



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

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Abstract

Social enterprises are becoming increasingly popular across the globe. They are seen, particularly by younger generations, as an exceptionally promising organizational model. More recently, the idea to tackle social challenges with entrepreneurial means has also been met warmly by policymakers. However, the legal framework for social enterprises remains poorly developed and legal analysis of the subject matter in academia is only slowly gaining momentum. Against this background, this article outlines the multifaceted, real-world phenomenon of social enterprises in business practice and management research, whereby different patterns of thought in Europe on the one hand and in the United States on the other can be identified. It then introduces the (corporate) law of social enterprises, especially the development of new organizational forms, and takes stock of this gradually emerging field of research in Germany, Europe, and the United States. Furthermore, it addresses research perspectives and open questions in the new field of social enterprise law, highlighting, *inter alia*, that one should distinguish more strongly than before between different models of social enterprises and organizational forms when considering a new legislative creation.

Keywords Social enterprises · Social entrepreneurship · Fourth sector · New organizational forms · Benefit corporation · *Cooperativa sociale*

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1 Introduction

Social entrepreneurship is a global trend. New initiatives, concepts, and organizational forms are constantly being developed by and for social enterprises.¹ The basic idea behind this movement – to tackle social challenges with entrepreneurial means – has meanwhile also been met warmly by policymakers.² In 2020, the European Commission dedicated to the topic a summary report of almost two hundred pages titled ‘Social enterprises and their ecosystems in Europe’,³ and in December 2021 it presented an ‘Action Plan for the social economy’.⁴ At the international level, the OECD published a guide on the legal frameworks for the social and solidarity economy in March 2023.⁵ In Germany, the current coalition agreement proclaims that a modern corporate culture should also include new organizational forms such as social enterprises and raises the prospect of developing a national strategy for social enterprises to provide greater support for public-welfare-oriented economic activity and social innovation.⁶

Legal commentators committed to analyzing and examining the subject matter can hardly keep pace with the developments. A recent monograph⁷ and a handbook on the ‘law of social enterprise’⁸ deal mainly with the legal situation in the United States; a freshly published anthology provides a first international overview.⁹ By comparison, studies from a German perspective have so far been extraordinarily rare.¹⁰ Against this background, this article undertakes a tour through the ‘Social Enterprise Zoo’¹¹ from a corporate law perspective. For better orientation, it first outlines the multifaceted, real-world phenomenon of social enterprises in business practice and management research (Sect. 2). Subsequently, it explains the legal framework for social enterprises in Germany, Europe, and the United States (Sect. 3). Finally, it addresses research perspectives and open questions in the new field of social enterprise law (Sect. 4).

¹ See Defourny and Nyssens (2021a); see also Bidet and Defourny (2019); de Bruin and Teasdale (2019); Defourny and Nyssens (2021b); Gaiger et al. (2019); Hall (2022); Sánchez-Hernández et al. (2021).

² For a good overview of the ‘global social enterprise lawmaking phenomenon’, see Liao et al. (2019).

³ European Commission (2020).

⁴ European Commission (2021).

⁵ OECD (2023).

⁶ Explicitly stating as much, Coalition Agreement 2021–2025 ‘Mehr Fortschritt wagen’ between SPD, Bündnis 90/Die Grünen and FDP, November 2021, p 24 et seq.; see, most recently, Bundesministerium für Wirtschaft und Klimaschutz (2023).

⁷ Brakman Reiser and Dean (2017).

⁸ Means and Jockey (2018).

⁹ Peter et al. (2023).

¹⁰ Meritorious treatment can, however, be found in Momberger (2015); Möslein (2017); Möslein and Mittwoch (2016); Mittwoch (2022), p 240 et seqq.; Spindler (2023).

¹¹ Young et al. (2016), subtitled ‘A guide for perplexed scholars, entrepreneurs, philanthropists, leaders, investors and policymakers’.

2 Social Enterprises in Business Practice and Management Research

Social enterprises come in numerous forms. The spectrum ranges from traditional associations aiming to integrate unemployed and disabled individuals into the workforce, to modern manufacturers of outdoor clothing attentive to the issue of sustainability.¹² To gain an impression of the multitude and diversity of actors, ideas, and forms of organization,¹³ it is advisable to start chronologically with the figure of the social entrepreneur¹⁴ and then to move on to the social enterprise. Along this path – and in this context – it is, however, important to keep in mind that the key terms of social entrepreneurship, social entrepreneur, and social enterprise are often associated with different meanings.

2.1 Social Entrepreneurs as Promoters in the United States and Asia

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

2.1.1 Bill Drayton as a Visionary and Supporter

Referred to reverently as the ‘Godfather of Social Entrepreneurship’, Bill Drayton (USA) was a central figure in recognizing the importance of social entrepreneurs as key drivers of economic change and social innovation.¹⁶ Drayton studied economics at Oxford, earned a law degree at Yale, and worked for McKinsey for a number of years before joining the US Environmental Protection Agency. In 1980, he and several like-minded people founded the non-profit organization Ashoka, based in Arlington, Virginia.¹⁷ Ashoka is devoted to identifying visionary social entrepreneurs¹⁸ around the world, nurturing these individuals with targeted support,

¹² On Patagonia as a pioneer of a new economy and as an icon of the US sustainability movement, most recently, Weitemeyer and Waltz (2022).

¹³ See Teasdale (2012), p 99: ‘[A] fluid and contested concept constructed by different actors promoting different discourses connected to different organisational forms’.

¹⁴ Similarly, Momberger (2015), p 5.

¹⁵ For biographies of key social entrepreneurs, Bornstein (2007), a book considered ‘a bible in the field’ according to the New York Times.

¹⁶ For more information on Drayton, see Bornstein (2007), p 11 et seqq.

¹⁷ The name (Sanskrit for the ‘active absence of sorrow’) derives from the Indian emperor Ashoka, who ruled in the 3rd century BC and is seen as one of the world’s earliest great social entrepreneurs; see on this, Bornstein (2007), p 15: ‘Drayton considered Ashoka to be one of history’s most tolerant, global-minded, and creative leaders.’

¹⁸ On the importance of visionary social entrepreneurs, Drayton (2002), p 123 et seq.: ‘First, there is no entrepreneur without a powerful, new, system change idea. The entrepreneur exists to make his or her vision society’s new pattern. He or she is married to that vision, in sickness or in health, until it has swept the field. There are four other ingredients: creativity, widespread impact, entrepreneurial quality, and strong ethical fibre.’

and allowing them to proceed: from small beginnings to greater success – in line with Drayton’s favorite saying: ‘From little acorns do great trees grow’.¹⁹ The first Ashoka Fellow was Gloria de Souza, a 45-year-old primary school teacher from what was then Bombay, who introduced and disseminated new, interactive teaching methods that were more closely aligned with indigenous experiences.²⁰ Today, Ashoka operates in more than 95 countries on all continents.

