Guidance explains that not only effective beneficiaries, but also potential beneficiaries should be included⁵⁷.

Accountability and responsibility. An important element of the relationship with stakeholders is definitively the mandatory issue of a community interest annual report. According to the Regulations, this report must include: (a) a fair and accurate description of the manner in which the company's activities during the financial year have benefited the community; (b) a description of the steps, if any, which the company has taken during the financial year to consult persons affected by the company's activities, and the outcome of any such consultation; and (c) the information regarding chairman's and directors' emoluments (including pensions and compensation for loss of

52 See Community Interest Company Regulations 2005, cit., Schedule 3.

53 See Guidance, Chapter 9, p. 3 f.

54 R. Spear, *From co-operative to social enterprise*, cit., p. 106.

55 See Regulations, cit., part 7, § 26.

56 See Guidance, Chapter 9, p. 5 f.

57 See Guidance, Chapter 9, p. 6.

office). If this is the case, the annual report should also include information regarding the declaration of dividends, transfer of assets, remuneration of debentures⁵⁸.

In this way, the law complements the ordinary information duties imposed on a company having regard to its special role as a Cic. It is important to underline that the community interest report is a specific duty imposed on the Cic's directors⁵⁹, falling then within their responsibility towards members, but also (it could be said) towards stakeholders in general, thanks to the monitoring role of the Regulator in their favour (on this profile, see below, § ...).

Indeed, the main monitoring function provided by the legislation on Cics is attributed to the Regulator as supervisor. The specific purpose related to this role is to ensure that the Cic continues to serve the community it is set up to benefit and that it is not operating in breach of the asset lock; on the contrary, the Regulator will not step in to solve internal conflicts, for which the companies are able to provide alternative dispute resolution mechanisms⁶⁰.

In order to exercise his/her monitoring powers, the Regulator can investigate the affairs of the company or appoint an external person for the same purpose. He/she may also require a Cic to allow the annual accounts of the company to be audited by a qualified auditor appointed by him/herself.

Most enforcement measures can be activated by the Regulator only in case of default by the management or any person in a position to control the company's activity⁶¹. These enforcement measures include: the appointment of a director, not removable by the company but only by the Regulator; removal of a director; appointment of a manager in charge of specific functions also in substitution of directors; transfer of Cic's assets to an Official Property Holder in order to prevent or interrupt misuse of these assets. In some cases, the Regulator may also rearrange the control of the Cic (by transfer of shares) or present a petition to the Court for its winding up.

An important measure is connected to the Regulator's power to bring civil proceedings in the name of a Cic when members or directors fail to do so. This allows, for instance, directors to be sued for a breach of fiduciary duties when members do not bring any action. This can be very relevant in order to represent stakeholders' rights against any misconduct of directors whenever they have no standing to sue.

Unlike other legal systems, where judicial control is almost the only answer to misconduct by social enterprises, the English model complements this system with forms of administrative control. The integration between judicial and administrative control also implies that the public authority, already provided with monitoring and sanctioning powers, has standing to sue before the Courts.

58 See Regulations, cit., part 7.

59 See Companies Act, cit., § 34.

60 See Guidance, Chapter 12.4.

61 See Companies Act, cit., § 41(2): "The company default condition is satisfied in relation to a power and a company if it appears to the Regulator necessary to exercise the power in relation to the company because: (a) there has been misconduct or mismanagement in the administration of the company; (b) there is a need to protect the company's property or to secure the proper application of that property; (c) the company is not satisfying the community interest test, or (d) if the company has community interest objects, the company is not carrying on any activities in pursuit of those objects".

More than the Belgian model, where the company pattern is somehow hybridised with rules deriving from the co-operative legislation (i.e., the role of workers as members, limitation to members' control powers), the British approach adapts the company legislation preserving most of its characteristics in terms of governance structure and allocation of powers among members, then focusing on a stronger implementation of the "asset lock rule" and the community interest finality through the role of the Regulator. Since no tax incentives are attached to the adoption of the Cic form, the success of this new model is almost exclusively sought through the move of social enterprises towards business methods and legislation⁶². It can be questioned whether this is sufficient or whether a complementary focus on "social interest governance" could help the growth of Cics in the near future.

2.3. The "Open Form" Model: the Cases of Finland and Italy

Both Finland and Italy recently passed a law on social enterprises (expressly named as such)⁶³ and in both cases no special legal form has been selected as eligible, provided that the organisation is formed and operates as a social enterprise: for this reason we call this model the "open form model".

In fact, the foundations of this common approach are quite different in the two cases.

The main purpose of the Finnish law is to encourage any kind of enterprise, however formed, to employ disabled people and long-term unemployed persons⁶⁴. Specific subsidies are granted in this perspective, provided that the enterprise complies with its main obligations in terms of labour law, social security, tax law, insurance and the like. The focus is much more on *activity* (more precisely, a specific field of activity or area of interests) than on *forms and governance models*. In these terms, the choice of the "open form" model is quite straight-forward.

Moving from a different perspective, the Italian law does not intend to provide any monetary incentive, nor (which is more important) to promote any specific field of activity or area of interests. Therefore, the focus is exactly on the definition of a (new) form of enterprise to be qualified as a "social enterprise". Forms and governance models become more relevant in this perspective attaching a different value to the choice of the "open form" model: not exactly (or not only) the assumption that different legal forms may operate in the same area of interests, achieving equivalent results (and, therefore, deserving equivalent monetary treatment; as in Finland), but, more precisely, the consideration that different legal forms may adopt comparable governance models despite their diversity.

This consideration does not prevent us from examining the **Finnish model** in the perspective of this paper, mostly focused on governance of the social enterprise. Of course, the approach to governance is quite different in this case. While, generally, the

62 For some criticism of this legislation, with special regard to the proliferation of legal forms, R. Spear, *From co-operative to social enterprise*, cit., p. 111.

63 See, for Finland, Social enterprise (WISE) - law 1351/2003, in force since January 2004, and, for Italy, Legislative Decree 24 March 2006, No. 155.

