

Do EU legislation and economic policies act in concert in developing
a harmonised business theory for social economy and social enterprise?
A European review from 1990 to 2011
“...’cause the Times They Are A-Changing”

Social enterprise, social entrepreneurship and social business have been pushed to the forefront of the social and economic stage, in the hope that they will provide solutions to the crisis that has been tearing Europe apart since 2008. This is, moreover, a global trend. These ‘solutions’ are increasingly being discussed as a potential substitute for the third sector, the third system, the non-profit sector, in the fight against exclusion and poverty. The social economy, in the form of statutory organisations, cooperatives, mutual societies and associations, has received varying degrees of recognition in the past. What are the reasons for these trends?

Economic commentators now regard these ‘hybrid models’ as essential factors for sustainable development. This trend is reflected in different ways in the different EU Member States, depending on the cultural, social and political context: utopian socialism, ‘labour movement’, ‘social Catholicism’, philanthropy, ‘gift economy’, the role of civil society, etc.

Throughout history, the role of social economy has above all been to integrate social considerations into political and economic life. While joint stock companies have been the backbone of Europe’s business economy since the second half of the 19th century, a number of major crises have led to the development of social economy clusters¹ many of which have survived, albeit in a minor capacity.

During the 1990s, the European Commission granted some legitimacy to social economy organisations, because they provide both market and non-market services. Has it taken advantage of their specific legal characteristics to further its economic objectives? Has the legislative and regulatory framework furthered their social objectives? Why is there so much interest in social entrepreneurship, which the Commission² refers to as “social business”?

How have our understandings of the social economy changed over the last 20 years?

Over this period, a growing literature on the economics and sociology of the social economy and social enterprises has been published, particularly by ISTR, EMES, CIRIEC, etc. At the same time, analyses of European legislation have focused essentially on ‘services of general interest’ – notably the social services – which are frequently managed by the social economy.

In the late 1980s, as awareness of the economic importance of the association sector grew, talks³ in France focused on the possibility of developing new statutes for ‘hybrid enterprises’, following the Bloch-Lainé report on corporate reform (1963) and the Sudreau report on the creation of non-profit organisations (1975): legislation modelled on the practical Anglo-Saxon example seemed to be a

¹ LEVEQUE Benoît (2011), “Réflexions sur la conjoncture économique et politique : un monde qui se défait, un monde à reconstruire”, Dossier conjoncture l’Action nationale, pp.157-175

² EUROPEAN COMMISSION (25/11/2011), Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions, “Social Business Initiative, Creating a favourite climate for social enterprises, key stakeholders in the social economy and innovation” – COM(2011) 682/2

³ ALIX Nicole & CASTRO Sami (1990), “L’entreprise associative, Aspects juridiques de l’intervention économique des associations”, *Economica*, 228 p.

good option; under such legislation, all corporate bodies would have the same legal statute but would then be classified according to their purpose or their use of profits⁴. German legislation, distinguishing between companies (or organisations that operate as companies) and other organisations has been another line of thought. This question was explored again in 1998⁵, for the benefit of 'social inclusion enterprises'.

As far as we know, the subject of new statutes for 'social economy hybrid enterprises' has never been addressed at a European level. Debates have focused on the utility of a 'European statute for Cooperatives' (which was introduced in 2003⁶, two years after the 'European Company statute'). For mutual societies and associations, any attempts to address new statutes have been unsuccessful to date, as the Commission's proposals have been withdrawn. However, the possibility of establishing a 'European Foundation statute' is currently being discussed⁷.

Therefore, very little research has been conducted into the need to update corporate legislation to include 'sustainable development' and more 'hybrid enterprises'. Any progress on this matter in the European Union results essentially from case law arising from disputes. However, things are moving both in the USA and in Europe, albeit for different reasons. The USA wants to ensure that corporate social responsibility requirements are met. Europe has two aims: firstly, to promote private sector investment in social programmes, and secondly to bring corporate legislation into line with modern trends.

What connection is there between progress in economic theory and the law?

This report discusses the changes that have occurred in Europe over the last 20 years. Based on the existing literature and on my own experience in the social economy sector, I have explored how changes in our environment affect the legal framework from two angles:

- organisational statutes
- the legislation applicable to the production of goods and services

My report is not really an academic research paper. It highlights how long it takes to translate practical and research analyses into public policy. It sets out several research recommendations whenever possible, based on the observation that:

=>Economic theory has moved on:

- from considering the social economy as a sector, an answer to government inadequacy and 'market failure' (and therefore market dominance),
- to recognising a partnership-based approach to the different methods of economic coordination: the market cannot operate without government coordination and cooperation mechanisms;
- by positively acknowledging that the Social Economy is not a sector for the production of goods and services but a specific form of governance based on cooperation, according to principles defined by a network of people. This is consistent with the major innovations embodied in the 'commons' (digital and collective goods);
- which has to be taken into consideration within a 'supply and demand' market, where different types of social enterprise co-exist.

⁴ ALIX & CASTRO, op.cit

⁵ LIPIETZ Alain (1998) "L'opportunité d'un nouveau type de société à vocation sociale", Rapport à Madame Aubry, ministre de l'Emploi et de la Solidarité, lettre de mission du 17 septembre 1998

⁶ EUROPEAN COMMISSION, 22/7/2003 CE regulation no. 1435/2003 of the Council on the "Statute for a European Cooperative Society" (ECS)

⁷ EUROPEAN COMMISSION, proposal for a "European Foundation statute", COM(2012)35/2

=>Legal systems have evolved at a different pace:

- European law treats the social economy and the 'third sector' as if they were evidence of 'market failures' (regulation of 'services of general interest') or 'governmental failures' (public procurement directives): even though the crisis has promoted greater flexibility, there is no positive European law relating to 'services of general interest': the market, even though unattainable in reality, is still considered an ideal to be reached, the most appropriate way to fulfil all types of function. Neither is there any specific legal framework for multi-stakeholder initiatives, for public or collective management and proprietorship, or for the hybridisation of resources within the same organisation;
- various organisational models are still subject to the dominance of the joint stock company model;
- a 'social enterprise' marketplace is emerging for investors: the main purpose of encouraging such development of social enterprises is to attract investors, not to promote proprietorship or collective management, and to do so in accordance with different types of governance by different types of stakeholders;
- while innovative changes have been made to partnership agreements and business contracts concerning 'joint stock companies' researchers have bypassed one important area: a theoretical explanation of the links between methods of governance and their benefits to production.

While the financial disaster has clearly revealed the cost of non-diversity, the European Union does not seem willing to relinquish its 'neutrality' regarding proprietorship and business management methods.

As research has not yet established any global theory about the link between different governance methods and the means of production of goods and services, there is no objective reason not to promote a set of co-existing/pluralistic corporate models rather than just ONE model, in order to encourage diversity as opposed to monoculture, and to prevent crisis rather than just to cure it.

I- EVOLUTION OF THE CONCEPT OF THE 'SOCIAL ECONOMY' THROUGH ECONOMIC THEORY, 1990–2011

In 2009, Joseph Stiglitz pointed out the lack of attention paid to social economy enterprises, such as cooperatives, mutual societies and non-profit organisations⁸. His call for a plural economic system was the culmination of a 20-year increase in awareness.

1 – The social economy and the third sector, solutions to market and government failures:

Jacques Delors coined the term "third sector"⁹ in the late 1970s, by analogy with the expression "third world" invented by Alfred Sauvy and (wrongly) interpreted as referring to countries trying to escape the capitalism/communism dichotomy and the two-pillar, private/public sector system. The need for it was first exposed by the fact that neither private nor public sectors could provide the right

⁸ Joseph STIGLITZ (2009), "Moving beyond market fundamentalism to a more balanced economy", *Annals of Public and Cooperative Economics*, Vol 80 no. 3, 3560

⁹ SWATON Sophie (2011) "Une entreprise peut-elle être sociale dans une économie de marché ?" Les Editions de l'Hèbe, Genève, 90 p.

balance. Some more positive justifications then emerged in response to certain needs (voluntary solidarity or stimulation of passive social spending).