2.1.2 Muhammad Yunus as a Pioneer and Idol

The best-known Ashoka Fellow and at the same time the shining example for many social entrepreneurs is Muhammad Yunus, a Vanderbilt-educated economist from Bangladesh. In 1976, he founded the Grameen Bank, based in Dhaka, which provides collateral-free microcredit to poor micro-entrepreneurs, mostly women, in order to help them to escape abject poverty. As ‘Banker to the Poor’ – the title of his autobiography²¹ – Yunus received the Nobel Peace Prize together with the Grameen Bank in 2006. He has explained his concept of a ‘social business’ in various books.²²

2.2 Social Enterprises in Europe and Germany

In Europe, the idea of social entrepreneurship also took hold, albeit with a slightly different focus: it was not the individual social entrepreneur who was – and is – at the center of interest here, but rather the social enterprise as a collective entity,²³ a structure deemed more impactful than individuals acting alone.²⁴ In the beginning, mainly associations and cooperatives aggregated under the collective term ‘Work Integration Social Enterprise’ (WISE) emerged. They were products of the severe economic crisis witnessed at the end of the 1970s and the beginning of the 1980s,

¹⁹ See Bornstein (2007), p 15. In addition to the *visionary idea*, Ashoka demands *creativity*, *entrepreneurial quality*, *widespread social impact of the idea*, and *ethical fibre* from prospective fellows – on this and on the selection process, see <https://www.ashoka.org/en-us/program/venture-selecting-our-ashoka-fellows>.

²⁰ In greater detail, Bornstein (2007), p 27 et seq.; for other early examples, Drayton (2002), p 125 et seq.

²¹ Yunus (1999).

²² Yunus (2009); Yunus (2011), p 1, with the following conceptualization: ‘[A social business is] a non-loss, non-dividend company devoted to solving a social problem and owned by investors who reinvest all profits in expanding and improving the business.’

²³ See Defourny and Nyssens (2008), p 203: ‘In Europe, on the contrary, the emphasis has been much more often put on the collective nature of the social enterprise ...’

²⁴ Pointedly, Defourny and Nyssens (2021c), p 354: ‘The founder’s profile and the social innovation he or she brings in are presented as central pieces of such beautiful “stories”. However, the bulk of theoretical and empirical literature demonstrates that social innovation is more often rooted in collective dynamics than in individual trajectories’; similarly, from an English perspective, Leadbeater (2013), p 78: ‘The only really successful social ventures are built on teams not individuals. Entrepreneurship involves the combination of different skills, over time, to resolve the multiple challenges a venture will face. Social entrepreneurs only succeed when they are both charismatic but also team players’; for a different perspective, see the earlier discussion by Leadbeater (1997), p 11 et seq.

a dynamic which led to high structural unemployment in many European countries, and they primarily aimed to create employment opportunities for socially disadvantaged people.²⁵

2.2.1 Italy as a Forerunner

Social enterprises flourished first on Italian soil. Here, they emerged in the 1970s as a grassroots movement in response to serious weaknesses in the state welfare system.²⁶ Initially, in the 1980s, a manner of cooperative served as a loose organizational model for them,²⁷ and this structure took on a more solid form as a social cooperative after legislation was passed in 1991.²⁸ The *cooperativa sociale* – as it is known – comes in two sub-forms: the WISE cooperatives for labor market integration (type B); and the new, broad-purpose cooperatives providing social welfare and/or educational services (type A), which explicitly pursue the general interests of the community.²⁹ In 2005, the legislature subsequently introduced the legal status (or label) of an *impresa sociale*, thereby giving social enterprises access to other organizational forms outside of the cooperative sector.³⁰ In 2017, the ‘third sector’ was newly organized by a legislative decree.³¹

2.2.2 Germany as a Latecomer

In Germany, social entrepreneurship was comparatively late in gaining a foothold,³² despite the existence of certain historical models. Reference can be made in this regard to Friedrich Wilhelm Raiffeisen, one of the two fathers of the German cooperative movement together with Hermann Schulze-Delitzsch. As early as the middle of the nineteenth century, he had established cooperative loan funds that provided money to destitute farmers for operational resources – a social entrepreneur *avant la lettre* with a model that was not so dissimilar to that of Muhammad Yunus.³³ Subsequently, however, these early approaches petered out. In their place, and in the wake

²⁵ On this point, see the earlier treatment by Borzaga and Defourny (2001), p 351 et seqq; see further, Defourny and Nyssens (2010), p 34 et seq and p 37.

²⁶ For more information on this point, see Poledrini and Borzaga (2021), p 134 et seqq.

²⁷ Poledrini and Borzaga (2021), p 133: ‘In those new, so-called social-solidarity cooperatives, in comparison to traditional cooperatives, elements of internal mutuality were attenuated, while those concerning solidarity were boosted’.

²⁸ Legge no. 381/1991; on the rapid acceptance, Thomas (2004), p 243; from a comparative law perspective, Kiesswetter (2018), p 73 et seqq and p 86 et seqq.

²⁹ In retrospect, OECD (2022), p 75 et seqq.

³⁰ Zoppini (2022).

³¹ Decreto legislativo no. 112/2017 of 4 July 2017.

³² Leppert (2013), p 19: ‘In contrast to the Anglo-Saxon discussion, the discussion about social entrepreneurship in Germany is relatively young’ (translation by the authors).

³³ Similarly, Weitemeyer (2022), p 630: ‘Thus, already in the middle of the 19th century, the founders of the cooperative movement, Friedrich Wilhelm Raiffeisen and Hermann Schulze-Delitzsch, acted in a socially entrepreneurial way according to today’s understanding’ (translation by the authors); in detail on the ‘social-ethical content of the cooperative idea’, Beuthien (1989), p 12 et seqq.

of Bismarck's social legislation of 1883–1889, there grew an entrenched expectation that the state and the church, together with their welfare associations, were responsible for the social good.³⁴ This assumption, along with an underdeveloped entrepreneurial culture, a weakly developed commitment to civil society, and the comparatively minimal willingness to donate money, led to an infertile breeding ground for privately initiated social enterprises.³⁵ Initial approaches with WISE organizations in the form of social enterprises as well as employment and qualification companies in the mid-1990s did not offer what they had promised.³⁶

It was not until the end of the 1990s that social entrepreneurship gradually gained traction in Germany,³⁷ especially through external actors who dedicated themselves to the promotion of social enterprises. One of them is Klaus Schwab, the founder of the World Economic Forum, who founded the Schwab Foundation for Social Entrepreneurship together with his wife Hilde in 1999. The Schwab Foundation can in a certain way be seen as a German equivalent to Bill Drayton's Ashoka.³⁸ Ashoka itself has been active in Germany since 2003,³⁹ and further support is offered by the Social Enterprise Network Deutschland e.V. (SEND), founded in 2017. According to the latter's Social Entrepreneurship Monitor, social enterprises now exist in all sectors, most commonly in education, health, and social work, as well as in the areas of information and communication technology.⁴⁰ Clear statistics are lacking. One rough estimate puts the number of social enterprises between 2000 and 70,000,⁴¹ while others speak of 70,000.⁴² According to a third source, there are as many as 154,000 German social entrepreneurs.⁴³ Most of them are still in the implementation

³⁴ Achleitner et al. (2007), p 12 et seq.

