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The social enterprise inspired by the US model?

The Benefit Corporation reviewed[2]

1. Introduction

This article is about entrepreneurship at the intersection of public and private. Entrepreneurship with a public benefit purpose, but practiced with the resources of an entrepreneur.[3] Underlying this form of entrepreneurship is the belief that public goals can be achieved by focusing on efficiency and profitability. Entrepreneurship with such a hybrid purpose is commonly referred to as 'social entrepreneurship'. This hybrid form of entrepreneurship has strongly emerged in recent years.[4] Social entrepreneurs conduct a wide range of businesses, including care-, housing- and educational institutions, but also clothing manufacturers, energy companies, third world (aid) shops and museums.[5] These hybrid companies use traditional legal forms. Not-for-profit legal forms are unsuitable due to the absence of the desired profit incentive and limited access to the capital market. However, are traditional for-profit legal forms suitable for achieving the objectives of hybrid social entrepreneurs? Such legal forms are traditionally (primarily) aimed at maximizing profit. Do these legal forms actually provide sufficient flexibility to pursue public benefit objectives?

In several states in America, this question has been answered in the negative. In these states the benefit corporation has been introduced as a customized legal form for social entrepreneurs.[6] This article will examine whether and to what extent the benefit corporation is an adequate model to facilitate social entrepreneurship (in the Netherlands). In paragraph 2 I discuss the background for the conclusion that traditional for-profit legal forms are not suitable for social entrepreneurs. Hereafter, I discuss and comment upon, the main features of the benefit corporation in paragraph 3. On the basis of this analysis I formulate some thoughts on a customized legal form for social entrepreneurs, suitable for implementation in Dutch corporate law, with the aim to (further) stimulate the discussion on the usefulness and necessity of such a legal form.

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[2] This article appeared in Tijdschrift Ondernemingsrecht 2012/57: May 2012

[3] M. Pirson, 'Social entrepreneurship; a blue print for humane organisations', in: H. Spitzeck e.a. (red.), Humanism in Business, Cambridge: Cambridge University Press 2009, p. 248-258.

[4] De Jongh, Schild & Timmerman 2010, p. 200.

[5] For a description of the variety of *social enterprises*, see: Clark Jr. & Vranka 2011, p. 2 *et seq*.

[6] Clark Jr. & Vranka 2011, p. 7.

2. A customized legal form for social entrepreneurs

The initiative for the introduction of the benefit corporation is taken by a non-profit organization, named B Lab. B Lab certifies companies that meet its requirements in terms of accountability, transparency and sustainability. In this way, certified companies can distinguish themselves from companies that use terms such as sustainable, green and responsible mainly as a marketing tool ('greenwashing'[7]). This provides certified companies with a particular social profile. That such profile may generate (commercial) benefit is also recognized by De Jong, Schild en Timmerman in their preliminary report on the social enterprise.[8] Customers may prefer services and/or products from a socially responsible company and such companies may be more likely to qualify for grants and donations. The recent increase in the number of 'green' and sustainable investors further enhances this effect. According to B Lab however, especially in larger companies, the abovementioned requirements alone are insufficient to safeguard the public benefit purpose of certified companies.[9]

2.1 The area of tension

Social entrepreneurs conduct their social enterprises in traditional for-profit legal forms. In Dutch corporate law these are the public limited liability company (*naamloze vennootschap*), the private limited liability company (*besloten* vennootschap) and the cooperation (coöperatie). Therewith the main difference between the public enterprise, as was proposed in the Bill Legal form social enterprise (*Rechtsvorm maatschappelijke onderneming*"), and the social enterprise directly becomes apparent.[10] The proposed public enterprise as a modality of the association (*vereniging*) and the foundation (*stichting*) lacked the - by social entrepreneurs - so desired profit incentive. Due to the limited appeal of the proposed profit-sharing certificates, access to the capital market would have been (too) limited.[11]

Within a traditional for-profit legal form there is a risk that the public benefit objective will be put aside by the traditional profit objective of this legal form.[12] This risk manifests itself particularly in the classic shareholder model applicable in the United States. While in the United States the debate on a broadening and qualification of the one-sided focus on profit maximization for shareholders has been initiated,[13] this has not yet been recognized explicitly in American jurisprudence.[14] The area of tension between a public benefit purpose of a company and its profit purpose will mainly arise in (hostile)

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[7] Clark Jr. & Vranka 2011, p. 2.

[8] De Jongh, Schild & Timmerman 2010, p. 236.

[9] Clark Jr. & Vranka 2011, p. 6.

[10] *Kamerstukken II* 2008/09, 32 003, nr. 2.

[11] E. Plomp, 'Winstuitkering door zorginstellingen', *Tijdschrift voor Gezondheidsrecht* 2009/7.