64 See P. Pättiniemi, *Work Integration Social Enterprises in Finland*, EMES WP n. 04/07; D. Daniele, *The legal framework for social enterprises: some European examples*, The case of Finland, November 2007.

attention is on internal governance mechanisms (including the functioning of assemblies, boards and committees, decision making processes, directors' liability, etc.), here these mechanisms are substantially not modified by the law or adapted to the social goals of the enterprise: companies, co-operatives, foundations, associations will continue to be regulated according to their ordinary rules. What is specially regulated is the governance at large, as resulting from the functioning of internal governance (as just defined above), contracts (in particular, labour contracts) and relationships with public entities (particularly the Ministry of Labour and other Departments which operate in its area of activity). This mix of legal instruments characterises the Finnish model distinguishing it from any other considered in this paper.

Social finality and activities. One element of continuity with other legal systems is the nature of the activity carried on by the social enterprise: it must operate as an ordinary business, then producing goods and services on a commercial principle. The social connotation is given by the function of providing employment opportunities, particularly for the disabled and the long-term unemployed⁶⁵.

Non profit constraint and asset allocation. The Finnish Statute on the Work Integration Social Enterprise (Wise) does not include any specific provision about the distribution of profits and allocation of assets. It is intended that ordinary rules will apply depending on the legal forms of the Wise⁶⁶.

Stakeholders and governance. Also, in common with some other models, examined here, is the focus on the disabled and long-term unemployed. At least partially, these stakeholders can be considered within the wider category of disadvantaged people, as commonly taken into account. Unlike other legal systems, however, the Finnish law does not consider membership (of disadvantaged persons themselves or their family members) as a tool of protection, but focuses on contract law and establishes that labour contracts have to provide the employees with the pay of an able-bodied person, as agreed in the collective agreement or, if it does not exist, as customary and reasonable, regardless of the worker's productivity. Through this kind of contract, the enterprise has to employ at least 30% of its employees among the disabled or disabled and long-term unemployed.

Accountability and responsibility. Secondly, social enterprises are subject to specific rules as to their relationship with the Ministry of Labour. They have to be enrolled in the register of social enterprises, as administered by the Ministry, and are subsequently subject to controls concerning their business practice and, more particularly, compliance with tax and social security obligations. They have also to provide information relevant to qualify them as social enterprises. More comprehensive information duties arise when social enterprises apply for and/or receive public subsidies. All these duties are enforced by the Ministry through the sanction of removal from the registry in case of default (other sanctions being applicable, as well).

65 On the Work Integration Social Enterprise (WISE) as a general category which identifies a type of social enterprise all over Europe, see C. Davister – J. Defourny – O. Gregoire, *Le imprese sociali di inserimento lavorativo nell'Unione europea: i modelli*, in *Impresa sociale*, 2006, 1

66 On the possibility of distributing profits see P. Pättiniemi, *Work Integration Social Enterprises in Finland*, cit.

This analysis leads us to question whether this combination between rules concerning contracts and rules concerning relationships with public entities should also be considered in the light of (internal) governance. Can the social enterprise better promote its interests while adopting measures directed towards representing workers within its governance structure? Should public bodies consider this as a preferential criterion while attributing subsidies? Could comparable results in terms of enforcement of work integration objectives be reached with different intervention by public bodies? If their role has to be related to finance, could they become financing investors in the social enterprises? Some of these solutions would probably move the Finnish model towards the other European models examined here. In no respect, would they suggest that legislation on labour contracts and public subsidies is not relevant or may not be crucial for the success of a social enterprise.

The **Italian law** of social enterprises is probably more complex and comprehensive than the other examined legislations. It was enacted in 2006⁶⁷ and introduced into a legal system already regulating social co-operatives (see paragraph 2.1 in this paper), associations, foundations, social utility non-profit organisations (Onlus), musical foundations, cultural foundations, and a number of other different entities at least potentially involved in the fields and activities of social enterprises. While social enterprises were already in place, the legal framework was highly fragmented: (1) a legal definition of the social enterprise was still lacking; (2) it was not definitively clear which entities could legally operate as enterprises and which legislation should be applied in that case; (3) even preliminarily, many of the above mentioned entities lacked (appropriate) legislation concerning the exercise of an enterprise and that concerning the ordinary enterprise could not be considered adequate with respect to the social finality. A law on the social enterprise intended to fill (some of) these gaps⁶⁸.

Social finality and activities. According to the Italian law, social enterprise is a qualification which can be referred to any kind of private organisation (e.g., associations, foundations, co-operatives, non-co-operative companies) which permanently and principally operates an economic activity aimed at the production and distribution of social benefit goods and services while pursuing general interest goals⁶⁹. Public entities are expressly excluded as well as private organisations which direct their activity towards members only. As we shall see later, membership is important but members are neither the only nor the major stakeholders of a social enterprise, although they *control* it.

The qualification of the enterprise as a social enterprise is subject to specific requirements concerning the field of activity, the allocation of the assets, the property and control structure.

Indeed, two alternative definitions of “social utility” are adopted: one is referred to the fields of activity (then goods or services supplied in one of the “qualified sectors” are

67 See Legislative Decree of 24 March 2006, No. 155 (implementing Law of 13 June 2005, No. 118).

68 See F. Cafaggi, *La legge delega sull'impresa sociale*, cit.; M. V. De Giorgi, *Note introduttive*, in *La nuova disciplina dell'impresa sociale*, edited by M. V. De Giorgi, Cedam, Padova, 2007, p. 1 ff.; C. Borzaga – F. Scalvini, *Introduzione*, in *Commentario al decreto sull'impresa sociale*, edited by A. Fici – D. Galletti, Giappichelli, Torino, 2007, p. XIII ff.

69 According to the law, the entrepreneurial activity is considered as the “main activity” if 70% of the enterprise’s revenues derives from such activity.

automatically considered as social utility goods or services)⁷⁰; another is referred to the enterprise's finality in cases in which it is directed towards work integration in favour of disadvantaged people or disabled persons (then, like in the type *b* co-operatives and like in the Finnish law, these workers must amount to 30% of the enterprise' workers). The former definition has often been criticised for its automatism and the lack of evaluation of concrete social value in the supply of certain goods or services, considering the modalities of this supply and the relationship with the beneficiaries⁷¹.