³⁵ Leppert (2013), p 44 et seq.; see also Göler von Ravensburg et al. (2021), p 93: 'The likelihood that individuals set up a[n] SE venture is reduced by cultural predispositions in Germany, which tend to discourage social enterprise in three ways: entrepreneurial failure is viewed particularly critically, entrepreneurial culture is not very well developed in comparison to what is the case in other industrialised countries, and Germans are not overly apt to set up a business.'

³⁶ Göler von Ravensburg et al. (2021), p 89 et seq.; on WISEs in Austria, see Anastasiadis (2016).

³⁷ Achleitner et al. (2007), p 13; see also Cagarman et al. (2020), para. 2.3.3: 'Since the beginning of the twenty first century, however, the scene has also started to gain importance, ... and, at the latest, when Muhammad Yunus was awarded the Nobel Peace Prize in 2006, the topic finally reached the centre of society.'

³⁸ See Karré (2021), p 293: 'Especially two non-profit foundations played a role in this, namely Ashoka and the Schwab Foundation for Social Entrepreneurship.'

³⁹ See Göler von Ravensburg et al. (2021) p 91: 'One of the milestones in the promotion of social entrepreneurship in the country was the foundation of Ashoka Germany, in 2003.'

⁴⁰ Social Entrepreneurship Netzwerk Deutschland (SEND) (2022), p 23 et seq.

⁴¹ Karré (2021), p 295: 'In Germany, estimates range from 2,000 to 70,000 social enterprises, based on either a stringent focus on social start-ups only or a more comprehensive approach that also counts traditional social enterprises.'

⁴² Göler von Ravensburg et al. (2021), p 85: 'Although the term social enterprise (SE) is not legally defined and no precise common understanding of the concept exists in Germany today, around 70,000 German entrepreneurial organisations aim to promote the common benefit rather than individual gain.'

⁴³ Cagarman et al. (2020), para. 2.3.3: 'According to a study by Kreditanstalt für Wirtschaft (KfW), there were 154,000 young entrepreneurs in 2017 who described themselves as social entrepreneurs ...'

and growth phase.⁴⁴ Typically, these entities are founded by younger people in an urban milieu.⁴⁵ They are also referred to as ‘new-style social enterprises’.⁴⁶ A frequently cited example from Hamburg is GoBanyo, an organization which operates a shower bus for homeless people that is financed through crowdfunding.⁴⁷ However, GoBanyo’s entrepreneurial approach is not yet very developed.⁴⁸ A more suitable illustration might be Hinz&Kunzt, Germany’s most widely distributed street magazine sold by homeless people.

2.3 Social Enterprises as an Object of Academic Research

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

2.3.1 The Discussion in the United States

In the United States, 1983 is considered a ‘watershed year’:⁵⁰ in that year, two important papers⁵¹ and a book publication⁵² on the entrepreneurial activities of non-profit enterprises appeared. Ten years later, Harvard Business School launched its ‘Social Enterprise Initiative’⁵³ and soon found followers among other leading business schools. Subsequently, competing theories for a better understanding of social enterprise mushroomed.⁵⁴ These include the cross-subsidy model, which sees social enterprises as the commercial arm of non-profit organizations;⁵⁵ the innovation school, which places social entrepreneurs in the ranks of the Schumpeterian entrepreneur;⁵⁶ the hybridity approach, according to which social enterprises are combinations of various types of social and business entities;⁵⁷ the institutional view, which emphasizes the historical and institutional context in which different varieties

⁴⁴ SEND (2022), p 22 et seq.

⁴⁵ Göler von Ravensburg et al. (2021), p 97.

⁴⁶ Karré (2021), p 292: ‘new-style social enterprises’.

⁴⁷ For a portrait, see Flachsensberg (2022); on a prize awarded to co-founder Dominik Bloh, a former homeless person, see Hamburger Abendblatt (2022), p 11.

⁴⁸ See Flachsensberg (2022), with the explanation of co-initiator Gülay Ulas: ‘In the medium term, it is our dream to finance the shower bus 100 per cent through our own product A shower gel of our own would be conceivable’ (translation by the authors).

⁴⁹ Defourny and Nyssens (2010), p 32 et seqq.

⁵⁰ Young et al. (2016), Preface, p xiii.

⁵¹ James (1983); Skloot (1983).

⁵² Crimmins and Keil (1983).

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

⁵⁴ Summarized by Young and Brewer (2016), pp 8 et seq., under the subheading ‘Social enterprise: competing intellectual frameworks’.

⁵⁵ Weisbrod (1998).

⁵⁶ See, for example, Shockley and Frank (2011).

⁵⁷ Billis (2010).

of social enterprises developed;⁵⁸ and the behavioral and evolutionary economics strand, which views social enterprises as a response over time to changing social needs and entrepreneurial motivations.⁵⁹

2.3.2 The European Discussion

An early point of scholarly crystallization in Europe was the founding of the journal ‘Impresa sociale’ on the initiative of the Centro Studi del Consorzio in 1990.⁶⁰ More recently, the EMES research group,⁶¹ which was founded in 1996 with EC funds and led under the direction of the social economist Jaques Defourny from the University of Liège, has become a key source of impetus. The resulting EMES network is now one of, if not *the* leading institution in the field.⁶² As a result of the ‘International Comparative Social Enterprise Models (ICSEM) Project’, its researchers have recently published a four-volume series of books dedicated to social enterprises in Asia, Latin America, Central and Eastern Europe, and Western Europe.⁶³ The young discipline received further impetus from newly founded journals in the UK: the Social Enterprise Journal (since 2005, Cambridge)⁶⁴ and the Journal of Social Entrepreneurship (since 2010, Oxford).⁶⁵

2.4 Definitional Dilemma

Despite the enormous growth in knowledge, there is still no generally accepted definition of a social enterprise: ‘The concept of social entrepreneurship continues to mean different things to different people and there is no clear understanding on where to locate it and how to qualify social entrepreneurs.’⁶⁶ One article counted a total of 87 different definitions as early as 2009.⁶⁷

⁵⁸ See, for example, Kerlin (2013).

⁵⁹ See, for example, Borzaga and Tortia (2010).

⁶⁰ See the editorial in Impresa Sociale 1990, p 3: ‘Impresa sociale: area tematica, obiettivi, linea editoriale. perché una rivista?’.

⁶¹ The name comes from an acronym of the first research assignment: ‘L’Emergence des Entreprises Sociales’.