[12] E. Elhauge, 'Sacrificing corporate profits in the public interest', *NYU Law Review* 2005/80.

[13] L. Timmerman, 'Ondernemingsrecht, Van smal (weer) naar breed?', *Ondernemingsrecht* 2009/142.

[14] Zie *eBay Domestic Holdings, Inc./Newmark*, 16 A.3d 1 (Del. Ch. 2010).

takeover situations. Based on the landmark decision of the Delaware Supreme Court in *Revlon Inc. / MacAndrews & Forbes Holdings, Inc.* directors are required in certain situations, including the situation where a company has (implicitly) given up its independence and is actively looking for a buyer, to maximize shareholder value in the short term and to disregard all other considerations.[15]
In order to regulate the aforementioned area of tension, B Lab, in collaboration with several U.S. law firms, drafted model legislation for the introduction of the benefit corporation as an alternative to traditional for-profit legal forms.[16] On the basis of this model legislation, the benefit corporation has already been introduced in seven states and there is legislation pending in five states.[17]
Dutch corporate law takes a completely different point of departure. This was clearly demonstrated in the case ABN AMRO / VEB *et al*. The Supreme Court reconfirmed, in a case similar to Revlon, that directors should - in any case - take into consideration the interests of all stakeholders in their decision making.[18] Nevertheless also in the Netherlands there is, given the recent discussion on the Bill on the distribution of dividends in care institutions (*Wetsvoorstel Winstuitkering Zorg*)[19] and the privatization of housing corporations[20], uncertainty about safeguarding the public interest in traditional for-profit legal forms. Does the model of the benefit corporation provide a solution to this uncertainty in the Netherlands?
Below I discuss in section 3.1 to 3.3 successively, the under the Model Legislation mandatory public benefit purpose, the mandatory stakeholder model and the transparency requirements that a benefit corporation is required to meet. In 3.4 I discuss the legal remedies available to enforce public beneficial policy of benefit corporations. Finally, in section 3.5 and 3.6 I reflect on some provisions, which the Model Legislation does not provide for, but which may be suitable for use in the context of social entrepreneurship in the Netherlands.

3. The benefit corporation reviewed

3.1 The public benefit purpose

The Model Legislation introduces the possibility for existing and to be incorporated business corporations to elect into benefit corporation status. To qualify for benefit corporation status a business corporation will have to include in its articles of incorporation that it is a benefit corporation and that its

[15] *Revlon Inc./MacAndrews & Forbes Holding, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[16] 'Model legislation', available on: http://benefitcorp.net/storage/Model_Legislation.pdf. ("Model Legislation").

[17] For a detailed comparison of the introduced legislation in the various states, see: J. Haskell Murray, *Benefit Corporations: State Statute Comparison Chart*, Regent University School of Law, available on: papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556.

[18] HR 13 July 2007, *NJ* 2007/434 (*ABN AMRO*), paragraph 4.5.

[19] See the letter of the 'Dutch Patients and Consumers Federation' to the 'Ministry of Health, Welfare and Sport' of 13 February 2012 available on: http://www.npcf.nl.

[20] H. Verbraeken & S. Severt, 'Laat privaat geld toe bij corporatie', Het *Financieele Dagblad* 28 februari 2012, p. 3.

purpose is to create "general public benefit".[21] The "general public benefit" is further defined by the Model Legislation as a material, positive impact on society and the environment.[22]
The Model Legislation also provides some specific public benefit purposes that may be included in the articles of incorporation of a benefit corporation. Examples are the provision of services and products to low-income or underserved individuals, preserving the environment, improving public health, promoting the arts and/or sciences and the accomplishment of any other particular benefit for society or the environment.[23]

3.1.1 The general public benefit purpose

Under the Model Legislation benefit corporations are required to (at least) create "general public benefit". The broad definition of this term in the Model Legislation provides, however, little practical guidance on what is meant by "general public benefit". Therefore, it will be difficult to determine for (the board of) a benefit corporation how it - in operational terms - can fulfill this general public benefit purpose. It will also be difficult for a judge to scrutinize decision-making and policies of the benefit corporation, which are claimed to be contrary to the general public benefit purpose. Useful objective criteria to answer the question whether a benefit corporation has remained within the limits provided by its corporate purpose of creating general public benefit do not exist.[24] Therefore, the practical value of the obligation for benefit corporations under the Model Legislation to create general public benefit can be questioned. It should, however, be considered that this obligation also serves another purpose; this general obligation attempts to avoid 'greenwashing'. Without this obligation a benefit corporation could formulate a single, narrow "specific public benefit" purpose in its articles of incorporation (for example keeping the river in back of the factory free from toxic effluents).[25] The benefit corporation in that case enjoys the benefits of the enhanced social profile, while bearing only a limited "burden" arising from the requirements of the Model Legislation.

