The suitability of Belgian Law to B-Corp

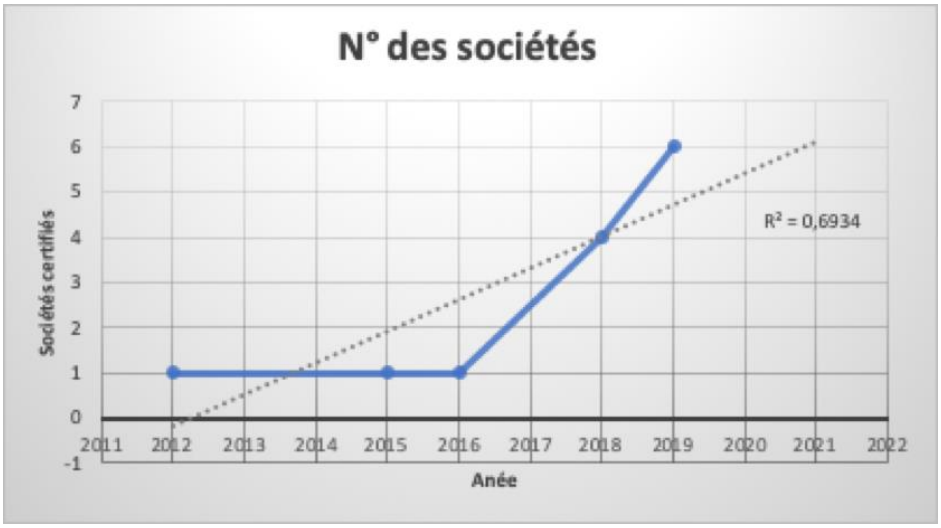
David Hiez, Professor of private law at the University of Luxembourg
Faculté de droit, d'économie et de finance
4 rue Alphonse Weicker, L2721 Luxembourg
david.hiez@uni.lu

Table of contents

1. Introduction[1]

Whereas Brussel is somehow one of the capital of the European Union, the law of Belgium is not very famous abroad. However, it is not uninteresting, for a major reason: the direct origin of Belgian law in the French tradition is challenged by the increasing importance of its Flemish part. The consequence is a remaining Napoleonian grammar with a different wording. That general assessment is far true about company law. Belgian company law deviated from French law in the 19th century and it is now absolutely autonomous and original. Firstly, the traditional notion of a « *commerçant* » trader has simply been removed. The core of the commercial law is now the economic activity, to which a full code adopted in 2018 is dedicated, and any person that undertakes such an activity is considered an enterprise. That major reform was the first step of a wider program and a new code on companies and associations has been enacted in 2019. Nevertheless, these evolutions have not severely changed the legal background for B-Corp. The B-Corps developed in Belgium like in Europe (see Fig. 1).

<u>Figure 1</u>: Number of B-Corp per year.



It is difficult to have a perfect view of their legal forms since the legal context has changed; for example, the social purpose company disappeared in 2019 (see Fig. 2), but here are the available data.