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

⁶³ Individual references are cited in footnote 1 above.

⁶⁴ Introductory essay by Haugh (2005).

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

⁶⁶ Galera and Borzaga (2009).

⁶⁷ Fojcik and Koch (2009), p 78 et seqq.; other compilations in Cagarman et al. (2020), para. 2.2, with the addition: ‘This plethora of perspectives makes it difficult to find a common ground. Although the term has been used in scientific discourse for several decades and the number of published papers has increased tremendously, there is, as yet, no generally applicable definition’; see also Aliaga-Isla and Huybrechts (2018); Persaud and Bayon (2019).

In a recent publication, the OECD characterizes social enterprises as providers of goods or services that fulfil a social objective and whose main purpose is not the maximization of profit for the owners but the reinvestment of profits generated for the continued attainment of its social goals.⁶⁸ A self-description elaborated by the German entity SEND reads as follows:

The primary goal of social entrepreneurship is to solve social challenges. This is achieved through the continuous use of entrepreneurial means and results in new and innovative solutions. Steering and control mechanisms ensure that social goals are lived internally and externally.⁶⁹

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

2.5 Social Enterprises on a Spectrum of Organizational Forms

A valuable heuristic tool for locating social enterprises within the overall framework of business organizations is the approach of the *spectrum school*.⁷⁴ According to

⁶⁸ OECD (2023), p 13.

⁶⁹ SEND (2022), p 17.

⁷⁰ See Borzaga and Defourny (2001), p 16 et seq., where the author states: ‘Let us begin with the economic and entrepreneurial dimensions for which four criteria have been put forward: a continuous activity producing goods and/or selling services; a high degree of autonomy; a significant level of economic risk; a minimum amount of paid work. To encapsulate the social dimensions of the initiative, five criteria have been proposed: an explicit aim to benefit the community; an initiative launched by a group of citizens; a decision-making power not based on capital ownership; a participatory nature, which involves various parties affected by the activity; limited profit distribution.’ (The respective individual explanations have been omitted without notation.)

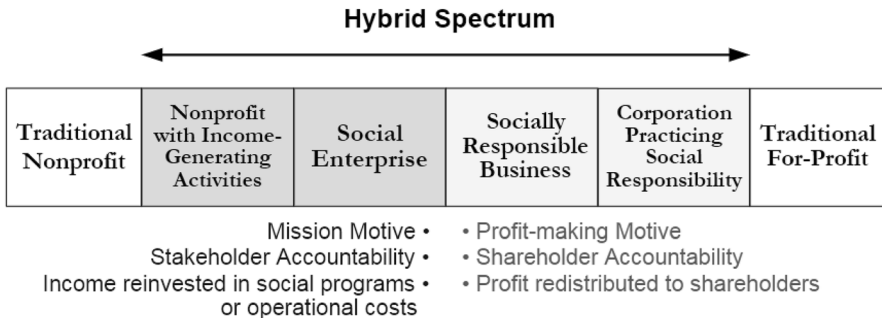
⁷¹ Defourny et al. (2021a), p 1: ‘In spite of all these efforts, it is today acknowledged, to a large extent, that the SE field is too wide and too diversified to be embraced by a single definition which would be unanimously accepted’.

⁷² In this sense, *ibid.*

⁷³ Brewer (2016), p 34.

⁷⁴ Dees (1996); Dees (1998); see also the summary of Hall (2022), p 90: ‘The social enterprise spectrum theory asserts that a range of organisations have a combination of social purpose and profit orientation, which can all be considered when using the spectrum approach.’

this approach, all organizational forms can be drawn on a spectrum with two end-points: one end is marked by traditional non-profit organizations that yield a high social return and are financed exclusively by charitable donations; the other end is marked by classic for-profit companies that strive solely for a high financial return. In the middle range, various mixed forms having a ‘blended value’ can be found: non-profit companies generating income, for-profit companies that carry out CSR activities, and finally – and very centrally – social enterprises with a social mission whose income is distributed to investors only to a lesser extent (if at all) and to a greater extent is reinvested or used completely for social purposes.⁷⁵



2.6 Social Enterprises and the ‘Fourth Sector’ of the National Economy

According to a common classification, three sectors are distinguished in an economy: the state (first sector),⁷⁶ private for-profit enterprises (second sector), and the social economy (third sector).⁷⁷ The latter traditionally includes foundations, non-profit associations, non-profit limited liability companies, and various kinds of charitable corporations,⁷⁸ which are often also referred to as non-profit organizations.⁷⁹ This classic three-sector model might prove too narrow given the further rise of social entrepreneurs and social enterprises: a negative delimitation alone

⁷⁵ Figure taken from Alter (2007), p 14; similarly, Achleitner et al. (2007), p 8 with Fig. 1; Díaz-Foncea and Marcuello (2023), p 136 with Fig. 1.

⁷⁶ For example, Nowotny and Zagler (2022).

⁷⁷ Brewer (2016), p 35: ‘[C]onventional legal forms generally assume that all organizations fall within and fulfill the legal purposes of one of the three sectors of the economy: government (“public”), for-profit (“private”), and nonprofit (“voluntary”). Any given legal form is primarily adapted to survive and thrive within its associated sector.’

⁷⁸ See, internationally, OECD (2023): ‘The SSE is typically made up of entities such as associations, non-profit organisations, cooperatives, mutual societies, foundations, and, more recently, social enterprises.’

⁷⁹ See, for example, Simsa et al. (2023).

(‘non-profit’) is no longer sufficient.⁸⁰ Rather, such entities follow an institutional logic of their own that seeks to combine a public interest orientation with profit-making. Nationally and internationally, it is therefore increasingly common to speak of an emerging ‘fourth sector’.⁸¹

3 Regulatory Framework for Social Enterprises Under Company Law

3.1 Absence of Special Regulations in Germany

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

According to surveys of the Social Enterprise Monitor, almost half of the social enterprises in Germany have non-profit status.⁸⁵ Notwithstanding, there is great heterogeneity with regard to the organizational forms chosen: 22.8% are organized as a profit-making limited liability company (‘GmbH’), 19.5% as a non-profit limited liability company (‘gGmbH’), 18.4% as a non-profit association, 10.6% as an entrepreneurial company with limited liability (‘*Unternehmergesellschaft*’, or ‘UG’), and 9.5% as a sole proprietor.⁸⁶ The two already mentioned companies, GoBanyo and

⁸⁰ Sánchez-Hernández et al. (2021), p 9: ‘The traditional division of economic sectors into first, second, and third sectors is slightly out of date. The new socioeconomic landscape is characterized by entrepreneurial ecosystems looking for sustainability, and new goals emerge such as eradication of poverty, gender equality, social justice, and environmental protection. Accompanying this trend, new business models appear that are difficult to classify into a traditional sector.’