The Johns Hopkins 'Comparative Non Profit Sector project', launched in 1990 under the direction of Lester Salamon¹⁰, has provided an irreplaceable empirical description of the non-profit sector, its size and its scope¹¹, and of the importance of volunteer work¹².

In 1998, this description led Salamon and Anheier¹³ to explain the analogy between the size of the non-profit sector and the type of society in which it evolves (liberal, social-democratic, corporatist, static) by the 'social origins' theory. But according to Antonin Wagner¹⁴, this theory is not distinct from the government and market failure approach, or from the 'two-sector' view of society.

Alain Lipietz¹⁵ specified that an 'economic sector' is characterised by the type of economic units that it comprises, the link between these units and the people who work in them, their beneficiaries, financing and regulation. Two ideal-types emerge: the tradeable sector (in which an offer is validated by a sale) and the public sector (which is controlled by elected officials and raises taxes). These ideal-types provide not only an ideal reference, but a practical one too: any discrepancies are regarded as exceptions to the rule and are carefully controlled by the law.

In 2000, Anheier¹⁶ used the term "third sector". He observed that the introduction of 'New Public Management' coincides with significant growth in the economic dimensions of the third sector (employment and turnover), resulting from the greater use of third sector organisations as service providers, within the framework of new public/private partnerships, whereas the other features of the third sector, such as the role of members, volunteer work and charity, have had less prominence. This evolution is more significant in liberal countries than in social-democratic countries.

The advantages of developing a 'collective heritage' like that of the social economy, through cooperatives and mutual societies, have been less clearly identified; such structures can maintain an indivisible capital reserve, which is independent of any 'shareholders' funds' and which is therefore available at a lower cost for creating jobs and delivering services to users. The establishment of this joint capital relies on a commitment by the partners, employees and users to 'give up their share' (besides their initial investment, excluding any rise in value).

The market is still regarded as the most relevant means of coordinating all types of transaction.

¹⁰ SALAMON Lester M. (2010), "Putting the civil society on the economic map of the world", "Measuring the Economic Value of volunteer work globally : concepts, estimates, and roadmap to the future", *Annals of Public and Cooperative Economics*, Vol 81 no. 2, pp.167-210

¹² SALAMON Lester M., SOLOWSKI S.Wojciech & HADDOCK Megan A. (2011), "Measuring the Economic Value of Volunteer work globally : concepts, estimates, and a roadmap to the future" *Annals of Public and Cooperative Economics*", Vol 82 no. 3, pp. 217-252

¹³ SALAMON L.M. & ANHEIER (1998) "Social origins of civil society: explaining the non-profit sector cross-nationally", *Voluntas*, 9(3), pp.213-260

¹⁴ WAGNER Antonin (2000) "Reframing "Social Origins" Theory: The Structural Transformation of the Public Sphere" *New School University, International Society for Third Sector Research*

¹⁵ LIPIETZ Alain Lipietz, op. cit.

¹⁶ ANHEIER Helmut, *Dimensions of the Third Sector: Comparative Perspectives on Structure and Change*, Centre for Civil Society London School of Economics Central Policy Unit Seminar "The Third Sector: Beyond Government and Market" Hong Kong, 25 July 2000

However, the 'blood donation' problem has begun to cast some doubt on this assumption. That problem was first noted in 1992¹⁷. In 1997, Titmuss¹⁸ observed that the self-interested behaviour on which market relations are based is less efficient in allocating a scarce resource than is voluntary work coupled with para-state institutions. Later, Philippe Steiner¹⁹ pointed out the development of the industrial dimension of blood transfusion: the growing gap between supply and demand creates a 'market'. He identified two types of motivation at the origin of economic behaviour: the *extrinsic* motivation of price effect should not be confused with *intrinsic* motivation, which is based on individuals finding within themselves the motivation to behave in a certain way (for example, token remuneration).

Eight years later, Jean Tirole²⁰ also attempted to understand something that traditional economic theory cannot easily explain: why do people choose to do things that are of very little personal benefit to themselves? He pointed out that the price theory no longer works if it is unclear whether the individual is motivated by generosity or by money; people give more when they are being watched by others.

This is the first challenge to classical economic theory, which is based on the self-serving preferences of individuals, and which posits in consequence that only capitalist organisations are efficient and is incapable of explaining why companies pursue societal objectives. Nor does traditional economic theory pay any attention to the importance of cooperation and good understanding between persons at work (or in society more generally speaking) to promote social cohesion and innovations. Rationalism is supposed to lead 'automatically' to performance according to market principles. Citizens' know-how is not recognised.

2 – A partnership-based approach to concomitant and competing methods of coordination

Some have attempted to show the role played by social economy organisations in stabilising the markets, for example the banking, insurance, social protection and personal assistance services markets.

According to Odile Castel²¹, several methods of production can exist alongside each other:

- capitalist activities
- production and distribution of free public services
- production and distribution of tariffed public services
- activities of pure reciprocity
- risk sharing activities

¹⁷ ALIX Nicole (1993), "Impact of European law on social welfare associations", ISTR Conference Pecz, 1994 ; "Associations et pouvoirs publics : l'impact de la construction communautaire sur leurs relations en matière de gestion d'établissements et services sociaux, RECMA no. 47, 3ème trimestre 1993" pp.92-99

¹⁸ TITMUSS R. M. (1997), "The gift relationship. From Human blood to social policy", London, London School of economics Books (1st edition 1970)

¹⁹ STEINER Philippe (2001), "don de sang et don d'organes : le marché et les marchandises fictives", Revue française de sociologie, 42-2, PP357-374

²⁰ TIROLE Jean (2009), "Intrinsic motivation, incentives and social norms", Revue économique 2009/3, volume 60, p.577-589

²¹ CASTEL Odile (2006 ?) "La réciprocité : principe de comportement économique en conflit/coopération avec le profit et la redistribution", CREM (Centre de Recherches en Economie et en Management), Faculté des sciences économiques, Université de Rennes I, Acad, Political Economy

- economic solidarity activities with sales in the market
- economic solidarity redistribution activities, with sales in the market

The 'social economy' encompasses the latter three. Castel argues that social economy organisations on the one hand have a more complex relationship with capitalist enterprises than merely compensating for 'market failures': the relationship between the two may be based on competition or on cooperation, with the social economy producing non-profitable products, reducing upward pressure on wages, creating new opportunities for capitalist enterprises (access to non-profitable social economy products), and improving the qualifications and health of workers. On the other hand, the social economy can have a contractual or a complementary relationship with the government.

Jean-Michel Servet²² refers to Polanyi to prove that pure 'market' monoculture is historically exceptional. According to Polanyi, the three forms of economic 'integration' (reciprocity, redistribution and market exchange) occur side by side within the same society: "*In the same manner in which either reciprocity, redistribution, or householding may occur in a society without being prevalent in it, the principle of barter also may take a subordinate place in a society in which other principles are in the ascendant*" (POLANYI, [1944], 2001, p. 59). These different forms of 'integration' are not development 'stages', and no succession over time is implied. Several secondary forms of 'integration' may exist alongside the dominant form, which may disappear for a while and then return.

Polanyi claims that the market cannot be replaced as a general reference framework, unless the social sciences develop a wider framework to which the market itself could refer. But Servet argues that the market, even when it appears to be *hegemonic*, is incapable of functioning autonomously on a lasting basis. As one form of 'integration' predominates over the others, hence the difficulty of establishing reciprocity in societies dominated by a market exchange principle.

Elinor Ostrom²³ points out that institutions are seldom either fully private or fully public – "market-driven" or "state-run". No market can exist for long without having public institutions in the background to support it.