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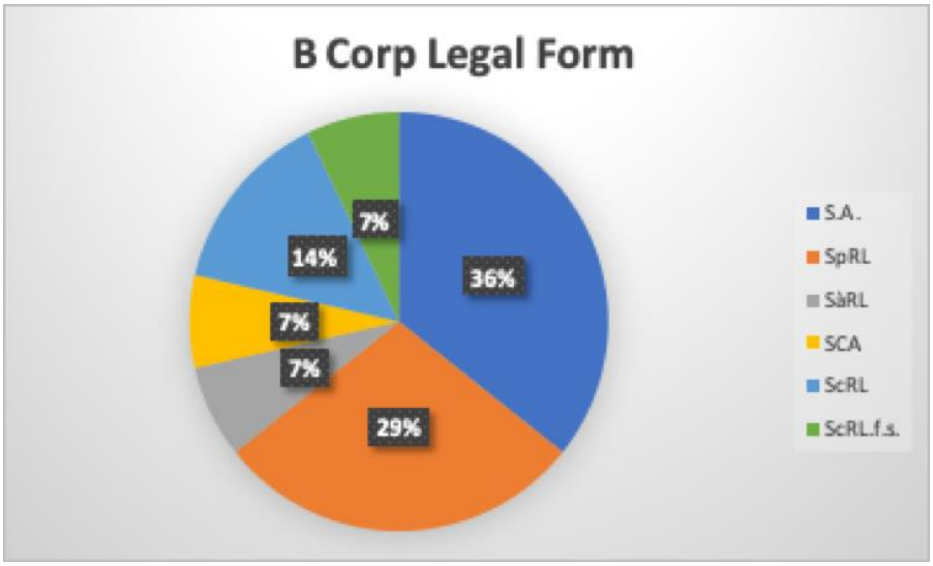
<u>Figure 2</u> : B-Corp legal form



Since most of the Belgian B-Corps have been labelled before the new codes, it is necessary to describe the legal landscape in which they developed. Then, we will describe the major points of the reform and we will conclude that the number of B-Corp is likely to go on growing.

1.1. The legal context of emergence of B-Corp

Belgian law is particularly interesting when considering benefit corporations. Indeed, the doctrine debated strongly and during many decades about the notions of association and company (1.1), and the legislator concluded that period by the establishment of the first benefit corporation, i.e. the social purpose company (1.2).

1.1.1. The traditional notion of company

After Napoleon's defeat, Belgium kept the French legislation. Therefore, its company law was similar to the French one, with its famous article 1832: **«** *A partnership is created by two or several persons who agree by a contract to appropriate property or their industry for a common venture with a view to sharing the benefit or profiting from the saving which may result therefrom. It may be created, in the cases provided for by statute, through the act of the will of one person only. The partners bind themselves to contribute to the losses* **».** The general evolution of business in Europe during the century required a modernization of the legislation. Some adjustments were adopted in the middle of

the 19th century, but the major reform was passed in 1873[2]. This act replaces the ancient part of the commercial code concerning the commercial companies. Its main innovations were the removal of the state accreditation required for the creation of public limited companies, the generalization of advertising towards third parties. It remained the core of Belgian company law till the end of the 20th century. But the reform of 1873 did not touch the civil code, and article 1832 remained unchanged.

The debate about the scope of the company arose only when a competing institution was legally organized, i.e., the not-for-profit association **(***association sans but lucratif***)**[3]**.** Its article 1 stated that **«** *the not-for-profit association is the one which does not undertake industrial or commercial activities, or which does not aim at providing a material win to its members* **»**. Apparently, the distinction is clear, except that there were strong debates all along the century about the precise domain of the not-for-profit association. The first point has been grammatical, to admit that the « or » should be understood as a « and », since the two conditions are not alternative but cumulative[4]. Indeed, the opposite interpretation would have allowed them to provide material win to their members if they did not have an industrial or commercial activity. The problem arose with the development of the economic activities of not-for-profit associations. The case law admitted that a not-for-profit association could have a lucrative activity if it was accessory to its main activity and that this lucrative activity was a necessary mean to achieve its purpose[5]. This point will not be further developed, but it has concentrated the debates about the definition of association and company. Indeed, the definition of the association directly impacts the one of the company.

Undoubtedly the company was targeted to the distribution of profits, and it was not allowed to adopt the form of a company if the distribution was not possible. But, in the meantime, there was no serious debate about the possibility to integrate social purposes into the object of a company, nor into its management[6]. No case law had declared a manager liable to have neglected the maximization of profits for shareholders. In the contrary, the corporate social responsibility is sometimes connected with the sustainable development and the state institutions in charge of this question. The only limit is the refusal that a company excludes such a distribution.