⁸¹ Through the German lens, see Weitemeyer (2022), p 630 et seq.; similarly, Mittwoch (2022), p 240: ‘[I]t already makes them appear as a new and emerging economic sector that expands and at the same time frays the traditionally modelled triad of market, state and non-profit enterprises’ (translation by the authors); internationally, e.g., Sánchez-Hernández et al. (2021), p 7: ‘The fourth sector can be defined as the group of organizations, models, and practices whose objective is to solve the great problems of the twenty-first century, combining elements from the traditional sectors: the public, the private, and the nongovernmental.’

⁸² See Bundesministerium für Wirtschaft und Energie (2018), p 32: ‘The topic of choosing an organizational form regularly plays a central role in start-up seminars. However, there is no general recommendation on the question of the right organizational form for social enterprises – just as in traditional entrepreneurship. Rather, the appropriate organizational form depends on a variety of factors’ (translation by the authors).

⁸³ See SEND (2021), p 5 et seqq. and p 14 et seqq.; see further, Wissenschaftliche Dienste des Deutschen Bundestages (2016).

⁸⁴ Pöllath (2007), p 45 et seqq. (entrepreneurial organizational forms), p 49 et seqq. (organizational forms oriented towards the common good); Momberger (2015), p 67 et seqq.

⁸⁵ SEND (2022), pp 16, 50.

⁸⁶ On this and on the other organizational forms, SEND (2022), p 25.

Hinz&Kunzt, are both non-profit and use the form of a gGmbH. As a second option, the GoBanyo founders had considered choosing a registered association.⁸⁷

3.2 Organizational Forms Available in Selected European Jurisdictions

In Europe, the range of organizational forms specifically tailored to social enterprises is broad. This is due to different political, social, and economic contexts, but also to path dependencies and historical contingencies. Ground-breaking research has been done, above all, by the above-mentioned ‘International Comparative Social Enterprise Models’ project of EMES, which involved 250 researchers from 55 countries all over the world.⁸⁸ From a legal perspective, it is appropriate to single out the comparative work by Italian law professor Antonio Fici⁸⁹ as well as the EU study on social enterprises and their ecosystems in Europe, mentioned at the beginning of this article.⁹⁰

3.2.1 New Variants of the Cooperative

The most common organizational form for social enterprises in Europe is a further-developed version of the classic cooperative: the so-called social cooperative. It first appeared in Italy with the law of 8 November 1991 on *cooperative sociali*.⁹¹ The main innovation is that the purpose of the cooperative is no longer limited to facilitating mutual self-help among the members, instead also including general social goals.⁹² In practice, this modification of the cooperative was quickly adopted; today there are about 15,500 of them.⁹³ Following the Italian example, many neighboring countries have introduced variants of the social cooperative under different names, such as the *cooperativa de soliedaridade social* in Portugal (1997), the *cooperativa de iniciativa social estatal* in Spain (1999), or the *société coopérative d'intérêt collectif* in France (2001).⁹⁴

There are several reasons for the popularity of the cooperative system in the social economy, these including the historically grown importance of cooperative structures in Southern European countries and the legal anchoring of the cooperative in the constitutions of, for example, Italy, Portugal, and Spain,⁹⁵ and the participatory elements of cooperative law in the form of voting done according to

⁸⁷ See co-founder Gülay Ulas in Flachsberg (2022): ‘In an association, however, you have to do many more loops, coordinate every big step with the general meeting. That would have been too slow for us as a founding team’ (translation by the authors).

⁸⁸ For details, see Defourny et al. (2021a), p 2 et seqq.

⁸⁹ Fici (2016); Fici (2020); Fici (2022); Fici (2023).

⁹⁰ European Commission (2020).

⁹¹ Legge no. 381/1991.

⁹² See Art. 1 para. 1 L. no. 381/1991: ‘Le cooperative sociali hanno lo scopo di perseguire l’interesse generale della comunità alla promozione umana e all’integrazione sociale dei cittadini ...’

⁹³ Figures according to Fici (2023), p 155 et seqq.

⁹⁴ Hernández Cáceres (2023), p 175 et seqq., with further references.

⁹⁵ For more on this development, see Douvitsa (2018).

headcount instead of capital shares. Against this background, the cooperative has been described as the ‘natural’ legal form for social enterprises.⁹⁶

3.2.2 Special Company Forms

Alongside Italy, the United Kingdom has emerged as an early promoter of social enterprises.⁹⁷ The UK Industrial and Provident Societies Act introduced the Community Benefit Society as early as 1965, but comparative research has hardly noticed it.⁹⁸ By contrast, the Community Interest Company (CIC), which was launched in 2005 as a special form of a company limited by guarantee or a company limited by shares, has received greater attention.⁹⁹ The British legislature designed it as an organizational subtype specifically for social enterprises.¹⁰⁰ Politically, its codification during the so-called New Labour government under Tony Blair was embedded in a larger strategy (the ‘Third Way’¹⁰¹) that had as its aim a more intense privatization of public services as well as state social welfare measures.¹⁰² The CIC is considered a success, with around 19,000 now to be found. Throughout Europe, however, social enterprises in the form of special subtypes of companies or corporations have remained rare, despite enjoying significant comparative advantages in terms of financing.¹⁰³

3.2.3 Legal Status for Different Organizational Forms

A third regulatory approach consists of assigning the label of ‘social enterprise’, and at present such a legal status is accessible to entities associated under a variety

⁹⁶ For example, Hernández Cáceres (2023), p 174: ‘European legislators found the cooperative model to be the most appropriate, or the most natural, for framing the phenomenon of social enterprises ...’; similarly, Fici (2023), p 163: ‘[T]he idea that the cooperative form is the “most natural” for a social enterprise’.

⁹⁷ See Brewer (2016), p 48: ‘Although Italy may be regarded as the first country to identify social enterprises as unique, the United Kingdom arguably provides the strongest government support to such organizations.’

⁹⁸ Industrial and Provident Societies Act, 1965, c. 12, § 52 (U.K.); viewing this institution negatively, Lloyd (2010), p 33: ‘these old-fashioned industrial and provident societies - the law for which has not been updated since 1965’.

⁹⁹ From the internal perspective of the spiritual father, Lloyd (2010), p 33.

¹⁰⁰ See UK Cabinet Office (2006), p 10: ‘A social enterprise is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners.’

¹⁰¹ Giddens (1998).

¹⁰² More closely, Liptrap (2021b), p 628: ‘Policymakers originally introduced the CIC to spin off some level of centralised public responsibility to non-state actors for the implementation and financing of social welfare policy’; from a comparative perspective, Fleischer (2022), p 834: ‘Interaction between the political and legal subsystem’.

¹⁰³ See Fici (2023), p 163: ‘Furthermore, SEs in the company form might be more effective in fulfilling their objectives, given their greater financial capacity compared with SEs established in other legal forms. [As their structure is] based on the capital individually held (one share, one vote), these companies should potentially attract more investors than other types of organizations, such as cooperatives, in which capital held is irrelevant to governance (one member, one vote).’