The so-called 'social and solidarity' economy has some of the characteristics of reciprocity; it is based on a principle that distinguishes it from other methods of production, distribution and financing, which are subject to redistribution laws, market forces and domestic constraints. Which is exactly what Lipietz²⁴ pointed out back in 1998.

According to Favreau, three conflicting approaches to social development have emerged through these debates²⁵: the neo-liberal approach, the social/statist approach and the partnership-based approach:

²² SERVET Jean-Michel (2007), "Le principe de réciprocité chez Karl Polanyi, contribution à une définition de l'économie solidaire", Institut universitaire d'étude du développement (IUED, Suisse) – in *Revue Tiers Monde*, 2007/2, no. 190

²³ OSTROM Elinor (1990) "Governing the Commons: The Evolution of Institutions for Collective Action", Cambridge University Press; (2010) "Gouvernance des biens communs, Pour une nouvelle approche des ressources naturelles", Edition de Boek, 2010

²⁴ LIPIETZ, op.cit.

²⁵ FAVREAU Louis (2003) "L'économie sociale et solidaire: pôle éthique de la mondialisation?" *Economie éthique*, no. 4, UNESCO, Paris, 2003

- under the neo-liberal approach, the capitalist economy must be dominant, the statist economy must offer no more than a minimum range of public services, and the social economy must confine itself to the social management of poverty.
- under the social/statist approach, the statist economy is unconditionally protected from the threat of neo-liberalism; hence there is a tendency to subjugate or to mistrust the social economy.
- under the partnership-based approach, a 3-way synergy develops. The state allows itself to be questioned and challenged by social economy organisations and by social movements, and agrees to co-produce public services and to coexist with new democratically-governed institutions.

Of course, each form of socialisation has its faults: market exchange is self-serving, redistribution is bureaucratic and reciprocity engenders favouritism. It is precisely through the coexistence of these three approaches and these three sectors (plus the huge non-monetary sector, which is almost entirely based on reciprocity) that the flaws in each can be controlled and compensated for. The answer certainly does not lie in implementing competition rules, nor in formally controlling spending and public procurement in the third sector. Neither of these solutions is appropriate

Polanyi's views find an echo in the social doctrine of the Catholic church²⁶: *"It is in the interests of the market to promote emancipation, but... it cannot rely only on itself... The market does not exist in the pure state... In commercial relationships the principle of gratuitousness and the logic of gift as an expression of fraternity can and must find their place within normal economic activity. ...What is needed, therefore, is a market that permits the free operation, in conditions of equal opportunity, of enterprises in pursuit of different institutional ends. Alongside profit-oriented private enterprise and the various types of public enterprise, there must be room for commercial entities based on mutualist principles and pursuing social ends to take root and express themselves. It is from their reciprocal encounter in the marketplace that one may expect hybrid forms of commercial behaviour to emerge, and hence an attentiveness to ways of civilising the economy."*

Thus, according to one of the leaders of the social economy, while the latter is not the third path so fervently hoped for by those who object to both statism and capitalism, it does provide a "breathing space" that makes the flaws in these two models more bearable²⁷.

3 – The social economy as a specific method of governance:

Cooperation is an alternative to the market and to hierarchy as a means of coordination. According to Bernard Enjolras²⁸, it forms the conceptual base common to all social economy enterprises. Such enterprises include associative firms, member-based organisations and entities that Charles Gide called "cooperative associations". Enjolras demonstrates that these enterprises, with their cooperation-based governance systems, are particularly relevant to achieving non-monetary objectives in a context of market and transaction failure. This explains their resilience, even in the face of competition. Hence Enjolras argues that the social economy enterprise is comparable with

²⁶ BENOIT XVI, La doctrine sociale de l'Église catholique, *Caritas in veritate*, encyclique du 29 juin 2009, chapitre III "Fraternité, développement économique et société civile"

²⁷ SEYS Jean-Claude (2012) "L'avenir de l'économie sociale", Les Carnets des Dialogues du matin, Institut Diderot

²⁸ ENJOLRAS Bernard (2009), "Market, hierarchy and cooperation: transaction cost and the theory of associative firm", Institute for social Research, working paper

the governance structures of social networks, open source systems and wikis, which could lead to the emergence of a “digital social economy”, a new area of research strongly to be recommended.

The digital revolution and the changes in the energy sector have indeed led to the creation of new collective enterprises.

Dacheux and Goujon²⁹ have shown that the transformation of modern capitalism has been marked by a dual, contradictory trend: on the one hand, the necessity of disseminating information freely and of identifying participatory forms of collective intelligence; on the other hand, the desire to introduce new property rights to safeguard market arbitrage and hence create new sources of profit. The growing importance of intangible property (currency, information, services, intangible assets, research, etc.), which can be duplicated without limitation at very little cost, has led to a redefinition of economic principles: scarcity is no longer normal, so the market is not necessarily the most efficient means of allocating scarce resources. Therefore, knowledge and culture can now be private goods (which people compete to acquire, and from which they may be excluded), public goods (no competition, no exclusion), collective goods (exclusion, no competition) or common goods (competition, no exclusion).

By regarding social cohesion as a source, rather than a product, of wealth, we demonstrate the importance of a new means of coordinating exchanges: the ‘deliberation’ process, with full consultation between stakeholders.

Hence the relevance of the ‘commons’ approach in renewing the analysis of the social economy. Elinor Ostrom³⁰ observed that what is lacking is a sufficiently precise logic of collective action, according to which a group of “appropriators” (Ostrom’s term to designate the people who belong to or manage the ‘commons’) could voluntarily organise themselves in such a way as to preserve the residual value of their own efforts. There are a great many examples of self-governed enterprises, but, due to a lack of theoretical explanation – based on human choice – major policy decisions are still based on the assumption that individuals do not know how to organise themselves and will always need to be organised by external authorities.

Non-cooperation models are useful tools for predicting behaviour among stakeholders in large-scale common resources, when they do not communicate with each other. They are much less useful in a context where the stakeholders communicate with each other and repeatedly interact in a localised physical environment. The ‘tragedy of the commons’ model shows what people do when they are in a situation that they cannot change, not when they are independent enough to create their own institutions and influence standard setting and perceived benefits.

Worse still, when models based on the assumption that individuals do not communicate and cannot change the rules are applied outside their intended scope, they can do more harm than good. For example, they can destroy the institutional capital built up over years of experience.

Bernard Billaudot³¹ applies this network approach – which seems not very far removed from the ‘information asymmetry’ theory, thus explaining the confidence in non-profit organisations – to

²⁹ DACHEUX Eric & GOUJON Daniel (2012), “La cohésion sociale n’est pas le fruit de la rareté : pour un renouveau du paradigme économique”, *Annals of Public and Cooperative Economics*, 83 :1, 2012, pp 83-99

³⁰ OSTROM Elinor (2010) op.cit.

³¹ BILLAUDOT Bernard (2011) “Une nouvelle cosmologie pour un développement durable”, conférence débat du 22 février 2011 (text no. 1); “Qu’est-ce que l’économie sociale et solidaire ? une nouvelle réponse théorique”, septembre 2010 (text no. 2 ; “Ecologie, justice sociale et

‘sustainable development’, proposing a new vision of modern society in which the priority of ‘good’ would once more go hand in hand with the priority of ‘fairness’ in societal choices.

The social economy is distinguished by the institutional relationship between its organisations and their stakeholders. This relationship is separate from the transactions taking place within each organisation, and is shaped by a set of technical and social standards specific to the network containing all or some of the stakeholders. Hence Billaudot arrives at his conclusion, that the social economy participates in associating the priority of ‘good’ with the priority of ‘fairness’, in a new approach to sustainable development.