Non profit constraint and asset allocation. The second requirement concerns the non profit nature of the social enterprise. An affirmative allocation of profits and surplus to the institutional activity is provided by the law (see article 3). Direct and indirect distribution of profits is then expressly prohibited (except for social co-operatives). Among the indirect forms of distribution, the law includes extra-remuneration of directors, employees or financiers at levels which are higher if compared with those ordinarily applied. In particular, as to financiers, a remuneration up to 5% beyond the base lending rate is admitted, provided it is not referred to capital shares⁷². In other words, a partial financiers' remuneration is allowed, but financiers, who are remunerated, may not be members of the organisation.

The profits distribution constraint is also correlated with a concurrent affirmative allocation of the assets in case of transformation, merge or split and in case of transfer of the enterprise. In fact, it is not clear why the legislator, in the former case, imposed the preservation of the *non-lucrative* feature (so that the resulting entity must be non-profit) while, in the second, he/she identified, as sole beneficiary of the transfer, a *social utility* entity⁷³. Moreover, all these transactions have to be approved by the Ministry of Social Solidarity, except for those directed towards benefiting social enterprises. In case of extinction, the residual assets are distributed, according to the organisation's articles, to social utility non-profit organisations, associations, foundations or religious entities.

Stakeholders and governance. The third requirement regards the property and control structure of the social enterprise. While it is allowed that a non-profit entity *controls* a social enterprise and, exercising a unitary direction, forms a group of social enterprises, the law prohibits public entities and for-profit organisations from controlling a social enterprise. Nonetheless, they may have shares or somehow participate in a social enterprise as long as their participation is not valuable in terms of *control*.

What is control in a social enterprise is complex to define. Exactly in this area it seems appropriate not to consider the formal concept of control in terms of ownership of the majority of the capital, but to look at the control over the governance structure of the

70 See article 2 of the Decree No. 155/06, which specifically mentions: social assistance, healthcare, education, environmental protection, cultural heritage protection and promotion, social tourism, graduate and post-graduate education, cultural services, extra-school education, provision of services for social enterprises (by organisations mostly composed of social enterprises).

71 C. Borzaga – F. Scalvini, *Introduzione*, cit., p. XVII; A. Bucelli, *Commento all'art. 2, D. Lgs. No. 155/06*, in *La nuova disciplina dell'impresa sociale*, edited by M. V. De Giorgi, cit., p. 84 ff.

72 This cap is not applicable to banks and other financial intermediaries, who can then be remunerated beyond the limit of 5%. On this subject see A. Fici, *Assenza di scopo di lucro*, in *Commentario al decreto sull'impresa sociale*, edited by A. Fici – D. Galletti, cit., p. 52 ff.

73 See art. 13, Legislative Decree No. 155/06. For a critical perspective on this legislation: A. Fusaro, *Trasformazione, fusione, scissione e cessione d'azienda e devoluzione del patrimonio*, in *Commentario al decreto sull'impresa sociale*, edited by A. Fici – D. Galletti, cit., p. 194 ff.

entity, starting from its governing bodies. The law confirms this view when it explains that, among other circumstances, control is given by the power of appointing the majority of the board of directors. But then, with regard to this particular meaning of the term ‘control’, it has to be added that, according to the law, public and for-profit organisations may not appoint directors at all (see article 8).

Besides this prohibition, the law does not provide an affirmative requirement regarding the composition of the membership (as happens in other legal systems like France or Portugal). For instance, it is not clear whether it considers the category of volunteers as (at least preferably) members of the organisation⁷⁴. However, a non-discrimination principle is stated as mandatory, so that inclusion or exclusion in and from the organisation may not be arbitrarily defined and are subject to internal review by the members’ assembly (or equivalent body). Then, it is the social enterprise itself which opts for the selection of special classes of stakeholders as members, provided that this general principle is respected.

The composition of the membership is also important because, when the social enterprise takes the form of an association, members (and only members) may appoint the majority of the board of directors. This means that, given compliance with this limit, the attribution of the power of appointing directors to external entities is absolutely conceivable according to the law: an important tool for stakeholders who are not members⁷⁵.

Also important (though weak) is the regulation concerning the monitoring internal body. Indeed, the law refers to the legislation of limited liability companies, providing the institution of this body as mandatory only when certain economic thresholds are exceeded (with respect to revenues and workers, mainly)⁷⁶. This body is in charge of the monitoring function not only over the accounts of the enterprise, but also over compliance with the legal *status* of the social enterprise as stated in the law. This compliance will then be outlined within the social balance sheets to be provided together with the ordinary balance sheets (as required by company law).

The provision of ordinary and social balance sheets by the social enterprise is a fundamental tool of transparency not only inside the organisation, but also outside it. Indeed, the “outside dimension” of social enterprise governance is also promoted by a multi-stakeholder connotation referred to forms of involvement different from membership.

74 This approach is taken by a different law on voluntary organisations (l. 266/91), sub article 3. The law on social enterprises refers to this law under article 2, where volunteers are considered as “supporting participants” (“aderenti”) and not (preferably) members. It seems that, if the organisation is a voluntary one, the volunteers must preferably be members, but this requirement does not apply to social enterprises. On this issue see P. Iamiceli, *Coinvolgimento dei lavoratori e dei destinatari delle attività*, in *Commentario al decreto sull’impresa sociale*, edited by A. Fici – D. Galletti, cit., p. 177 ff.

75 See G. Schiano di Pepe, *Commento all’art. 8, d. lgs. 155/06*, in *La nuova disciplina dell’impresa sociale*, edited by M. V. De Giorgi, cit., p. 212 ff., part. p. 215, who holds that, according to general principles, it will, in any case, be the general assembly to appoint all the directors, although on the basis of a designation by third parties.

76 In fact, these thresholds are reduced to half with respect to those provided for a limited liability company, probably in consideration of the reduced size of social enterprises with respect to limited liability companies: an assumption which is probably disputable.

Apart from financiers and volunteers (for whom the law does not provide any specific right in terms of participation in governance)⁷⁷, the law attaches major importance to beneficiaries and workers. They have a formal right to be involved in the governance of the organisation through mechanism of information, consultation and participation which allow them to *influence* internal decision-making, at least with reference to those issues which affect work conditions and the quality of the goods or service supplied (see article 12)⁷⁸. In fact, the social enterprise is quite free to choose whatever level and mechanism of involvement (both quantitatively and qualitatively), so that the implementation of this provision in terms of sanctioning is quite difficult although possible in abstract terms. Major relevance should, therefore, be attached to the self-regulation and self-enforcement of these practices⁷⁹.