Belgian doctrine discussed also the nature of the company: contract, institution, and more recently functional or structural theory. However, Although the debates have not reached an agreement, a

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2 Loi du 18 mai 1873 sur les sociétés commerciales ; Malherbe et al. 2020, *Droit des sociétés*.

3 Loi du 27 juin 1921 sur les associations sans but lucratif, les fondations, les partis politiques européens et les fondations politiques européennes.

4 Coipel (dir.) 1985, *Les A.S.B.L. Evaluation critique d'un succès XXXVIIe Séminaire, 20-21 Mars 1985*.

5 Malherbe et al., op. cit., n°*426.*

6 For a nuance, but mainly motivated to defend the existence of social purpose company (see below): Foriers and François, op. cit., footnote 103. The authors do not claim that this would be unlawful or would engage the managers' liability, but draw the attention on the debates about the notion of company interest.

disenchanted opinion is that it is an essentially academic dispute and that all these theories cover part of the regulation of the company[7]. This debate echoes on the notion of company interest. Company interest (*intérêt social*) refers sometimes to the financial interest of the company to provide the maximum of profits to its shareholders, but it refers as well in other contexts to the interest of all its stakeholders, notably when the board has to assess the opportunity of a take-over bid[8]. The question of the lucratively of the company has been fundamentally renewed since the reform of 1995.

1.1.2. The experience of social purpose companies

The establishment of a special framework for benefit corporation, in Belgium with the social purpose company (« *société à finalité sociale* ») is strongly related to the general context of company law, and more particularly to the relationship established between companies and associations. For sure, the benefit corporation movement has been initiated by businessmen wishing to escape from the maximization of profit as the single compass for their enterprise. In that respect, the company is the suitable legal status for the enterprise, and not the association is not. Indeed, the association refers to a grouping of persons that pursuit a philanthropic aim or organizes social activities, such as sport, theatre… This has been exactly the implicit conception in which the act on associations was drafted in Belgium.[9] Meaningfully, the act on associations of 1921 does not deal with all associations but only not for profit associations.

In the meantime, in Belgium like in other countries, enterprises with an important economic dimension but aimed at the provision of social services without the pursuit of profit emerged: schools, hospitals, support to disabled or jobless persons… In that context, the restrictive definition of not-for-profit association and of company created a grey zone, and consequently some legal uncertainty. Some social economy enterprises claim for the creation of a new legal form[10] in order to bring more clarity and not to hinder the development of these new enterprises. In the meantime, on a more conceptual level, it was suggested to rethink the relationship between company and association. Some authors claimed that the opposition of companies and associations was not obvious, but a conceptual construction that could be modified.[11] Therefore, it would be possible to use the legal form of a company, which experience has demonstrated its qualities to make an enterprise successful, with other purposes that the maximization of profits and their distribution.

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7 Malherbe et al., op. cit., n°*406*..

8 Malherbe et al., op. cit., *n°514.*

9 Act 27th of June 1921, Moniteur belge, 1st of July 1921, n. 182. Davagle 1994, *L'A.S.B.L. dans tous ses états*.

10 Foriers and François 2014, « *Un nouveau regard sur quelques distinctions classiques en droit des sociétés* ».

11 Coipel 2002, « *Pour une nouvelle étape dans la distinction entre association et société* », pp. 549 f.

This proposal was not unanimously approved among the academics, but it was a very promising renewal of the conception of the coordination of the various private law groupings[12]. In the francophone legal thinking, till the end of the 19th century, any grouping was considered as an association, without any connection with its legal personality, and company was a contract by which was created a special association. The first evolution, during the 19th century, has been the increasing importance attached to the question of legal personality. With the adoption of acts on association in the beginning of the 20th century, to which legal personality was attributed under some conditions, association and company appeared as distinct groupings and association could not be considered anymore as the general category. This is the reason why the major doctrinal debate of that time was about the border between the company and the association, even if Belgium and France did not give the same answer. Along the 20th century, with the company has become the usual way to run an economic activity instead of the traditional personal enterprise undertaking on its personal behalf. Therefore, the company has become the pattern for the enterprise. In that context, the proposal to admit the possibility for a company to run a non-for-profit economic activity is to be considered as the achievement of the evolution: the company would become the general category, and association would be a special grouping.