But these forms of institutions, based on the reciprocity principle, are minor forms in a society where the market principle is dominant. It is interesting to analyse the success story of social business and social enterprise in this respect.

5 – In a ‘supply/demand’ market composed of social enterprises:

The social enterprise concept is spreading in response to several expectations:

- impoverished and debt-ridden States are no longer seeking just to pass on some of their former prerogatives to private parties, but are also encouraging private investors to become involved in a *social investments market*; *capitalism* is attempting to overcome the obstacles to its development through *corporate social responsibility* (viewing practices from an ethical perspective) and by attacking the market of the most underprivileged (*‘Bottom of the Pyramid’* strategy);
- the failure of socialist countries and bureaucratic administrations is leading to the adoption of *corporate management methods* in an attempt to solve *social issues* more effectively.
- public goods and ‘general interest’ services, in particular social services, are now regulated within a competitive system controlled by national and European authorities and in the context of a global services market.

Using the classification of the EMES³² network as a reference, it is possible to identify at least 4 types of social enterprise:

- the social enterprise as a means for associative organisations to achieve self-sufficiency
- the social enterprise as a ‘social economy’ process
- the social enterprise set up by a social entrepreneur, for the purposes of social innovation
- the social enterprise resulting from ‘corporate social responsibility’ (CRS) policies implemented by for-profit organisations in partnership with the civil society

The first two processes arise from the social economy, while the second two arise essentially from the business community. The latter are highly active: dedicated to growth by its very nature, capitalism is looking for new opportunities in the social arena and in the ‘Bottom of the Pyramid’ market.

The USA government’s ‘Federal Department of Foreign Affairs’ supports the so-called ‘impact economy’, in which government should work with civil society and the private sector to create a positive social and environmental impact while generating economic value. It sees the ‘impact

développement durable ; éléments d’analyse pour une refondation de la gauche” proposition pour une journée de réflexion avec des membres de Europe écologie- les Verts) (text no. 3)

³² DEFOURNY Jacques & NYSSSENS Marthe (2008) “Fondements d’une approche européenne de l’entreprise sociale”, Cahier de recherche, Ecole de gestion de l’Université de Liège, 18p.

economy' as a "tremendous opportunity to address investment in a way that enables the United States' greater foreign policy goals and creates sustainable value for business."³³

Defourny and Nyssens³⁴ highlight the differences between the European approach and the US approach, which itself is divided into the "social innovation" school of thought and the "earned income" school of thought. They say:

- The governance structure, in the European context, is regarded as a means of supporting the organisation's social mission, while the US school believes that a social enterprise can adopt any legal form, ranging from a for-profit organisation to a public entity. This scarcely respects the principle of member-autonomy. Much importance is attached to the individual profile of social entrepreneurs, and there is less focus on collective dynamics.
- In an ideal-type EMES social enterprise, the resources are often hybrid in nature (coming from trading activities, public subsidies, volunteer work or donations); this conception is shared by the US social 'innovation school', but is less (or not at all) endorsed by the 'earned income' school, which believes that sales proceeds are key. This belief is in line with some public policies in Europe.
- In Europe, the production of goods or services is generally incidental to the pursuit of the organisation's main social mission, a conception that is shared by the 'social innovation' school; the 'earned income' school regards commercial activity as a source of income, which can therefore be completely separate from the social mission.
- US promotion of social innovation relies primarily on branding or 'labels', which are forms of recognition by the market. Europe, on the other hand, relies more on public guarantees based on statutes and supervision.

The above comparisons show that different conceptions of social enterprise can have different theoretical foundations. Dennis R. Young³⁵ has developed a unified theory of social enterprise, based on the principle of supply and demand:

- different types of *demand* for services produced by these enterprises: private individuals who wish to buy them, companies that want to incorporate them into their corporate strategy, governments who are trying to find a better response to social needs;
- different types of *supply*, arising from different motivations and incentives: social entrepreneurs pursuing public and personal objectives; non-profit organisations looking for new means, including financial means, of fulfilling their social objectives; investors, donors and volunteer workers driven by social and personal motivations.

There is therefore a real social enterprise 'market', which balances out supply and demand and which is supported by legal frameworks and resource organisations³⁶. In response to that reality, what is happening in the European Union? What framework is European law providing for the pursuit of community social objectives? And for the support of the social economy's distinctive forms of governance?

³³ BALDERSON Kris & FAIZ Lala (2012) "Accelerating the Impact Economy through Investment and innovation", Stanford Social Innovation Review

³⁴ DEFOURNY Jacques & NYSENS Marthe (2010), "Approches européennes et américaines de l'entreprise sociale : une perspective comparative", ADDES Seminar 9/11/2010

³⁵ YOUNG Dennis R. (2007), "A Unified Theory of Social Enterprise", Working paper 07-01, Andrew Young School of Policy Studies, Georgia State University

³⁶ PORTEJOIE Camille (2011), "Impact des différentes visions de l'entrepreneuriat social sur la pratique des organisations ressources", Majeure Alternative management, HEC School of management, 2010-2011, Observatoire du management alternatif, Centre for Social Economy of the University of Liege

The European Commission has recently given the following definition of social enterprises³⁷:

- those for which the social or societal objective of the common good is the reason for the commercial activity
- those where profits are mainly reinvested with a view to achieving this social objective
- and where the method of organisation or ownership system (governance) reflects their mission, using democratic or participatory principles or focusing on social justice

Is this a reasonable understanding of the sector? Of its distinctive forms of governance? Are the definitions fully adequate as a foundation for the development of legal and financial frameworks over the next few years?

Furthermore, the Commission now uses an overarching concept of 'social economy' to refer to cooperatives, mutual societies, associations (social economy in the strictest sense of the word) and also all other types of social enterprise. Within this budding 'social enterprise market', what will be the distinctive role of the 'collective' social-economy enterprises (cooperatives, mutual societies, associations), which are all characterised by common features: democratic governance by members, the non-distribution or partial distribution of profits (part of the added value being held in reserve and assigned to services of general interest), and collective ownership (no individual owner)?

II – EVOLUTION OF EUROPEAN LEGAL DOCTRINE AND FRAMEWORKS OVER THE SAME PERIOD

When analysing the evolution of European legal frameworks over the same period, from 1990 to the present, a distinction should be made between:

- regulations applicable to the activities of social economy organisations (which leads us to address the social economy *as a sector*);
- regulations applicable to the organisations themselves (which leads us to address the social economy *as a governance system*).

In accordance with the Treaties, European legislation is theoretically neutral vis-à-vis types of operator and is aimed only at activities.

As far as these activities are concerned, EU legislation is interested only in those of an "economic" nature: the European Union is born of the gradual evolution of the European Economic Community into the European Community, and hence has a strong economic focus. It is the 'internal market', created through the removal of intra-community trade barriers and the implementation of competition law, which is supposed to pave the way for the "*highly competitive social market economy*" referred to in the Treaty of Lisbon. The other political and social instruments, which were introduced later, are given minor importance.

Liberalisation and openness are key factors in the European integration process. Whether responsibility for them falls within the scope of the Member States or of the European Commission is an issue that everyone dodges, as if the changes of the last 20 years were not deliberately introduced but were the unexpected result of new standards and institutional action. Perhaps historians will be able to shed some light on this.

In any case, the founders of the Union effectively granted tremendous powers to the European Commission. Competition policy falls within its exclusive competence, which has given rise to a

³⁷ EUROPEAN COMMISSION, Social Business Initiative, op. cit.

vicious circle: the European competition policy is all-powerful because it is not counterbalanced by either a European industrial policy or a European social policy. As a result, competition is increasingly predominant and the Member States are once more reluctant to surrender any of their national prerogatives to supranational institutions... meaning that the development of industrial and social policies is even less likely.