Accountability and responsibility. The main instrument of accountability is definitively represented by the social balance sheets. Its real impact on the organisation and on the relationship with stakeholders is not easy to foresee at this time. The executive regulation has not come into force yet and, although the practice is gradually developing, not only in the third sector, a deep analysis of the functions of this instrument is still lacking⁸⁰. In the current framework of executive regulation, social reporting is due to represent the organisational and operational dimensions of social enterprises; the relations with the various classes of stakeholders are especially considered, as well as the modes in which social enterprises interact with other institutions, also in the form of social networks. While evaluation of the impact of the activity on the process of pursuing social goals is widely considered, this draft regulation fails to include internal monitoring among the features on which social enterprises should report: a weakness that they may overcome by self-regulation, given the fact that these Guidelines will only set minimum standards⁸¹. Special attention should also be paid to the specific role of social enterprises as distinguished not only from lucrative enterprises but also from other non-profit organisations⁸².

While the “internal” dimension of the monitoring function is shaped on the basis of company law, the “external” monitoring role is attributed to the Ministry of Social Solidarity, vested with investigation and injunction powers. If the enterprise does not comply with the legislation, it will be cancelled from the section of social enterprises within the public registry and its assets will be devolved to a different non-profit entity⁸³. It is important to highlight how the Italian law fails to coordinate this

77 About volunteers, see above sub footnote ...72.

78 F. Alleva, *Commento all'art. 12, d. lgs. 155/06*, in *La nuova disciplina dell'impresa sociale*, edited by M. V. De Giorgi, cit., p. 258 ff.; P. Iamiceli, *Coinvolgimento dei lavoratori e dei destinatari delle attività*, cit.

79 P. Iamiceli, P. Iamiceli, *Coinvolgimento dei lavoratori e dei destinatari delle attività*, cit., p. 191 ff.

80 See Draft Guidelines on Social Balance Sheets proposed by the Ministry of Social Solidarity in December 2007.

81 See Draft Guidelines on Social Balance Sheets, cit.

82 F. Cafaggi, *Social responsibility and non-profit organisations*, forthcoming.

83 In fact, the provision is not clear in this respect, given that it explicitly refers to the case in which the enterprise no longer operates rather than continuing to operate as an enterprise different from the social one (see the combination between article 13 and article 16). However, given the “assets-lock” imposed in case of transformation, as examined above, it seems reasonable to believe that the constraint cannot be lighter when the “transformation” is imposed as a sanction against a default. On

monitoring system with all the others that, depending on the form of the social enterprise (association, foundation, social co-operative, etc.), will continue to operate at the same time. Then, not only administrative and judicial monitoring functions will coexist, like in other legal systems, but different forms of administrative control will (in principle) be involved for the same organisation and the same type of violation. The costs in terms of enforcement and clarity of the rules are, of course, enormous⁸⁴.

Operating within the (here) so called “open model”, the Italian law tries to identify a sort of fundamental core of rules qualifying all social enterprises, whatever their legal form. Many of these rules are derived from the legislation of specific types of organisations or adapted on the basis of these rules (e.g., the non-discrimination principle recalls the open nature of co-operatives in the current law; checks, accounts and ordinary balance sheets are regulated having regard to ordinary corporate law; some provisions of the law on voluntary organisations do apply to social enterprises). However, other rules are new or are innovative, like those concerning social balance sheets⁸⁵ or the involvement of beneficiaries and workers. In specific cases, a higher degree of innovation would have been preferable (like with regard to the monitoring body, as almost plainly derived from the company model).

To work on a legal concept cutting horizontally across a number of given legal forms offers the advantage of “shopping” through the models and searching for the “optimum result”, without forcing entrepreneurs to become familiar with a new form and new comprehensive legislation. Of course, current Italian legislation is far from being “optimum” (many expressions of criticism have been outlined in this article, already) and, moreover, as is the case when the “open form” approach is taken, it faces the challenge of the problem of major co-ordination: if “horizontal” legislation does not have to cover all the issues already covered by the “vertical” statutes (which are applicable separately), it has to be consistent with them. For instance, one could wonder whether a limited liability company that pursues social interests rather than distributing profits to members is still a company under the Civil Code and, even more critically, whether this company is still a social enterprise when it is controlled by a single non profit entity that, although non-profit, has no social purpose⁸⁶. Not to bear such “co-ordination costs” a legislator may prefer to introduce a totally new form of enterprise or to adapt a sole existing legal form (e.g., a co-operative company).

this issue, see P. Iamiceli, *Struttura proprietaria e disciplina dei gruppi*, in *Commentario al decreto sull'impresa sociale*, edited by A. Fici – D. Galletti, cit., p. 60 ff., part. p. 72; A. Bucelli, *Commento all'art. 16, d. lgs. 155/06*, in *La nuova disciplina dell'impresa sociale*, edited by M. V. De Giorgi, cit., p. 330 ff., part. p. 339.

84 On this debate, already before the introduction of the law on social enterprises, F. Cafaggi, *Introduzione*, in G.P. Barbetta – C. Schena (eds.), *I controlli sulle organizzazioni non profit*, Bologna, Il Mulino, 2000.

85 Although a reference is contained in the law on banking foundations, it does not expressly concern social enterprises.

86 On this criticism, see P. Iamiceli, *Struttura proprietaria e disciplina dei gruppi*, cit.

3. Comparing the Models and Analysing some Policy Issues

Although different for approaches and contents, the laws outlined above allow a comparative analysis in the perspective of the discussion of some policy issues regarding the legislation on social enterprises in Europe.

Of course, many differences between legal systems may occur for reasons endogenous to such systems (e.g., a relevant activism of the public sector within fields of interests to social enterprises, or a rooted success of the co-operative model as the main private actor in the social economy and/or in other sectors, or a significant appreciation for volunteership which slows down the process of “entrepreneurialisation” through the major involvement of paid work, and so on). These differences may become even more relevant if Central and Eastern European countries are considered⁸⁷. Nor can this comparative analysis suggest policy conclusions taking into account all these factors. However, when policy makers face common issues regarding the legislations on a private enterprise characterised by social finality, a comparative analysis can take place before endogenous factors are considered.