Whereas there is no direct relationship between that proposal and the functional theory of company, some common features can be established. Let's remind that the functional theory, so named after its elaboration[13], proposes in the 1960s 1970s to consider the company like a frame for the enterprise[14]. Instead of being analyzed like the enterprise itself, the company was considered as a tool to regulate the functioning of the enterprise, from the shareholder point of view, with the obligation to mitigate their selfish interests to include the ones of the enterprise's stakeholders. Starting from the institutional conception of company, this was an attempt to incorporate the critics addressed to it in a contractual theory perspective. Likewise, the proposal to extend the domain of the company consists in removing its specificity i.e., to distribute profits, and to consider it as a more general pattern, able to perform various functions.

To ensure the validity of that new conception in regard to the civil code, the evolution has been explicitly stated in the definition of company[15]. However, the general definition has not been amended in the core provision, but a new line added to allow such companies that do not pursuit the

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12 The major promotor of that renewal was Michel Coipel. See also: Coipel 1996, « *Les sociétés à finalité sociale: innovation, révolution ou illusion* », pp. 49 f. For some Flemish references, see Foriers and François, op. cit., footnote 87.

13 Malherbe et al., op. cit., n°405.

14 Mainly into the French doctrine: Paillusseau 1967, *La société anonyme, technique d'organisation de l'entreprise*. More recently in Belgium a close writing: Dierx 2002, De « la société anonyme comme modèle et TIC: la société cotée comme prototype », pp. 628 f.

15 Ancient Company Code, art. 1. In 1995, this precision was added into article 1832 of the civil code, but this provision has been moved from the civil code into the company code when it was enacted.

distribution of profits, in the cases provided by the code. Therefore, the possibility for a company to pursue another goal was not general but limited to the hypothesis defined by the company code. This came up with the creation of the social purpose company in 1995.[16]

In application of article 661 of the ancient company code, the social purpose company is a modality of company, that may be added to most companies recognized as legal persons: general partnership, limited liability partnership, private limited liability company, cooperative society, public limited liability company, limited stock ownership company, economic interest grouping[17]. Of course, to qualify as a social purpose company, these companies must meet additional conditions: they don't aim at the enrichment of shareholders, and their by-laws contain mandatory provisions. The by-laws have to include some clauses: the shareholders pursue a limited profit or no profit, the definition of the social purpose and the absence of any indirect financial profit as the main purpose of the company, the definition of the profit allocation policy suitable to the object of the company and the rules for the constitution of reserves, the limitation of voting rights in the general meeting to 10% for one shareholder, the limitation of distribution of profit (if any) to the maximum allowed for approved cooperatives, the elaboration of a special annual report on the achievement of the social purpose, the possibility for any employee to become a shareholder one year after he/she has been hired at the latest and the termination of its quality of shareholder one year after he/she is not an employee anymore, the allocation of net assets to a similar company in case of liquidation.

The regulation of these companies will not be further developed[18], it was only necessary to highlight their legal orientation. Even if social purpose companies and cooperatives differ, the latter inspired the former: there is no historical connexion, but the proximity of legal provisions is obvious. Moreover, it seems that most existing social purpose companies were a modality of cooperatives[19]. Actually, there has been a consensus that the social purpose company has not been a success, since they remained rather few. Several reasons have been proposed to explain that relative failure. First of all, there has been no tax incentive, since the social purpose company is taxed as another company. Secondly, if a not-for-profit association was able to convert into a social purpose company, the outcome was partially unsecured, since all the public support to associations were not guaranteed for social purpose companies. This is problematic, since one of the goal of the creation of the social purpose company was to provide a solution for associations wishing to develop their economic activities securely. This was not a good starting point to ensure a rich future to that experience, even

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16 Act 13 April 1995.- An Act to amend the acts on commercial companies, co-ordinated November 30, 1935.