As far as the 'type' of operator goes, the EU preserves neutrality: the European Treaties do not prejudice the rules governing the system of property ownership in the Member States (article 222). This neutrality may result in two things: total freedom to start and grow a business, or the dominance of certain types of organisation over others.

1 – European legislation applied to 'services of general interest' provided by the social economy considered as a response to 'market failure' or 'government failure':

The social economy, championed by social groups seeking local solutions to their needs, has always been both a child of necessity and a motor for social diversity. Many social economy enterprises create and manage social, health and welfare services, etc.

For 20 years, competition law has effectively treated these services as a response to 'market failure': their existence is warranted only if the markets do not already provide efficient solutions. This is corroborated by the history of 'services of general economic interest' (SGEI) in Europe.

Moreover, as social economy enterprises are promoted by groups of individuals, they are treated as a response to 'government failure' by the public procurement directives, which have shaped the relationship between the public authorities and 'general interest service' providers since 1992.

'Market failure' in the context of regulation of 'services of general interest':

Given the economic origins of the European Community, economic activity has always taken precedence over social objectives. According to the texts of the European Commission, the existence of a 'general interest' activity cannot be recognised when there are or there *could be* commercial operators in the same field, considered by this fact as a 'market' - even if it does not exist in reality - as an ideal situation. In most cases it has been proved difficult to distinguish between 'economic' and 'non-economic' activities: this is why competition rules are applied as widely as possible. Therefore, the standards relating to 'social' and 'general interest services' are to be found in a directive on 'freedom of services' and subordinated to it.

Inspired by human values explicitly translated into operating principles (accessibility, continuity, adaptability, etc.), 'services of general interest' (SGIs) have always been an essential aspect of the European social model. They are deeply implemented in the national social and cultural models. National traditions are extremely varied, ranging from the primarily state-controlled public services in France, to the decentralised *Daseinsvorsorgen* in Germany and the public utilities in Great Britain. Since the Treaty of Rome was adopted, the question of SGIs has arisen as part of the process of applying competition rules.

The degree of indecision has no doubt been heightened by the fact that France and Germany have taken opposite paths: after the second world war, Germany was determined to destroy the cartels that had had such a harmful effect on political power; France chose to go down a different route, i.e. liberalism before the war and a common commitment to rebuilding after the war, using large, monopolistic, public-sector organisations with no ideological affiliation. A consensus was reached in Europe, based on a compromise between these two trends.

In the late 1980s, the social economy was less concerned with pan-European matters, and citizenship issues took precedence³⁸. By 1993, even national social economies had to fight to protect their distinctive models against the unthinking application of European competition law.

The European Court of Justice (ECJ) gave a ruling based on the complaints filed: definition of an *enterprise* (1991: any entity engaged in economic activities, regardless of its legal form and its funding source), and of a *service* (any service, even if delivered free of charge to the end user, which may be offered concurrently, against payment, by a commercial company; and even if forbidden by the national constitution³⁹, for example voluntary interruptions of pregnancy⁴⁰).

The complaints process has been ongoing for several years now: the complaint filed by the federation of private insurance companies against French mutual societies that are exempt from paying tax on insurance contracts has been going on since 1992, and the compromise reached in 2007 has just been called into question by the Commission. In September 2011, the ECJ ruled that the specific nature of cooperatives warrants a specific approach, especially with regard to taxation. The ECJ considered that a tax aid to a cooperative would not necessarily be considered as a state aid, which would be a sort of reversal of the burden of proof. However, similar ongoing proceedings have not yet been brought to a close.

In response, and from 2000 to 2010, the associative sector focused on the introduction of positive legislation for 'services of general interest', but it was an uphill task. In 1997, the Treaty of Amsterdam introduced a positive, but obscure, reference to "*services of general economic interest*". At the Nice Summit, the Member States issued a declaration in which they requested clarification of this reference. Their request was backed by the European Parliament. As a result, in 2002, the Commission was 'encouraged' to propose a Green Paper. The Treaty of Lisbon included a new legal framework for 'services of general interest', based on the principle of co-responsibility between the EU and the Member States. However, its implementation would mean clarifying the common principles behind the proper performance of the specific tasks assigned for delivery of public goods.

It was not until almost 2010, when Europe was hit by the economic crisis and threatened with recession, that the Commission acknowledged the pressure that competition law and national budget cuts had been putting on 'services of general interest' for the last 20 years. It relaxed the rules for local and social services, but not for major network operators.

However, although the Commission has confirmed the prerogative of Member States to define 'general interest services', it has retained ultimate control by reserving the right to check for 'manifest errors' of definition. The fundamental issues remain, with the market thus still taking precedence.

In 2012, the 'Social business Initiative' of the European Commission is still constrained in today's approach by yesterday's legal categories. The connection between social business/the social economy and the management of SGEIs and SSGIs has still not been addressed. 'Hybrid' social business, social economy and social enterprise models, which attempt to reconcile economic

³⁸ CNVA (1989), French National Council of associative life, "Les associations et l'Europe : pour un plan d'action en faveur des activités associatives, facteur de développement d'une Communauté plus solidaire", La documentation française, avis et rapport au secrétaire d'Etat auprès du Premier ministre, La Documentation française, 184p.

³⁹ N. Alix, op cit. RECMA 1993

⁴⁰ N. Alix, op cit. RECMA 1993

activities with non-economic activities and social objectives with economic objectives, are legal and fiscal objects that are not explicitly recognised by European competition law.

These problems affect not only the social services delivered by cooperatives, mutual societies and associations, but also the creation and collective management of various and important sectors: digital (free or open software, Creative Commons, Wikipedia, open-access publications, "open" (free) science, open business models) and natural resources (indigenous populations, poor farmers, etc.).

Traditionally, the use of forests, fishing preserves, land and water may not everywhere be subject to formal property rights. The civic and social 'commons', public spaces in towns and cities, nutritional eco-systems, alternative currencies, joint budgets, etc. must also be taken into consideration. The European texts on 'intellectual property' do not take account of these collective forms, which the 'commons' movement is attempting to promote.

'Government failure' in the context of the public procurement directives:

The social economy relies on the involvement of citizens in the economic sphere. It results from initiatives taken by groups of citizens, who use different ownership and management models and thus deliver services different from those provided by the market and the government. However, within public/private partnerships in Europe, these citizen-based initiatives can be suspected of being amateurish or considered inadequate by large corporations, and they are sometimes tarred with 'unfair competition' accusations from the viewpoint of 'pure' market principles.

This is the reason why some Members of the European Parliament are beginning to ask for the recognition of citizens' initiatives of general interest, in application of the principle of subsidiarity to EU fundamental rights. This principle is a main principle in the European Treaty⁴¹, but used in a way which does not reflect the varied political and philosophical traditions which founded European construction. In these traditions, the principle of subsidiarity *"is linked not to the ends of society but to the principles governing its organization...Subsidiarity thus goes beyond a simple principle of institutional organisation and is applied first to the relation between the individual and society and then the relation between the society and the institutions, before possibly providing the inspiration for a division of powers between the base and the summit... It is a principle of social organisation..Its perfect application obviously presupposes the existence of social groups. It is, furthermore, developed as a reaction against excessive individualism... Most importantly, rather than defining a norm, the principle of subsidiarity indicates a trend. It leaves open the concrete conditions of its application and these can therefore vary according to the circumstances of time and place...The second meaning evokes the idea of help ('subsidium') and has the connotation of the idea of intervention. It implies a type of help which encourages and authorises autonomy. And appears to be an invitation to rethink social relations in a context of greater autonomy"*⁴². These interpretations effectively establish an important new principle of 'reciprocity', a principle which could greatly help in the recognition of citizen's initiatives of 'general interest'.

⁴¹ *"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."* (Treaty on European Union), Article 3(b).

⁴² COUNCIL OF EUROPE (1994), "Definition and limits of the principle of subsidiarity", Report prepared for the Steering Committee on local and Regional Authorities; ISBN 92-871 2522-8; see the German Grundgesetz and the article 118 of the Italian Constitution, introduced in 2001.