On the basis of this comparative analysis, some conclusions will be presented for further discussion, also with regard to the alternatives among the legal forms, as previously examined.

3.1. Defining the Social Finality

Defining the social finality of a private organisation in terms of social benefit or social utility is by far one of the most difficult tasks of a policy maker regulating social enterprises. Moreover, this is a crucial premise which operates as a “navigator” for those who have to apply the law as entrepreneurs, consultants, public officers, judges and so on. Therefore, the first conclusion that can be proposed is that a law which totally abandons this definition delegating it to the practitioners would probably fail in its scope.

Two issues are related to this: (a) who will be in charge of defining what social finality means; and (b) how should this be defined.

As to the first issue, three approaches emerge within the framework analysed here:

1. the social finality is directly defined by the law (Italy, France, Portugal, Poland, Finland);
2. the definition is delegated to a public regulator different from the legislator (United Kingdom);
3. the definition is delegated to private parties by reference to the articles of the private organisations which operate as social enterprises (Belgium).

In abstract terms a fourth solution would be possible: (2-bis) to delegate to a private regulator, such as a network organisation composed of non-profit entities or a mixed network organisation also composed of public entities operating in relevant fields.

⁸⁷ K. Hadzi-Miceva - N. Bullain, *A Supportive Financing Framework for Social Economy Organisations*, in A. Noya - E. Clarence (ed.), *Social economy: building inclusive societies*, cit.; EMES, *Study on Promoting the Role of Social Enterprises in CEE and in the CIS*, cit.

The alternative between (1) and (2) is quite interesting: when the legislator defines social utility, a concern about uniformity is probably at stake (the legislator will be inclined to adopt a concept of social utility which is fairly equivalent in different branches of the law); when it is a “specialised” regulator who has this task, then a higher consideration of the specific role of social enterprises as we can already see emerging in practice is probably expected. In other words, a “specialised” regulator could and should rely on greater expertise and knowledge in the specific domain in which he/she operates.

This second approach could be even more relevant if the fourth alternative (sub *2-bis*) were considered: indeed, if the objective is to favour a conceptualisation of social utility which takes into account the concrete needs of society, then network organisations could be an important source of information. Of course, different mechanisms of involvement could be considered to reach this goal, as consultation and open forum organised by the legislator or a public regulator (a sort of co-regulative model would then be enacted⁸⁸).

Although paying major attention to the demand stemming from society (particularly, the social entrepreneurs themselves, as individually considered), the alternative sub (3) risks lacking co-ordination and allowing very different applications of the law in favour of very different needs. A complementary method would be to delegate an authority (probably a public supervisor) with the power of approving the articles of the organisation in order to evaluate its (social) finality. However, also in this case, it could be un-effective and problematic to provide this authority with such power without defining any general principle or grid within which the evaluation should be done.

As to the second issue, three approaches can be identified:

1. the social finality is defined as mainly regarding the sectors in which the enterprise will operate (Italian social enterprise, partially Italian type A social cooperative);
2. the social finality is defined as mainly regarding the type of beneficiaries (United Kingdom, Portugal);
3. the social finality is defined as mainly regarding the results that the activity is intended to achieve (work integration, social inclusion, answering not-satisfied needs, access to certain goods or services, etc.) (France, Italian type B social cooperatives, Poland, Finland).

Again, the list is not all-inclusive in abstract terms, but, from (1) to (3) it shows a gradual approximation to a concept which includes the contents of social utility, which, by definition, is more a *result* than an *activity* (or a field of activity). Then, the reference to sectors and beneficiaries may only operate as far (the former) or closer (the latter) proxies of the concept. The issue is whether these proxies are sufficient or adequate. In particular, the mere identification of the sector does not seem appropriate, since it does not give any guarantee of the concrete needs it will satisfy (a manufacturer of medical instruments also operates in the health-care sector, but this does not say anything about the social finality of the enterprise).

88 F. Cafaggi, *Un diritto privato europeo della regolazione? Coordinamento tra pubblico e privato nei nuovi modelli regolativi*, in *Pol. dir.*, 2004, p. 205 ff.

It is also important to underline that the social finality of an enterprise may be concurrently related to the modality in which it operates. For instance, two hospitals are both carried on in order to cure patients, but only the one which operates allowing (also potential) beneficiaries' involvement in the decision making process (so promoting the emergence of not satisfied needs among the patients or in the community) will be a social enterprise: this way, the governance may become a concurrent proxy to define social finality.

3.2. Between Affirmative and Negative Assets Allocation: the Non-distribution Constraint and the Assets-lock

All the above examined laws include a double constraint on the allocation of assets:

- a *negative* one, concerning the prohibition of distributing profits and other resources to members (and, in some laws, directors, employees, financiers);
- a *positive* one, regarding the allocation of these resources to reserves or, generally, to the financing of social institutional activities (or to social interest organisations – so, generally, in case of liquidation, but in some cases also during the life-cycle of the organisation; see the French case).

The second constraint is important for distinguishing a social enterprise from an ordinary non-profit organisation.

An element of distinction among the legal systems is represented by the possibility of allowing a partial derogation from these constraints in favour of members (as financiers) or financiers (as non member).

It is not possible to correlate this distinction to a specific legal form, since the only legal systems, within the ones examined here, which opt for the total distribution constraint are the Portuguese and Polish systems with respect to social (solidarity) co-operatives. On the contrary, in other countries like Italy, the co-operative form is the one which allows greater freedom in terms of the distribution of profits.

Within the systems that allow a partial remuneration of financial instruments, it is important to distinguish between:

1. remuneration of shares or equivalent instruments held by members (this is allowed in France, in Italy - for social co-operatives but not for other social enterprises, as regulated by the Legislative Decree of 2006 -, in Belgium, in the United Kingdom);
2. remuneration of other “non participatory” financial instruments (this is expressly allowed and regulated for social enterprises in France, in the United Kingdom and in Italy, either for social co-operatives and for social enterprises at large, but in this last case it represents the only allowed remuneration, the one sub (1) being prohibited).