17 C. sociétés, art. 661.

18 For more details, notably: Hindriks et al. 1996, *ASBL et société à finalité sociale Quelques aspects juridiques et économiques*; Lacour 2002, *La société à finalité sociale Bilan et perspective*. More recently: Foriers and François, op. cit., ns°20 f.

19 Foriers 2018, « *L'intérêt social et la spécialité légale à la lumière de la réforme du code des sociétés : une lecture et quelques réflexions* ».

if it has been positively considered abroad, and sometimes inspired other reforms, like in Luxembourg.
Nevertheless, some authors defended the maintenance of this company in the perspective of a general reform that has been considered in the 2010s. Apart from Michel Coipel, who was one of the promotors of this modality of company, Paul Alain Foriers and Alain François articulated several reasons to keep that possibility[20]. Firstly, they observe that the high majority of companies remain targeted at the distribution of profits and that it is still meaningful to offer a special pattern for the few companies aiming at another goal. Secondly, that modality would allow these peculiar companies to be visible. Thirdly, there is a practical interest i.e. to benefit from the advantages of companies, notably the attractivity for financing.

However, the major reform of the grouping law that took place in 2019 has deeply transformed the whole system.

2. The recent general reform of company law

During the last years, Belgium seems to have adopted a frenetic activity to reform private law. Already in 2001, a company code was adopted[21] and in 2013 the process for the drafting of the economic law code started[22], but some proposals also appeared to reform the civil code[23]. The 4th of April 2019 was adopted the bill to fully reform the civil code[24], that will contain nine titles (instead of three books nowadays). Book 3 on property law and book 8 on proof have been adopted[25] and entered into force. Other books are on discussion. Things sped up in 2018 and 2019 in business law, since the economic law code was achieved[26] and the new company and association code adopted[27]. These new codes are not only a matter of coordination, they introduced grate innovations, that impact necessarily the question of B-Corp[28].

The economic law code is innovative firstly by its title. If legal thinking uses usually the expression commercial law and business law, it refers more rarely to economic law. The purpose of the code is

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20 Foriers and François, op. cit., n°47.

21 Loi du 7 mai 1999 contenant le Code des sociétés.

22 Economic Law Code, 28 February 2013.

23 https://legalworld.wolterskluwer.be/fr/nouvelles/domaine/droit-civil/denis-philippe-pour-un-nouveau-code-civil/

24 https://justice.belgium.be/fr/bwcc

25 Act of the 4 February 2020 introducting the book 3 « Les biens » into the Civil Code ; Act of the 13 April 2019 introducting the book 8 « La preuve » intro the Civil Code.

26 April 15, 2018. - enterprises Law Reform Act (n°2018-04-15/14). http://www.ejustice.just.fgov.be

27 March 23, 2019. - Act introducing the Code of Companies and Associations (n°2019-03-23/09).

28 For a summary of the reform: De Cordt 2019, « *La réforme du droit belge des sociétés* », pp. 435 f.

to cover all the aspects of the regulation of economic activities: competition law, consumer law, insolvency law… Considering only economic activities, the distinction between civil and commercial has disappeared. But the most unusual is maybe the scope of this new code, since it is applicable to any enterprise, and the definition of an enterprise is extremely wide. The definition of the enterprise stated by the code[29] lists three categories: (a) any natural person who runs a professional activity in an independent way; (b) any legal person; (c) any other organisation without legal personality. Then, the code provides some derogations, but they concern only some organisations without legal personality or some public persons. For example, a manager of a company, when he is not an employee, is considered as an enterprise for the application of the economic law code. Of course, a company, B-Corp or not, will be an enterprise, but as well a not-for-profit association. This means that both will be submitted to the same legal regime concerning their economic activity. And apart from the new notion of enterprise, the substance of the regulation has been renewed as well and this impacts companies[30].