In reality, since 1992, the European ‘public procurement’ directives have provided models for partnerships between public authorities and ‘general interest service’ providers, thus forcing the Member States to amend their legislation. The use of public procurement procedures to ensure the lowest possible price and to prevent corruption seems to be universal. For the sake of peace and quiet, public authorities and professional organisations have accepted the supremacy of ‘call for tenders’. Citizen-based initiatives have come to be regarded merely as tenders for public contracts, and not as a source of innovation and new ideas. The type of social enterprises, which, unlike the traditional social economy, do not have their roots in a community of members and which focus primarily on selling services, fit in all-too perfectly with this approach.

The result is that public/private partnerships favour large-scale operators without diversity, and small operators and volunteer workers are excluded as they do not have the means to participate in such procedures. They are forced to merge, which affects their performance as campaigning organisations and which may ultimately condemn them to failure.

Thus, the fight against corruption and the opening up of markets can actually eliminate small organisations. Public contracts establish a model for service providers, and give those that seem the most ‘professional’ – with the help of accountants and auditors – a greater chance of being selected. Ultimately, this will change market regulation procedures and will inevitably lead to exclusion. That in turn will encourage the public authorities to impose public service obligations on all operators, in order to ensure that the most underprivileged have access to the service in question. There is a risk of the cost of non-diversity being reflected in a lack of social diversity, and in the development of ghettos of the poor.

Research should pay more attention to the measurement of the impact of calls for tenders on different kinds of organisations developing social services and on the long-term performance of the service provided: what will become of the principles of altruism and reciprocity, and what will be the effects for the ‘customers’, for their ‘communities’ and for society as a whole.

2 – The coexistence of models alongside a dominant model:

The EU Treaty has been neutral towards patterns of ownership since 1957. Effectively, the joint stock company has become the model of reference.

Little research has been done into the usefulness of legal forms such as foundations, trusts, etc. in ensuring the long-term survival of companies themselves. Who, for example, is aware that the Bosch⁴³ group owns a foundation for public utility that holds 92% of its capital, has no voting rights and is managed equally by managers of the group and by employee representatives?

Of course, the Member States have different historical legal structures for governing cooperatives, mutual societies, associations and foundations. Some, scarred by the Communist era, are still very distrustful of these. But above all, Europe is holding back and could even be described as hostile to them. Jacques Delors set up a ‘Social Economy’ department within the Commission’s former DG 23, which dealt with both the commercial AND the non-commercial aspects of the social economy, but the experiment was discontinued.

⁴³ MAUGIS Guy, Bosch France President (2012), “Pour une éthique de l’industrie, les enseignements du modèle Bosch”, Ecole de Paris du management, séminaire Vie des affaires, séance du 6 janvier 2012

It even seems that cooperatives are suspected of fixing prices, restricting production and dividing up markets. In 1980, the ECJ ruled that, in view of the exclusive purchase obligation imposed by cooperatives on their members, any cooperative should be regarded as an association of businesses and therefore as a cartel.

With the constant help of the European Parliament, social economy enterprises have been fighting tough battles of identity for 20 years, starting with the battle over their statute: although the European Cooperative Society statute was introduced in 2003⁴⁴, two years after the European Company statute, mutual societies and associations have so far been unsuccessful in their fight for a specific statute, the Commission's proposals having been withdrawn. On the other hand, the possibility of introducing a European Foundation statute is currently being discussed⁴⁵.

The Members of the European Parliament have just submitted a request to simplify the European Cooperative Society statute (which is so complicated that it has scarcely been used) and to investigate the possibility of workers being both owners and employees. As far as mutual societies are concerned, a recent report addresses the unfortunate fact that the observance of their business models is not underpinned by any secondary legislation.

In 2009, a report published by the ILO⁴⁶ revealed that all cooperatives, regardless of the sector in which they operated, had better withstood the economic crisis, and the IMF⁴⁷ praised the soundness of cooperative banks. Yet they are still having to fight to ensure that, as open stock companies, their equity capital is regarded as such by the accounting standards and not as debts. This fight with the IASB (International Accounting Standards Board) and the US's FASB has been going on since 2002/2003 and has been full of twists and turns. In autumn 2010, when the accounting authorities had finally been persuaded, the prudential authorities in Basel, Brussels and Paris decided to get involved: by narrowing down the definition of equity capital, they have once again penalised the membership shares of cooperative banks.

The European commissioners in charge of competition regularly launch attacks against cooperative banks, which they accuse of acting as cartels, and brandish the principle of "*one share, one vote*" as opposed to that of "*one person, one vote*".

Commissioner Barnier's 2011 Social business initiative has been made possible thanks to strong action by the European Parliament in favour of social economy (Patrizia Toia's report). The fact that Commissioner Barnier has competence *only* in the domestic market and regarding financial affairs has certainly played a role in the fact that his initiative bears the title 'Social Business' and not 'social economy'.

The Member States themselves have been developing new legal frameworks to encourage market-oriented entrepreneurship and to recognise formally the 'multi-stakeholder' nature of many initiatives. The criticism levelled against non-profit organisations has focused on their limited access to capital. These organisations are accused of being dependent on subsidies and donations, and the USA is now looked to for fresh inspiration (as described in section 3 below).

⁴⁴ EUROPEAN COMMISSION, regulation on the Statute for a European Cooperative Society, op.cit. européenne (SCE)

⁴⁵ EUROPEAN COMMISSION, proposal for a regulation for a European Foundation statute, op. cit.

⁴⁶ ILO (International Labour Organization), BIRCHALL Johnston & KETILSON Lou Hammond (2009), "Resilience of the cooperative business model in times of crisis"

⁴⁷ IMF Working Paper (2009), "Cooperative banks in Europe", Policy Issues, Wim Fonteyne

In most countries, social enterprises have so far been classified as 'third sector' organisations (associations, mutual societies, cooperatives or foundations) or have operated under statutes pertaining to cooperatives.

The statute introduced in 1991 for Italian social cooperatives gave a significant boost to the cooperative movement, especially since associations had limited legal capacity. Portugal introduced the 'social solidarity cooperative' (1997), Spain the 'social initiative cooperative' (1999), France the 'collective interests cooperative society' (2001) and Poland the 'social cooperative' (2006).

Other legal texts have been introduced but do not refer explicitly to cooperatives, although they are partly inspired by them. In 1995, the Belgian government made it possible for any commercial company to become a 'social purpose company'. Finland (in 2004) and Italy (in 2006) have created legal frameworks for the 'social enterprise'.

In 2005, the United Kingdom created 'Community Interest Companies', or CICs, which must pursue purposes that are considered beneficial to the community and ensure that the benefits they provide are not confined to an unduly restricted group of beneficiaries. CICs are subject to an 'asset lock', which guarantees that the company's assets are used for the benefit of the community (fundamental principle of cooperatives) and prohibits the company from distributing its assets, except to issue equity; they are not considered as attractive enough for investors.

In any case, without public encouragement and an appropriate tax status, these new initiatives are relatively insignificant. It is undeniable that a supportive public policy, including an adequate legal framework, is a condition for success and this is why the role of the national AND European authorities must shape the future of social enterprises.

3 – A social enterprise marketplace is emerging for new types of investors:

To resolve the economic crisis, governments are placing much reliance on private investment and on a new approach to managing social issues.

Firstly, there has been a shift from passive philanthropy to active philanthropy, involving the provision of expertise by investors. This is the equivalent of what the private equity industry has done for 'business' entrepreneurs (interview of Sir Ronald Cohen by Caroline Hartnell, editor of *Alliance* magazine, at the 6th EVPA Annual Conference).