In fact, these two approaches are not significantly far apart. Indeed,

- all of them adopt a “cap” to limit members' and non-members' remuneration of financial instruments (including shares);

- while allowing remuneration of members' shares, some of them distinguish between financial instruments which give rights to vote and financial instruments without the right to vote (as for social co-operatives, in France and in Italy): then the remuneration sub (1) becomes quite similar to the remuneration sub (2);
- other limitations in terms of participation in governance regard more precisely the right of appointing directors or being part of the board:
 - o in some cases (Italian social co-operatives), this limitation is directly connected with the right to remuneration (financing members may not appoint more than one third of the board);
 - o in other cases (United Kingdom, Italy), this limitation is connected with (lack of) membership: not-members (therefore, also financiers) may appoint only up to 49% of the board of directors (United Kingdom and Italy, with respect to associative social enterprises) or may not cover the majority of its chairs (Italy with respect to social co-operatives).

Conclusively:

- all these systems do recognise a “capped” remuneration of investment in the social enterprise;
- all these systems do recognise a limited right to financial instrument holders (though not members) to participate in the governance structure of the enterprise, either as a member or as an “outsider” entitled to appoint a minor part of the board of directors;
- some of these laws (Italian law on social co-operatives) include specific restrictions for financing members in terms of voting power.

The allowance for a partial remuneration of financial instruments in the social enterprises is indeed an important tool for its sustainability and growth⁸⁹. It contributes to reducing or annulling the dependency of the enterprise on public support and fosters its capability of making innovative investments in order to successfully compete in the market.

The role of the financiers within the governance structure is also critical. In fact, their participation could help the enterprise to operate according to efficiency standards. On the other hand, at some point, this complementary view may enter a conflict with other major interests as pursued by the social enterprise in terms of safeguarding beneficiaries, for instance. In this perspective, legal systems:

- limit the remuneration below a cap: the enterprise is not searching for any finance whatsoever, but is interested in financiers who are willing to give up part of the remuneration in favour of social goals;
- limit the financiers' power of participating in the governance below the “control threshold”, so that critical decisions may always be controlled by persons whose major interest is not financial.

89 F. Cafaggi, *L'impresa a finalità sociale*, cit.; A. Zoppini, *Relazione introduttiva ad una proposta per la disciplina dell'impresa sociale*, cit.; J. Defourny, *Introduction: from third sector to social enterprise*, cit., p. 18.

All these solutions are definitively important. However, they may not cover all critical circumstances, especially if the law limits non members-financiers' rights, but allows remuneration for ordinary members (as in France and in the United Kingdom, for instance). Therefore, (and in any case) specific legislation on conflicts of interests could be appropriate in order to monitor the decision making process in cases in which voting powers are not limited in the first place. Of course (and with no disadvantage), this legislation would also cover conflicts among classes of stakeholders different from financiers (e.g., public bodies).

3.3. *The Governance Structure: which Rights for which Stakeholders?*

With different intensity, all the laws examined here recognise some rights in favour of stakeholders although they are not members; but different approaches arise. Particularly, a diverse balance between membership governance and non-membership governance emerges. We can distinguish between participation and control rights.

Of course, a preliminary issue regards the identification of stakeholders. In this respect, differences do exist but they are quite limited. Close attention is paid to beneficiaries in almost all the laws (a specific reference is lacking in the Belgian one, where third parties are generally protected, however). Some are more inclusive, considering indirect beneficiaries as well (Portuguese law) or potential beneficiaries (British Guidelines). Also workers are normally considered as a prior class of stakeholders (particularly under the French, Portuguese, Italian, Belgian, Finnish laws), sometimes at the same level as that of beneficiaries (French, Portuguese, Italian laws). Financiers have been discussed above (see § 3.2). Sometimes the laws adopt a final clause to include any interested person who supports or contributes to the pursuit of the enterprise's goals (French law) or is affected by its activities (British law).

A different approach is sometime taken with respect to public entities. The current debate on social enterprises tends to highlight independence from public power and finance as a distinctive connotation of this type of organisation with respect to other non-profit entities⁹⁰. Among those we have examined, some laws prevent public bodies from controlling social enterprises (Italian law) or establish limits to the size of the capital share they can hold in the enterprise (French law). In fact, independence from public entities could play an important role in fostering innovative building capacity inside the enterprise regardless of possible constraints deriving from political agendas. It also highlights the self-financing capability of the social enterprise as well as the concurrent role of private financiers⁹¹.

As to this framework, a policy maker could wonder whether it should be the law to identify the interests due to be represented in the social enterprise or whether a higher level of freedom should be recognised to the enterprises themselves. The issue is whether the material protection of one or more of these categories represents an element of qualification of a social enterprise. In this perspective, the focus on beneficiaries (including potential and indirect ones) and workers could, in fact, be favoured, while the

90 See C. Borzaga – J. Defourny (eds.), *The emergence of social enterprise*, London, Routledge, 2001, cit.; OECD, *Social enterprises*, cit.

91 On the self-financing capability and the diversification of financial sources as specific connotation of the social enterprise, see OECD, *Social enterprises*, cit.

identification and protection of other interests as relevant could be subject to the free choice of any enterprise.

Identification of relevant interests should be distinguished from definition of membership.

Once membership is considered, diversities among the laws increase:

- some laws expressly define one or more classes of members as qualifying members of the organisation (the Polish law with respect to specific classes of beneficiaries; the Portuguese, with respect to beneficiaries or workers; the French, with respect to beneficiaries *and* workers; the Italian, on type B social co-operatives, but only to the extent that disadvantage workers should *preferably* become members: in fact, all the cases within the co-operative model);
- among these only one requires that the organisation is multi-stakeholder with respect to membership (the French law, since at least three categories have to be included as members);
- other laws attribute some stakeholders with a right to be admitted as members (the Belgian law with respect to workers who have been appointed for one year);
- other laws do not identify classes of members, but introduce a non discrimination principle with regard to admission practices (Italian law on social enterprises);
- other systems do not provide any limitation in this respect (British and Finnish laws).

Of course, the reason for including certain classes of members as mandatory could be the same already outlined before with respect to the qualification of the social enterprise in relation to relevant interests. However, if it is accepted that membership is not the only mechanism for the recognition of interests within a private organisation, then it could also be agreed that organisations should be free to set their membership and, even more so, to decide whether one or more classes should then directly be represented in the general meeting.