Of course, the most important for B-Corp is the new company and association code. Its title may not surprise; as the economic law code considers altogether for-profit and not-for-profit organisations, it is perfectly coherent to deal with the structure of these two groupings into the same legislation. But this new code goes beyond and renews substantially the definition of these two legal persons. The new definition of company is to be quoted in totality[31] : A company is constituted by a legal act by which one or several persons, named shareholders, make a contribution. It has a patrimony, and its object is the pursuit of one or several activities. One of its goals is to distribute or provide to its shareholders a direct or indirect financial advantage.

Surely, one step further has been taken, since the distribution of profits is not anymore literally the core of the object of a company. The only remaining prevalence of this object consists, symbolically in the fact it is the only one mentioned, and technically in the impossibility to create a company without, at least partly, that object. Apart from that, there may be other objects, and it is even not required that the distribution of profits is the major one. However, it will not change practically the situation of companies, since most of them will remain oriented to the maximization of profits for shareholders.

In the meantime, the definition of association[32] has been as well renewed: an association is constituted by a convention between two or several persons, named members. It pursues a not-for-

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[29] Economic law code, art. I.1 1°.

[30] Bossard 2018, « *Le bouleversement de la société de droit commun par la loi du 15 avril 2018 portant réforme du droit des entreprises* ».

[31] Company and association code, art. 1:1.

[32] For an extensive study of the innovations for associations: Davagle et al. 2019, *Le nouveau visage des ASBL après le 1er mai 2019*.

profit purpose in the framework of one or several determined activities that constitute its object. It may not distribute or provide, directly or indirectly, any financial advantage to its founders, its members, any board member or any other person but in the disinterested purpose stated by the by-laws. Any transaction that violates that prohibition is void.[33]

The revolution seems conceptually less general than for companies, but it is actually probably more important. Indeed, the debate about the coordination of the different conditions required from not-for-profit associations has been terminated by the removal of the most controversial one: the prohibition of commercial and industrial activities. Therefore, the only requirement is now the absence of any distribution of financial advantage, what can be compared to the French solution.[34] That extension of the domain of activities of not-for-profit associations improves their legal certainty and surely facilitates their development. Whereas associations and companies were distinguished by their activities and their ability to make profit, the single remaining criterion is the possibility or not to distribute the profits. The restriction laid down for not-for-profit associations on this distribution has been extended, or at least precised, about both its substance and its recipients. The prohibition of distribution does not concern only the members, but also founders and board members; in other words, it means as well the prohibition of any remuneration of these board members. Moreover, the prohibition of any provision of a financial advantage to any other person entails the voidness of any gratuitous act of association that would not be covered by its statutory object. It may be noticed also that the prohibition mentions any financial advantage, that is to say that it is wider than profits. Whereas in French law there is a strict opposition, or complement, between association and company, with the identical criterion of the distribution of profits, the definitions of company and association in Belgian law are situated in two different levels: only company refers to profits and association refers to financial advantage.

These two new definitions have established an original framework for enterprises that pursue a social purpose. Whereas, before 1995, these enterprises were likely to meet difficulties to find a legal form suitable to their specificities, nowadays they have the choice between the not-for-profit association and the company. Indeed, both are possible, since the company may easily include another purpose than the distribution of profits into its object, and the association may undertake industrial and commercial transactions. In that new legal context, influenced by the observation of a low number of social purpose companies, the legislator simply decided to remove this new modality for the company. The authors that were reluctant to remove the social purpose company consider now that the new landscape implies logically their disappearance[35]. Interestingly, it may be noticed that the justification for that removal is not the possible inclusion of a social purpose for any company, but the possibility for the not-for-profit associations to run any economic activity.

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33 Company and association code, art. 1:2.