There are several different forms of venture philanthropy: direct investment in social enterprises (especially where the goal is to invest in a local community and the company is able to provide expertise as well as financial support); investment in a venture philanthropy organisation (where the company has no knowledge of the sector in which it is investing, and prefers to go through an intermediary); or creation of a specific fund.

The plans for use of 'social impact bonds' in the United Kingdom were taken a step further in 2011: social investors (foundations, hedge fund and pension fund managers, new 'venture philanthropists') would take out bonds and use the money to fund preventive measures through a 'third sector' organisation on the basis of pre-defined success indicators. Taking the prison reconviction rate as an example, if the fall in the number of reconvictions were greater than 10%, then the government would pay interest of 7.5 to 13.5%. If the reconviction rate did not drop by at least 7.5%, the investors would not receive any interest at all and would have therefore effectively made a philanthropic donation.

Some advocate an even more structured approach, and propose updating corporate law, as in the USA, in order to give a clear role to investors. Lindsay M. Baghramyan⁴⁸ observes that it was at a September 2006 meeting ("*Exploring New Legal Forms and Tax Structures for Social Enterprise Organizations*" sponsored by the Aspen Institute, which is a major investor) that the participants discussed whether new legal vehicles are needed or whether existing laws may be used with some adjustments. In 'for-profit' organisations, the directors have a duty to act in shareholders' interest. Too frequently this prioritises profit over capital growth and directors must comply. This explains why, following Milton Friedman's critique of 'Corporate Social Responsibility' (NY Times, 1970), several US States decided in the 1980s to adopt new laws known as 'constituency statutes', which codify the right (or obligation) of directors to consider interests other than shareholder interests.

Celia Taylor⁴⁹ clarifies the debate on the possibility of creating new legal forms for social enterprises. She describes 'B corporations' (the B stands for benefit or beneficial) as corporations that choose to qualify under a certification system that designates them as socially responsible to consumers and investors. To obtain certification (which is granted by 'B Lab', an organisation that takes one tenth of one per cent of corporate revenue and measures social performance), a corporation must be incorporated in a US State that has adopted a 'constituency statute' law. The corporation by-laws must stipulate explicitly that directors must consider the interests of employees, the community and the environment.

After the failure of Ben & Jerry's, which fell victim to a takeover by Unilever, the provisions relating to B corporations were revealed as inadequate.

Following the Aspen Institute's meeting – which was attended by Ashoka and Marcus Owens, a lawyer and former director of the US's Internal Revenue Service Exempt Organization Division – the 'L3C' corporate designation was introduced. An 'L3C' (Low-Profit Limited Liability Company) is a for-profit entity in the sense that investors expect to receive dividends and a return on their investment, and a non-profit entity in the sense that it is set up for charitable purposes. The words *low-profit* in the title signal to investors that the L3C is intended to make a low profit. An L3C has at least two tranches of investment: a 'low-return tranche', which offers a low rate of return on investment and absorbs most of the risk, a 'market-return tranche', which offers a market-rate of return and represents a lower risk for investors, and 'mezzanine' tranches. This requires 'long-term capital', of which there are two forms: 'Program Related Investments' (PRI) and 'Socially Responsible Investment funds'.

With an 'L3C', market investors know that the low-return tranche will absorb any losses if profit is low, thereby reducing the risk; 'B corporations' do not provide any such guarantee. This is why the L3C is regarded as the best structure for promoting growth in social enterprise and attracting investors.

Lastly, California introduced 'Flexible Purpose Corporations' in October 2011. This new corporate vehicle differs from L3Cs and B corporations in that it is specially designed for for-profit organisations seeking 'traditional' investors:

- the social and/or environmental purpose is approved by the management and shareholders;
- the shareholders may only exercise their rights insofar as they do not conflict with the 'special purpose(s)', and the other stakeholders may neither demand the resignation of the

⁴⁸ BAGHRAMYAN Lindsay M, (2011?) "L3C or B Corporation: Which Legal Structure Best Promotes the Growth of Social Enterprise", Bay Path College

⁴⁹ TAYLOR Celia (2009) "Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Business", University of Denver Sturm College of Law. Working paper no. 10-22, volume 54 2009/10

directors nor pursue legal proceedings⁵⁰. The Board of Directors and the management are supposed to be protected from the shareholders.

In France, Daniel Hurstel⁵¹ has suggested amending article 1832 of the Civil Code so that a commercial company can not only “*share its profits or make use of the savings that may derive from these profits*” but also “*finance or develop an activity that satisfies a social need*”. Hurstel specifies that the company founders would have to choose whether to pursue a profit-making purpose or a social purpose (note that Hurstel uses *social* and *non-for-profit* as synonyms, which they are not). The primary goal would be to create a brand or ‘label’ with which to identify the company.

None of these new corporate forms mentions:

- transferring profits to the reserves
- limiting the compensation of partners and directors (part of governance rules)
- what will be done with liquidation surplus

The introduction of these principles into the law, as opposed to appearing merely in the obligations of the company’s own statute, is not mentioned either. Law enforces the principles: as a reminder, in 1999, French cooperative banks opposed a government bill that would remove the legal cap on stock-based compensation, considering that it was an open door to “de-mutualisation”. Neither do they address the question of tax: what would be the point of making a donation to a ‘social company’ if it is possible to acquire a share in its capital?

The theoretical discussions focus essentially on new ways of coordinating different types of investors and stakeholders. The practical impact on the different types of social enterprise and, in particular, on cooperatives, mutual societies and associations, must be analysed and measured beforehand.

Wherever national legislation allows, social enterprises are starting to issue bonds and seek investors. The introduction of stricter bank capital requirements under Basel III may well be a good thing for other reasons, but it is expected to have the side effect of restricting the lending capacity of banks, including cooperative banks.

In Europe at least, banks have not traditionally been involved in the governance of companies: they decide whether or not to grant a loan and lay down their conditions but, unlike equity investors, they do not sit on Boards of Directors. So it seems a paradox of the financial crisis that, in Europe, activist market finance may take over the role of banks in financing businesses, including social enterprises. The appearance of investors – albeit social investors – in social enterprises is likely to steer the latter towards business models with which their investor-contributors are already familiar, through management tools that have been tried and tested in fully ‘commercial’ undertakings. In that way, large commercial companies will effectively be imposing their governance methods on social enterprises, unconstrained by any formal limits on extraction of profits. Is this what a responsible social economy sector really needs?

4 – The ‘poor relation’: the method of governance and its impact on production

⁵⁰ MAC CORMAC Susan H. (2011), Partner, San Francisco, Clean Technology and Climate Change Committee for the ABA Section of Science of Science and Technology Law

⁵¹ HURSTEL Daniel (2009), “La nouvelle économie sociale, Pour réformer le capitalisme”, Ed. Odile Jacob, 216 p.

According to Borzaga and Tortia⁵², the purpose of a company is to create an economic and social surplus. The new concept of “*shared value*”⁵³ (Porter & Kramer) takes into account the fact that social problems engender additional costs for businesses. Hence, taking them into consideration will not necessarily increase a company’s costs. On the contrary, thanks to technological innovation and to the processes and management methods used, doing so can even increase productivity and market share.

But research leaves us with a ‘poor relation’: the link between governance method and production.

Philippe Frémeaux⁵⁴ argues that democracy is inadequate in social economy organisations. Draperi⁵⁵ strongly criticises some large cooperatives and mutual societies in France, and even more abroad (the United Kingdom), which are becoming commonplace. This threat is hanging more heavily than ever over all social economy organisations, including associations, due to the combined effects of competition in all markets and of the management and financial constraints imposed by public authorities. Such constraints result in institutional monoculture, a process that has been studied over the last twenty years or so by Di Maggio and Powell, and more recently by B. Enjolras.