While considering this issue, what role members have within the organisation with respect to non members stakeholders should also be determined. For instance, some of the laws examined here attribute the power of appointing the major part of the board of directors (Italian and British laws, particularly) to members. Then the identification of members also draw the line between controlling and non controlling stakeholders.

Particularly when membership has a multi-stakeholder nature, rules concerning decision-making processes play a very relevant role. Indeed, to include diverse interests as represented in the general meeting (or any other equivalent body) could mean very little if a single class is in a position of controlling the whole organisation. For this reason, legal systems that attach major importance to the pluralism of interests foresee the possibility of creating separate assemblies per classes of interests (Italian law on co-operatives, French law) and the balance the power attributed to each class in order to avoid any of them having the majority (French law).

Although seen in the perspective of classes of interest, the issue is related to the democratic feature of the social enterprise as a way towards pluralism and fair decision making processes. Of course, the problem arises also with respect to single participants,

although not considered per classes of interest. In this perspective, the models examined here clearly establish different rules to avoid a single member having control of the organisation:

- within the “co-operative model” the “one member, one vote rule” is generally adopted, although with exceptions;
- within the “company model”, the ordinary correlation between capital investment and voting rights operates, although, in some cases, the law mitigates this correlation establishing a minimum and maximum concentration of votes in favour of a single member (as in the Belgian law) or includes legal forms in which the “one member, one vote rule” operates (as for companies limited by guarantees in the UK);
- within the “open form model”, one of the two mechanisms comes into account depending on the specific legal form of the social enterprise.

In fact, a sort of hybrid and intermediate model prevails where laws generally tend to avoid the emergence of controlling rights in favour of single members, without necessarily opting for uniformity and equal voting rights.

This intermediate solution seems to adequately balance the need for pluralism and the interest in differentiating among classes of interests in accordance with the finality and the specific connotation of the organisation.

On the contrary, it seems disputable to allow the emergence of controlling positions in favour of single members (as in the British law, but, with the exclusion of public and for-profit entities, also in the Italian law on social enterprises). Indeed, in order to safeguard the intrinsic nature of a social enterprise, controlling members could be identified only if they are organisations which not only pursue social goals (while the Italian reference to the non lucrative nature does not seem sufficient) but also present a democratic connotation as discussed here.

As already affirmed, membership is not the only way of recognising interests as relevant within a private organisation. In fact, only some laws attribute specific rights to “external stakeholders”:

- they are entitled, individually or collectively, to information, consultation and participation rights under the Italian and British law;
- they may be part of a consulting body under the Portuguese law;
- they have standing to sue against a defaulting enterprise under the Belgian law.

These rights are quite different in their function: participation rights in the first two cases and monitoring rights in the last case.

Indeed, only the first two approaches allow external stakeholders to actively take part in the governance of the enterprise, contributing to internal decision-making through a direct expression of their needs or points of view. In fact, nothing in the laws says to what extent the internal bodies should take into account this consultation; in the light of the principles of fairness and good faith, it is reasonable to believe that the organisations should not be bound by it, but should publicly justify (e.g., in the social balance sheets)

the reasons why they could not agree with external stakeholders' expression of interest, also considering possible conflicts among different classes of stakeholders⁹².

Information duties are also very important (see § 3.4). At a minimum level, information allows stakeholders to assess the efficiency and effectiveness of an enterprise's activity and governance in order to adjust, on this basis, their choices of consumption, work, finance, etc.

Moreover, information duties are crucial with respect to the last option outlined above concerning stakeholders' standing to sue, where this right is recognised. Normally, for an outsider, it is very difficult to gather sufficient information in order to be able to sue on solid grounds. The critical issue regards the way in which such information is provided. Normally, it is not sufficient to exclusively rely on information directly provided by the organisation, again, for example, in the social balance sheets, but it is necessary for a more independent party or body to supervise this information and exercise autonomous investigation powers. This could be the role of an internal monitoring body, provided that the law establishes adequate criteria for the independence of its members. Alternatively (or concurrently), an external supervisory agency (either public or private, like a non-profit advocacy organisation) could operate. It could be discussed whether the same internal body or external supervisor would be more effectively vested with the power-duty to sue in favour and in substitution of stakeholders, so determining a reduction of costs in terms of information gathering and procedural administration of the dispute⁹³.

3.4. Accountability and Responsibility Issues

Almost all the laws we have examined oblige the social enterprise and its governing bodies to comply with information duties in favour of members and/or qualified third parties (for this later option, see particularly the Portuguese, French, Italian, British laws – see also § 3.3). Moreover, although with different levels of enforcement, almost all these laws oblige social enterprises to issue a social balance sheet at the end of each year.

These provisions are fundamental elements of the legislation on social enterprises and their mandatory nature should not be disputed. Indeed, full and effective information is the ground for any kind of relationship with the organisation, either in case of default (when a party intends to dispute its activity) or during the ordinary life-cycle of the enterprise (when a party may wish to establish a business, financing or consumer relationship).

For these purposes, the ordinary accountability rules provided for for-profit enterprises are important but not sufficient. They cover the economic and financial cycle of the enterprise, but they do not address the social feature of its activity. They also differ as to the addressees (shareholders) and to the content (the effectiveness not the fairness). This is the role of the social balance sheets. In order to be effective, social balance sheets

92 See P. Iamiceli, *Coinvolgimento dei lavoratori e dei destinatari delle attività*, cit.

93 With specific reference to the role of self-legislation in this domain, F. Cafaggi – P. Iamiceli, *Le dimensioni costituzionali della regolazione privata*, in *Giurisprudenza costituzionale e fonti del diritto*, edited by N. Lipari, Esi, Napoli, 2006, p. 315 ff.

have to offer concrete elements in order to assess the results deriving from the material choices put into action by the social entrepreneurs, providing more qualitative than quantitative information⁹⁴.

What should be underlined (and is not always explicitly stated in the law) is that accountability does not regard only the activity (covering both the processes and the results), but also the governance of the enterprises as a fundamental element of the processes which lead to certain results: which interests are represented in the general meeting; what role has this body played within the life-cycle of the enterprise; who appoints the directors; whether there are any executive directors or directors in charge of specific affairs; what is the role of the staff; to what extent are workers involved in the management and refer to it; to what extent have other stakeholders been concretely involved and which decisions have been taken according or through their suggestions, etc. The link between governance, activity and social finality is much stronger in relation to social enterprises than for profit enterprises. Participation and control are part of the mission, not purely instrumental in achieving effectiveness.