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

In France, since 2014, all commercial enterprises may acquire the status of *économie sociale et solidaire* (ESS).¹¹⁰ This gives rise to advantages, for example in public procurement procedures and in securing financing from the state investment bank, but it also entails significant restrictions on profit distribution, with the result that there has thus far been only sparse use of the ESS in practice. In 2019, a further status was added to French law with the *société à mission*, which was inspired by the US benefit corporation.¹¹¹ All commercial entities can obtain the status if certain statutory requirements are fulfilled¹¹² – legal benefits do not flow from this status, but it does offer possible reputational advantages.¹¹³

3.2.4 Characteristics of the European Model

In searching for a common denominator of the special European organizational forms for social enterprises, which allow the use of a corresponding designation when doing business, we find one in the prioritization of the social objective. To ensure the pursuit of a social mission, which is (at least in part) being pursued with entrepreneurial means, particularly statutory distribution restraints are foreseen.¹¹⁴ Admittedly, they vary in strength from jurisdiction to jurisdiction. An Italian *cooperativa sociale* must use at least 50% of its profits to achieve its statutory objectives

¹⁰⁴ In general, Cools (2023), p 98; Fici (2023), p 165 et seqq.; Fleischer (2022), p 831; Liao et al. (2019), p 97 et seqq.; OECD (2023), p 45 et seqq.

¹⁰⁵ See Art. 2, para. 1 Decreto legislativo no. 112/2017.

¹⁰⁶ See Art. 1, para. 1 Decreto legislativo no. 112/2017.

¹⁰⁷ Art. 1, para. 1 Decreto legislativo no. 112/2017: ‘Possono acquisire la qualifica di impresa sociale tutti gli enti privati, inclusi quelli costituiti nelle forme di cui al libro V del codice civile ...’

¹⁰⁸ On this organizational form, Section 3.3.3, below.

¹⁰⁹ See Cian (2020), p 50.

¹¹⁰ Loi n° 2014-856 of 31 July 2014; in more detail, Cozian et al. (2022), para. 51 et seq.

¹¹¹ Cozian et al. (2022), para. 63.

¹¹² From a comparative perspective, Fleischer and Chatard (2021).

¹¹³ See Cozian et al. (2022), para. 66.

¹¹⁴ With further details, Neri-Castracante (2023), p 62 et seqq.

or to increase its assets.¹¹⁵ A French *société coopérative d'intérêt collectif* is required to allocate at least 15% of its profits to a statutory revenue reserve and at least 50% of the remaining profits to a statutory development fund.¹¹⁶ The British CIC is characterized by two safeguards, i.e., an asset lock on its shareholders¹¹⁷ and a dividend cap: it is allowed to distribute a maximum of 35% of the profit to its shareholders.¹¹⁸

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

Differences in voting rights, on the other hand, depend on the basic organizational form: while the Italian and French variations of the social cooperative follow the basic cooperative model of 'one member – one vote', the British company subtype does not vote according to headcount but rather according to capital shares. Where social entrepreneurs assume a specified legal status, the voting rights follow the organizational model on which the status is based.

3.3 Organizational Forms Offered in the United States

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

3.3.1 Low-Profit Limited Liability Companies

First of all, the low-profit limited liability company (L3C) was introduced in Vermont in April 2008 and later in seven other states.¹²³ Conceived by Robert Lang,¹²⁴ the organizational form had – like social entrepreneurship in the United States in general – close links to the third sector: it was, owing to the legal purpose of social

¹¹⁵ Decreto legislativo 112/2017, Art. 3, para. 3.

¹¹⁶ Loi n° 47-1775 of 10.9.1947, Art. 16 and Art. 19 *nonies*.

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

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

¹¹⁹ See Fici (2020), p 24; Neri-Castracante (2023), p 56 et seqq.

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

¹²¹ Loi n° 47-1775 of 10 September 1947, Art. 19 *terdecies* in conjunction with Décret n° 2015-1381 of 29 October 2015.

¹²² For more details on what follows, see Fleischer (2023a), margin no. 26 et seqq., with further references.

¹²³ In greater detail, Brakman Reiser and Dean (2017), p 61 et seqq.; Murray (2016), p 543 et seqq.

¹²⁴ See Lang in Lang and Minnigh (2010), p 15: 'I first conceived of the L3C business organization form in 2005. That name has created some issues. It does not mean that L3C cannot make a substantial profit or that the investors cannot make a substantial profit. The name comes from the basis for the 1969 law that authorized Program-Related Investments (PRIs).'

and sustainable enterprises, supposed to allow such entities to receive special grants (program-related investments) from charitable foundations,¹²⁵ where such grants would otherwise be reserved for purely non-profit enterprises.¹²⁶ The new laws were, however, inadequately drafted and therefore failed to achieve their purpose.¹²⁷ Today, the L3C seems to have led to a dead end.¹²⁸

3.3.2 Social Purpose Corporation

Another variant is the Social Purpose Corporation (SPC).¹²⁹ It was introduced in California in 2011, under the name Flexible Purpose Corporation (FPC); it then appeared one year later in Washington and two years later in Florida. However, it failed to establish itself on the market of organizational forms¹³⁰ and can therefore be neglected here.

3.3.3 Benefit Corporation

In current US practice, the choice of an organizational structure for social entrepreneurs focuses almost exclusively on the so-called benefit corporation.¹³¹ Its intellectual authorship lies with three student friends from Stanford who, after successful careers in business and investment banking, developed an increasingly strong aversion to the relentless pursuit of short-term profit.¹³² With the help of a lawyer, they drafted a model law for a benefit corporation.¹³³ According to the model's provisions, a benefit corporation must commit itself, in its articles of association, to creating a general public benefit.¹³⁴ The first version of this organizational form was introduced in Maryland in 2010.¹³⁵ Today, a total of 36 states and Washington D.C. allow the formation of a benefit corporation, among them Delaware with a slightly different version that is called a public benefit corporation. According to rough estimates, there are now between 7,000 and 10,000 benefit corporations in the United States.¹³⁶

¹²⁵ Lang in Lang and Minnigh (2010), p 15: 'PRI was designed to provide capital to those enterprises that operated in the space between the nonprofit and the place where traditional for-profits existed. That space is the low-profit-zone. In that space, the profit earned is insufficient to meet the risk/reward parameters of normal for-profit-investors. It is that space for which I designed the L3C.'

¹²⁶ In greater detail, Murray (2016), p 543 et seq.

¹²⁷ Bishop (2010), p 246.

¹²⁸ Along these lines, Manesh (2019), p 607, n. 9.

¹²⁹ See Brakman Reiser (2012), p 55; Clarke (2012), p 301.

¹³⁰ For greater detail, see Plerhoples (2023), p 910 et seqq.