Indeed, while the legal status of cooperatives, mutual societies and associations in France ensures that social economy organisations are relatively safe from takeover, it does not prevent them from mimicking the profit-making motives of commercial companies. In this respect, one might say that the legal ‘clothes’ of the social economy ‘do *not* make the man’! It is the everyday observance of rules (and, for the social entrepreneur, compliance with established values, principles and the ‘rule book’) that ‘makes the man’ (Parodi’s critique of Draperi’s book, RECMA).

Blanche Segrestin and Vincent Hatchuel⁵⁶ believe that there is a legal vacuum: there is no legal vehicle to deal with the whole enterprise – there is only one for company law with the right for shareholders on the one hand, and the employment contracts on the other. To change this situation, the authors suggest that we draw inspiration from cooperatives, self-management, worker participation, co-determination (which differs from the joint management system in Germany) and ‘Corporate Social Responsibility’. This would enable us to identify any criticisms and pressures from stakeholders and to take them into consideration when defining a management strategy for social enterprises.

They recommend developing a model, alternative to the corporate model, which would acknowledge the purpose of creating collective value and would be based on 4 principles:

- ⇒ a mission to create collective value: distinction between commercial and non-commercial organisations;
- ⇒ the status of the head of the organisation, with management authority: the directors would not be expected to protect such and such a category of participants, and the stakeholders would have to recognise this management authority;
- ⇒ resolving who should have the right to dismiss managers: not the shareholders who are constantly coming and going;

⁵² In NOYA Antonella & ROSE-ACKERMANN (1996), “Les organisations d’économie sociale dans la théorie de la firme”, *Journal of Economic Literature*, in “*American Economic Association*”, vol 34

⁵³ PORTER Michael E. & KRAMER MARK R (2011), “The big Idea: creating Shared Value”, *Harvard Business Review*, 7/2/2011

⁵⁴ FREMEAUX Philippe (2012), “Quel potentiel de développement pour l’économie sociale et solidaire ?” Study for Charles-Léopold Mayer Foundation et Caisse des Dépôts et Consignations

⁵⁵ DRAPERI Jean-François (2007), “Comprendre l’économie sociale, fondements et enjeux”, Dunod, 244 p.

⁵⁶ SEGRESTIN Blanche, HATCHUEL Vincent, “Refonder l’entreprise”, Seuil, 2012

- ⇒ inclusion of solidarity rules: any decisions taken in the interests of the organisation should be taken jointly with the main stakeholders.

Is it not time to let ourselves be guided by the similarities that Elinor Ostrom⁵⁷ identified between what she described as sustainable “*common-pool resource institutions*” and “*self-organised institutions*” :

- uncertain and complex environments
- population stability (“*individuals who have shared their past and intend to share their future*”)
- ... in other words, a low renewal rate?

Ostrom established that the following design principles are shared by all sustainable ‘common-pool resource’ institutions:

- clearly defined boundaries
- rules on the appropriation and provision of common resources that are adapted to local conditions
- collective choice arrangements (which allow the rules to be changed)
- monitoring (by Ostrom’s “*appropriators*” themselves or by persons accountable to them)
- a scale of graduated sanctions
- conflict resolution mechanisms
- self-determination rights recognised by higher-level authorities
- multiple layers of nested enterprises

Therefore, it is important to encourage research into the link between the doctrinal, philosophical and political foundations of the social economy (in particular its democratic structure), the translation of these foundations into rules, procedures and strategies, as well as their impact on operational management processes⁵⁸:

- governance (including the compensation of partners and directors) and financial management
- legal and organisational strategies
- human resource management
- sales and marketing management

Conclusion: towards a greater diversity of organisational models

“The creation of the European Union did not kindle a cultural boom or, in other words, a rebirth. I think that, as far as general and higher education are concerned, a negative trend has emerged... We are living in a world of economic, rather than intellectual, competition... we need to banish the idea that Europe should be built on homogeneity. The problem with Brussels is that it has failed to nurture diversity. European thought must change, in the sense that it should focus on unity in diversity and diversity in unity.” (Edgar Morin, *Confrontations Europe*, La Revue, no.98, April–June 2012).

“We cannot have our cake and eat it... in other words, we cannot have fragmented, dispersed ownership involving ever-growing numbers of people, and a decision-making system designed for only a handful of shareholders... Hence we have concluded that the larger the number of

⁵⁷ OSTROM Elinor (2010), op.cit.

⁵⁸ PARODI Maurice (2009) “Les valeurs, les principes et les règles de l’économie sociale traversent tous les domaines de la gouvernance et de la gestion”, RECMA

*shareholders, the more inevitable successive governance crises become... of course the democratisation of corporate governance encourages the development of increasingly complex businesses, but the flip side is that these businesses are more and more dependent on opinion.*⁵⁹ One solution would be to create 'corporate parliaments' within companies, in addition to the General Assembly; this parliament would be composed of and controlled by a small number of representative shareholders. Natural persons rather than abstract individuals.

As Elinor Ostrom pointed out, we need a theoretical explanation based on human choice, and relevant collective ownership and management models in certain circumstances, giving individuals the opportunity to organise themselves. This applies equally:

- to informal cooperation between persons inside the institutions governed mainly by the principles of market or redistribution (public institutions);
- to formal social economy institutions like cooperatives, associations and mutual societies; and to every kind of legal framework useful for proprietorship and the governance of 'commons'.

As long as research has not established any global theory about the link between different governance methods and the ways of producing (and therefore types of goods and of services produced), there is no manifest(/substantiated) reason for promoting diversity. Economic theory must pay more attention to the importance of cooperation and good understanding between persons at work and in society to promote social cohesion and innovations, and to feed trust. Without trust, there is no possible life in society. Research should go further in the measurement of long-term, sustainable performance and on the importance of the 'deliberation process' to achieve sustainable social cohesion.

Research should identify how the different Polanyi principles – market, redistribution and reciprocity – should co-exist:

- within any type of organisation: for instance, trying to forbid employees of for-profit enterprises to 'waste their time' on free cooperation amongst themselves is nonsense in terms of social and even technical innovation⁶⁰;
- between different types of organisations – with a focus on diversity – the social economy enterprises being the 'ideal-type' for reciprocity.

That is why the appearance of investors – whether social or long-term – in social enterprises, which will influence their trajectory, is an important field of observation for research.

This study has also shown the need for a positive European law relating to 'services of general interest', as well as for a property and collective management law, especially regarding digital technology, information and culture dissemination, and the management of natural resources, which were long considered, wrongly, to be inexhaustible public goods. We have suggested introducing an interpretation of the principle of subsidiarity as an important new 'reciprocity' principle within the European Treaty, in order to recognise citizen's initiatives of 'general interest' and in the 'commons'.

We have shown that research should pay more attention to the measurement of the impact of 'calls for tender' on the different kinds of organisations developing social services and on the long-term performance of the service provided: what will become of the principles of altruism and reciprocity,

⁵⁹ GOMEZ Pierre-Yves & KORINE Harry (2008 1st edition in English, 2010 2nd edition in French), "Entrepreneurs and Democracy: A Political Theory of Corporate Governance", Cambridge University Press, 348p.

⁶⁰ ALTER Norbert (2009), « Donner et prendre, la coopération en entreprise », Editions La Découverte, 240p.

and what will be the effects for the 'customers', for their 'communities' and for society as a whole?

The time has come to update our laws and standards in line with one major principle: greater diversity in forms of enterprise, enabling at least the following principles:

- the right to pursue long-term development goals rather than short-term profit
- the observance of collective ownership and management practices in addition to market rules
- the recognition of hybrid entities financed by public and private funds

The cost of non-diversity is catastrophic, literally. Like in the Bob Dylan song, "...'cause the Times They are A-Changing", we should give local communities and affinity groups a chance to help reshape the whole. Why not therefore include 'reciprocity' as a fourth pillar of sustainable development, alongside the three 'economic', 'social' and 'environmental' pillars?

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