In this area, a major role may be played by self-regulation and ethical codes. Given a minimum set of general principles (like fairness, comprehensiveness, effectiveness of information), the law could delegate private network organisations or the enterprises themselves to define the contents and the modalities of “social disclosure”. Also, lacking this legal transfer of competence, social enterprises could commit themselves, on a legal and/or ethical basis, to issue social balance sheets and other information according to certain standards. This would foster effective competition among social enterprises establishing the basis for a constructive dialogue with external stakeholders as well as the public sector.

This seems to be the major objective of accountability in the area of social enterprises: to establish constructive responsibility towards the community at large or selected stakeholders as a way of allowing democracy and participation.

Of course, the sanctioning profile of responsibility should not be lacking: internal and external supervisors, as well as single stakeholders if empowered by the law, must be able to dispute the decisions of social enterprises in case of infringements of the law, of the organisation’s articles, or concurrent obligations. In this perspective, recovery of damages always represents a critical remedy in the area of social activities for the difficulty of assessing them and the lack of effectiveness in the concrete circumstances. Therefore, the laws should concurrently focus on the possibility of issuing injunctions as specific non-monetary relief and as a means directed towards prevention before sanctioning (see specifically, in this perspective, the Italian law). Depending on the general framework in which public functions are executed in each legal system, this approach could imply a major role for administrative rather than judicial control, provided that the “public controller” is independent and is itself accountable to the community (see the British case for this perspective)⁹⁵. This solution could lower the

94 See A. Matacena, *Accountability e social reporting nelle imprese sociali*, in *Impresa sociale*, 2007, 1, p. 13 ff.; L. Sacconi – M. Faillo, *Come emerge l’impresa sociale? Uno sguardo d’insieme alla teoria della complementarità tra ideologia, governance e accountability*, in *Impresa sociale*, 2005, 4; E. Baladin, *Sistemi di governance e sistemi di accountability nel nonprofit*, in *Impresa sociale*, 2005, 4.

95 On the responsibility of regulators, see F. Cafaggi, *Gouvernance et responsabilité des régulateurs privés*, in *Revue internationale de droit économique*, 2005, p. 111 ff.

costs of a more “decentralised” form of control, based on the initiative of individuals who are harmed by defaulting enterprises or directors. It could also increase the effectiveness of the control when a potential plaintiff fails to prove his/her concrete interest in the case.

At the same time, self-regulation should be taken into account: non-profit organisations, which represent the interests of social enterprises at large, could be empowered to perform a monitoring function, mostly directed towards discouraging misconduct inside social enterprises and, eventually, sanctioning (on a legal or ethical basis) those enterprises that fail to pursue their social goals.

3.5. Back to the Legal Forms: Co-operatives, Companies or “Openly Defined” Private Actors?

The first part of this paper developed the analysis of some legislations on social enterprises in Europe, having regard to the legal forms of the social enterprise: the co-operative, the company form, the open form model (where no specific legal form was selected by the legislator).

In fact, the analysis developed in the second part shows that similarities between the models are quite frequent and a clear cut polarisation based on the adoption of specific legal forms is not easy to detect. Of course, one reason is given by the fact that the same legal form may have different connotations in diverse legal systems so that a total uniformity inside the same model cannot be expected. But the main point is that, once the legislator adapts a given legal form to the contents of a social enterprise, a sort of hybridisation of the forms takes place, so that, for instance, the company model, as adopted in Belgium, has some similarities with the co-operative one as adopted in Italy and in France (more than in Portugal)⁹⁶. A second reason is that legal transplants and mutual learning has had great relevance. The role of collective organisations in promoting the adoption of models has contributed to defining a common background which has then been qualified according to country specific factors. Compared to the for profit sector, social enterprises show a much higher level of convergence in the absence of European intervention. It is a clear example of minimum harmonisation through bottom up cooperation.

Partial convergence does not imply partial uniformity and, above all, when there are different choices concerning legal forms, a policy maker should move from the foundations of the social enterprise and its intrinsic nature and connotations to wonder whether any legal form or one in particular may be adequately adapted to serve the purpose of an efficient and effective governance for the social enterprise.

The comparative analysis outlined above and the evaluation of the different models in terms of policy assessment suggest that at least a few premises should be taken into account. Particularly, the legal form, whatever its name and overall legislation, should guarantee:

- the possibility of carrying on an activity, which can be qualified as entrepreneurial, as the main activity of the organisation;

⁹⁶ With specific regard to the evolution of the co-operative model, R. Spear, *From co-operative to social enterprise: trends in European experience*, cit., p. 100 and p. 102.

- a control mechanism over the social nature of the finality pursued by the organisation, as defined at least per broad principles by the law;
- the enforcement of a positive (although not total) assets lock to ensure the achievement of social goals (this also implies a non distribution constraint, although partial);
- the possibility for the enterprise to sustain its own activity through remunerated financing;
- a certain degree of stakeholders' interests representation inside the governance of the enterprise, with specific but not necessarily exclusive representation with regard to beneficiaries and employees;
- the enforcement of a non-discrimination principle concerning the composition of membership, if any;
- the enforcement of a democratic principle inside the governing bodies which allows pluralism, fair dialogue and no emergence of controlling rights, unless in favour of non profit organisations which share the social goals and the democratic nature of the social enterprise;
- an adequate degree of accountability which allows sufficient information disclosure (also in favour of third parties) about the governance and the activity of the social enterprise.

To what extent one or more legal forms may be adapted to this *status* is a question of flexibility which should be assessed with regard to each legal system: the greater this flexibility, the more reasonable the option of the "open form model". As illustrated above, this offers the advantage of promoting a sort of competition among legal forms which allows social enterprises to show their intrinsic nature by selecting the model they think of as the most appropriate for their purposes. On the other hand, the adoption of the "open form model" implies higher costs in terms of co-ordination among the forms and awareness of their legislations: a price that policy makers, on the one hand, and social enterprises, on the other, may not want to pay.

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