¹³¹ For a good overview, Cox and Hazen (2020), p 71 et seqq.

¹³² In this regard, see the self-assessment of Houlahan et al. (2017); in detail, Marquis (2020).

¹³³ Reprinted in Alexander (2014), Appendix A.

¹³⁴ Model Benefit Corporation Legislation (MBCL), § 201(a).

¹³⁵ In greater detail Marquis (2020), p 90 et seqq.

¹³⁶ For a compilation of the available data, Fleischer (2023a), margin no. 17 et seq., with further references.

3.3.4 Characteristics of the US Model

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

In a remarkable contrast to their European counterparts, the US models are not subject to any distribution restrictions, neither in the form of a dividend distribution constraint nor in the form of an asset lock. Although this is not explicitly regulated, it follows from the blanket reference to the general provisions of corporate law. For example, § 362a Delaware General Corporation Law clarifies that a public benefit corporation is a ‘for-profit corporation’. Unlike non-profit corporations in Germany, a prohibition on profit distribution is considered unnecessary for the benefit corporation also because it does not enjoy any tax benefits or other privileges.¹³⁷ Further, the general principles for corporations apply to voting rights: voting is not based on headcount but on capital shares. The basic democratic features of European social cooperatives are alien to the US benefit corporation.

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

3.4 Definitions Under European Union Law

At EU level, various proclamations deal with social enterprises, starting with a Commission Communication of October 2011.¹³⁹ The first definition in a binding legal act can be found in the EuSEF Regulation of 2013.¹⁴⁰ An updated definition is

¹³⁷ On this point, Möslein and Mittwoch (2016), p 427.

¹³⁸ Ventura (2023), p 10: ‘In Europe, social enterprise is traditionally considered an alternative to charities, while the United States has embraced a broader view of SE, including profit-oriented business organisations involved in socially beneficial activities, hybrid dual-purpose businesses mediating profit goals with social objectives, and non-profit organisations engaged in mission-supporting commercial activity.’

¹³⁹ European Commission (2011), p 2 f.

¹⁴⁰ Art. 3(1)(d) of Regulation (EU) No 346/2013 on European social entrepreneurship funds, OJ L 115/18, 25.4.2013.

contained in the Regulation establishing the European Social Fund Plus (ESF+) of 2021.¹⁴¹ According to its Article 2, para. 1, no. 13, a ‘social enterprise’ is

an undertaking, regardless of its legal form, including social economy enterprises, or a natural person which:

- (a) in accordance with its articles of association, statutes or with any other legal document that may result in liability under the rules of the Member State where a social enterprise is located, has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes, and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives;
- (b) uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective;
- (c) is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact.

In this definition, it is noteworthy, on the one hand, that the early catalogue of EMES criteria¹⁴² has left deep traces and that the prioritization of the social objective is bindingly prescribed in the tradition of the European model. On the other hand, it is striking that some of the organizational forms or statuses for social enterprises in the Member States have already incorporated the requirements of EU law, presumably also to benefit from corresponding EU funding.¹⁴³

4 Open Questions and Research Perspectives in the Law of Social Enterprises

Social entrepreneurship is not merely a trend; rather, it will most likely remain a ‘growth industry’ also in the medium term.¹⁴⁴ There are at least three reasons for this. First of all, there are numerous overlaps with the key theme of sustainability, even if social and sustainable enterprises are not fully congruent.¹⁴⁵ Secondly, in the emerging ESG era, the social component will soon be spelt out in more detail alongside the environmental component. Thirdly, social entrepreneurship fits well into the

¹⁴¹ Regulation (EU) 2021/1057, OJ L 231/21, 30.6.2021.

¹⁴² See footnote 70 above, as well as the corresponding text.

¹⁴³ See Fici (2020), p 9: ‘This definition [of 2013] has strongly influenced the development of the national legislation on SE, both encouraging its adoption and shaping its features and contents’; see also Fici (2023), p 157.

¹⁴⁴ As previously and accurately assessed by Möslein (2017), p 175.

¹⁴⁵ On both aspects, see Mittwoch (2022), p 240 et seqq.

socio-political zeitgeist that – rightly or wrongly¹⁴⁶ – sees the basic structures of capitalism subjected to fundamental criticism.¹⁴⁷ Considering this, the law of social enterprises will also gain in importance. Fundamental discussions at the national and international level will likely focus on the overarching legal framework, alternative regulatory techniques, and organizational forms for social enterprises.

4.1 A Framework Regulation for the Social Economy in Germany?

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

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

¹⁴⁶ See the worthwhile treatise by Plumpe (2019).

¹⁴⁷ See, for example, Pistor (2019), who is criticized, however, by Schäfer (2021), p 854.

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

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

¹⁵⁰ In detail, OECD (2022), p 27 et seq.

¹⁵¹ See Karré (2021), p 296; OECD (2023), p 21.

¹⁵² Karré (2021), p 296: ‘The main question here is whether social businesses can or should be seen as a group or subset of organisations that differ so significantly from more traditional organisations operating in social-welfare provision and have such a big beneficial impact on society that a special treatment is warranted.’

4.2 A Special Organizational Form for Social Enterprises in Germany?

From a comparative law perspective, the question arises as to whether an independent organizational form for social enterprises makes sense or is even necessary in Germany. After all, 21 of 28 Member States in the European Union have (at least) one specific organizational form for social enterprises.¹⁵³ In the United States, the benefit corporation is available in 36 states and Washington D.C.

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

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

¹⁵³ Fici (2023), p 155.

¹⁵⁴ SEND (2022), p 16 with footnote 14.

¹⁵⁵ Ibid.; from an academic perspective, see also Momberger (2015), p 307 et seqq.

¹⁵⁶ In general, Beuthien (2018), Einl., para. 2: 'They [= German cooperatives] therefore (unlike the French *économie sociale*) do not pursue public service objectives; charitable activities may only be a secondary purpose for them' (translation by the authors); see also Momberger (2015), p 79 f.

¹⁵⁷ See, for example, Momberger (2015), p 312 et seqq. and *passim*; on the state of the debate most recently, Fleischer (2023a), margin no. 46 et seqq., with further references.

¹⁵⁸ See, for example, Habersack (2020), p 646 et seq.; Spindler (2023), p 595.

4.3 Regulatory Techniques for New Organizational Forms and Other Frameworks of Association

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

4.3.1 Creation of a New Organizational Form

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

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

4.3.2 Subtypes of Existing Organizational Forms

As a small-scale solution, a subtype of an existing organizational form can be targeted, one which builds on the foundations of an established form and adds some special rules to it.¹⁶⁶ This was the approach taken, for example, by the Italian legislature with the *cooperativa sociale*, which is a special version of the cooperative. The same is true for the English CIC, which is based on the existing rules for companies,¹⁶⁷ and for the benefit corporation, which is a ‘subtype of the corporation’.¹⁶⁸

¹⁵⁹ On what follows, see already Fleischer (2023b), under V.