34 L. 1st of July 1901, art. 1.

35 Malherbe et al. 2020, *Droit des sociétés*.

One concrete effect of the change into the definition of a company is to facilitate the classification of cooperatives into the category of the companies since its specific object fits perfectly with the wider general definition. The definition of the cooperative itself has been fully changed[36]. Whereas its definition was very formal, referring only to the variability of its capital [37], it is now defined : The cooperative society has as main purpose the satisfaction and/or the development of economic and/or social activities of its shareholders and/or of third parties interested notably by the conclusion of agreements with the former towards the provision of goods or services or the execution of works in the context of the activity that the cooperative society performs or makes perform[38].

The definition is a little bit complicated, but, surely, the satisfaction or the development of the activities of its members may be compared with the definition provided by the European regulation. Meanwhile, it complies with the definition and principles of the International Cooperative Alliance. This may solve the tricky problem that faced Belgian law during many years i.e. the false cooperatives[39]. It must be precise as well that the cooperative may be accredited if it meets some more strict conditions, notably about its governance and its limited profitability[40]. More interestingly for the question of B-Corp, it may also be accredited as social enterprise, if it meets three conditions : 1° its main purpose is, in the general interest, to produce a positive social impact for man, environment or society ; 2° any advantage for the shareholders are limited by reference to the regulation on true cooperatives ; 3° in case of winding-up its net assets have to be allocated in a manner that fits the best possible with its object as social enterprise[41]. It must be noticed that the cooperative society is the only organisation that can be accredited as social enterprise.

If one compares the new definition of the company with the one of the social purpose company, the company appears more capitalist, since it cannot prohibit the distribution of any profits, whereas the by-laws of a social purpose company could do. But the general evolution of company law is surely more important and realizes a complete revolution. The pursuit of another goal than distribution of profits is not reserved anymore to special companies, but is open to any company, without any special regulation. The legislator drew the conclusion of that major evolution, and the social purpose company has been simply removed. The question arises whether that loss makes really no damage; indeed, the social purpose company did not allow only the pursuit of an economic activity without

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[36] Tilquin et al. 2020, « *A new paradigm for cooperative societies under the new Belgian code of companies and associations* », http://www.iuscooperativum.org/.

[37] Ancient companies code, art. 350.

[38] Companies and associations code, art. 6:1 §1.

[39] Tilquin et al., op. cit.

[40] Companies and associations code, art. 8:4. This is an heritage of the regulation established to distinguish true and false cooperatives.

[41] Companies and associations code, art. 8:5.

the purpose to distribute profits; it contained as well other provisions, notably about the voting rights or allocation to reserves. The flexibility of Belgian company law makes possible to adopt the same provisions, notably through the choice of the legal form of the cooperative. Therefore, the new solution appears technically neutral, but it may be considered symbolically as a defeat for social enterprises which lost their own legal form.

In the end of that excursion, it must be assessed if the new legislation is more friendly for B-Corp. Despite the recognition of the possibility for a company to pursuit a non-profitable purpose besides a profitable one, the goal of the reform was not specifically this one. Three guidelines were considered: simplification and coherence, freedom and flexibility, facilitation of the mobility of companies to comply with the European objective[42]. To put it differently, the possibility for a company to pursue another goal than the maximization of profits is not the consequence of a critic of such maximization; no limit is put to the persons who will wish to create such a company. But the wish to simplify the regulation and a neutral liberalization entails the absence of impediment to use the company in order to achieve a social or whatever else goal. Before 2019, there was no precise impediment to add some social principles to the functioning of the company, and the number of companies labelled B-Corp at that time show it clearly. This has never been contested. Therefore, it cannot really be said that the new companies and associations code improved the situation for B-Corp; this would be possible only if some impediments could have been shown before. But that does not mean that nothing has changed. What is new is that these companies tempted to run their activities differently are now absolutely free to go further in that direction without adopting another legal form.

[42] De Cordt, « *La réforme du droit belge des sociétés* », (art.) **op.** cit., n°2.

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Index