¹⁶⁰ Beuthien (1989), p 11, with further references.

¹⁶¹ Stiftung Verantwortungseigentum (2023), p 1; see also Frankfurter Allgemeine Zeitung (2023).

¹⁶² See Sanders et al. (2021); see also Obernosterer (2023), para. 10 et seqq.

¹⁶³ Stiftung Verantwortungseigentum (2023), p 2.

¹⁶⁴ This is clarified by Sanders (2022), p 628.

¹⁶⁵ Fleischer (2022), p 830.

¹⁶⁶ Lieder (2018).

¹⁶⁷ See Lloyd (2010), p 33: ‘... the CIC piggybacks on existing company legislation’.

¹⁶⁸ Manesh (2019), p 610.

In Germany, organizational subtypes have been introduced at various occasions in recent times,¹⁶⁹ but not in the area of social enterprises.

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

4.3.3 Legal Status

Adjacent to these two regulatory techniques lies a third, which is referred to internationally as legal status,¹⁷¹ legal qualification,¹⁷² or legal certification.¹⁷³ With such legal status, the legislature provides for certain special rules that are available as a regulatory option open to several or all forms of companies and associations. Early manifestations of this approach can be found in Belgium, where the *société à finalité sociale*, which is also open to corporations, was created in 1995,¹⁷⁴ and in the 2003 Finnish law on work-integrative social enterprises.¹⁷⁵ A better-known example is the Italian *società benefit* of 2016, which, unlike the US benefit corporation, is not an organizational subtype,¹⁷⁶ but with its dual purpose is available to all partnerships and corporations as well as cooperatives. The same applies to the French *société à mission* of 2019 – a status that all commercial companies can acquire.¹⁷⁷ Since 2017, there also exists, in Luxembourg, the *société d'impact sociétal* as a legal status for joint-stock corporations, limited liability companies, and cooperatives,¹⁷⁸ and since 2022 Spain allows joint-stock corporations and limited liability companies to be designated *sociedades de beneficios e interés común*,¹⁷⁹ though this status awaits further elaboration through a regulation. In Germany, although functioning from a slightly different perspective, companies can enjoy a non-profit tax status and be

¹⁶⁹ See Fleischer (2022), p 830 f.

¹⁷⁰ See Fleischer (2014), p 1089, with further references.

¹⁷¹ Liptrap (2020), p 496 with footnote 1; OECD (2023), p 45 et seqq.; see also Cools (2023), p 98 et seqq.

¹⁷² Fici (2023), pp 153, 165 et seqq.

¹⁷³ Liao et al. (2019), p 97 et seq.

¹⁷⁴ Loi of 13 April 1995; on this law, see Hiez (2023), p 445 et seqq., with further references. However, this legal status was abolished in 2019 in the course of the reform of Belgian company law and replaced by a cooperative variant, the *société coopérative comme entreprise sociale*. For more details, see Aydogdu and Nickels (2018), p 98 et seq; Cools (2023), p 98.

¹⁷⁵ Law No. 1351/2003 of 31 December 2003; in more detail, Kostilainen et al. (2021), p 55 et seqq.

¹⁷⁶ See Cian (2020) p 50: ‘non un nuovo tipo societario’.

¹⁷⁷ See Jean-Noël Guerini, in Rapport Lescure et al., N° 1237, Assemblée Nationale, Enregistré à la Présidence de l'Assemblée nationale le 15 septembre 2018, Tome II, p 127: ‘[Ce] statut se cumulera avec les statuts existants: société anonyme à mission; société par actions simplifiée (SAS) à mission; société à responsabilité limitée (SARL) à mission; entreprise unipersonnelle à responsabilité limitée (EURL) à mission. Il ne s'agit pas de créer un statut d'entreprise supplémentaire’; from a comparative perspective, Fleischer and Chatard (2021), p 1525.

¹⁷⁸ Loi de 12.12.2016.

¹⁷⁹ Ley no. 18/2022, 28.9.2022.

titled a gGmbH (§ 4 GmbHG), a gUG,¹⁸⁰ a gAG¹⁸¹ and, according to the prevailing opinion, a geG;¹⁸² there is, however, no similar designation for a non-profit partnership.¹⁸³ At the European Union level, the European Parliament has recommended the introduction of a label for social and solidarity-based enterprises.¹⁸⁴

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

4.3.4 Private Certification

Finally, one could consider private certification mechanisms for social enterprises. The international prototype is the Certified B Corporation (in short: B Corp), a private certificate from the non-profit organization B Lab, headquartered in Pennsylvania.¹⁸⁸ This certificate is awarded after successful completion of a standardized private certification process (B Impact Assessment) and should not be confused with the benefit corporation as an organizational form, even though the same idea generators stand behind both.¹⁸⁹ Today, B Corp is a globally established certificate of quality, and there are over 5,000 certified B Corporations in more than 70 countries across 150 different sectors.¹⁹⁰ As regards Germany, the B Corp directory now includes roughly 50 entries from 12 different business sectors. In addition, interested companies can also make use of domestic certification mechanisms: TÜV Rheinland, for example, offers several sustainability management certificates,¹⁹¹ and non-profit organizations can obtain the 'PHINEO Wirkt!' seal.¹⁹²

An advantage of private certification is that it relies solely on market forces and does not require any legislative involvement.¹⁹³ In addition, competition between

¹⁸⁰ Federal Court of Justice (BGH), 28.4.2020 – II ZB 13/19, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2020, 781.

¹⁸¹ Rozwora (2021).

¹⁸² Oldemeier and Seeck (2023).

¹⁸³ Orth (2022); for amendments *de lege ferenda*, Wedemann (2016).

¹⁸⁴ European Parliament resolution of 5 July 2018, 2016/2237(INL); on this, see, for example, Liptrap (2021a); Vargas Vasserot (2023), p 33.

¹⁸⁵ See Fleischer and Chatard (2021), p 1531; Sørensen and Neville (2014), p 281.

¹⁸⁶ Fici (2017), p 21.

¹⁸⁷ Fleischer and Chatard (2021), p 1531; Sørensen and Neville (2014), p 277 f.

¹⁸⁸ See the monograph by Chris Marquis (2020).

¹⁸⁹ In greater detail, Fleischer (2023a), margin no. 3 et seq., with further references.

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

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

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

¹⁹³ Spindler (2023), p 595.

rival certifiers could serve to promote tailor-made certification criteria and effective autonomous control mechanisms.¹⁹⁴

4.4 Enforcement of the Social Mission and Prevention of Social Washing

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

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

5 Conclusion

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

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Declarations

Conflict of interest The authors declare that there is no known conflict of interest or competing interest that could have influenced the work presented in this article.

¹⁹⁴ See Möslein (2021), p 11.

¹⁹⁵ Defourny et al. (2021b), p 6.

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