3.1.2 The public benefit purpose under Dutch law

If we translate the mandatory inclusion in the articles of incorporation of the public benefit purpose under the Model Legislation into Dutch corporate law, the question arises what the effect of such mandatory inclusion would be. I believe that the statutory anchoring of the public benefit purpose, even if this is formulated in general terms, has a significant effect under Dutch corporate law. In this I agree with the opinion of De Jongh, Schild and Timmerman. They believe that the inclusion of a public benefit purpose in the articles of association of a Dutch company has significant consequences for the relations between the different stakeholders within such company. Corporate bodies are in their

[21] Article 103 and 104 Model Legislation.

[22] Article 201 (a) jo.102 sub a Model Legislation.

[23] Article 201 (b) Model Legislation.

[24] *Maeijer/Van Solinge & Nieuwe Weme II-2** 2009/22.

[25] Clark Jr. & Vranka 2011, p. 21.

decision-making bound by the objects clause included in the articles of association.[26] This objects clause sets limits to the powers of directors (article 2:7 and 2:9 of the Dutch Civil Code (hereinafter: "**DCC**")), gives content to the manner in which stakeholders should behave to each other in accordance with the principle of reasonableness and fairness (Art. 2:8 DCC) and neglecting this objects clause will contribute to the judgment that there are legitimate grounds to question the policies of a company (*gegronde redenen om te twijfelen aan een juist beleid*) or that there has been mismanagement (Art. 2:350 DCC and Art. 2:355 DCC).[27]
To achieve this effect potential Dutch legislation modeled on the benefit corporation should oblige the inclusion of a public benefit purpose in the articles of association. This statutory anchoring of the public benefit purpose has a dual effect. It strengthens the accountability of a company, and those directly involved, when it comes to the public benefit purpose. In addition, it gives explicitly more room to directors to be guided by public benefit purposes. The latter I shall explain in more detail on the basis of the discussion of the stakeholder model, which is mandatory for benefit corporations.

3.2 Mandatory stakeholder model

The Model Legislation introduces the obligation for the board of directors and individual directors of a benefit corporation to consider the effects of any action or inaction upon: the shareholders, employees, customers and beneficiaries of the public benefit purpose, society, the environment, the ability of the benefit corporation to achieve its public benefit interest and its corporate interest, including the importance of a continued independence of the benefit corporation.[28] In addition, the Model Legislation provides that directors may also consider the interests of other groups or persons they deem appropriate. Unless the articles of incorporation provide this explicitly, the board does not need to give priority to certain interests.

3.2.1 Consideration of multiple interests

The Model Legislation introduces the concept of (mandatory) consideration of multiple interests (*belangenpluraliteit*) in decision-making. This is a classic concept underlying Dutch corporate law. The Model Legislation thus provides a counterbalance to the traditional dominance of the shareholders' interest in business corporations in the United States. The Model Legislation also creates the possibility to prioritize (in principle) the pursued public benefit interests over the other interests by including a clause to this extent in the articles of incorporation. The Model Legislation differs in this respect fundamentally from the classic American shareholder model. According to the authors of the Model Legislation this mandatory stakeholder model provides the appropriate legal facility for the realization of the hybrid objectives of social entrepreneurs.[29]
The Model Legislation chooses a (non-exhaustive) statutory specification of the interests, which

[26] *Maeijer/Van Solinge & Nieuwe Weme II-2** 2009/49.

[27] De Jongh, Schild & Timmerman 2010, p. 238.

[28] Article 301 Model Legislation.

[29] Clark Jr. & Vranka 2011, p. 28.

directors should (at least) take into account when exercising their duties. Dutch corporate law does not have such a specification. Under Dutch law, the question which interests the board should take into consideration in its decision-making depends on the circumstances of each case. The (public benefit) purpose of the company included in the objects clause in the articles of association specifically is to be taken into account in the balancing of these interests (Section 3.1.2). Under Dutch law, the open standard of corporate interest (*vennootschappelijk belang*) is used.[30] However, also in the Netherlands, for example Eijsbouts argued that the Dutch legislator should replace the concept of corporate interest by a provision that further specifies the various stakeholder interests that are involved in a company.[31] According to Eijsbouts, such a provision could provide directors more direction as behavioral standard and also provide them more guidance as accountability standard. I am, however, not in favor of a statutory specification of the various stakeholder interests that directors may take into consideration in their decision-making. The decision-making of the board would thereby be juridified too much. The discretionary power of directors is paramount and routine justification by directors of the way the various interests have been weighed in a particular case should be avoided. Unlike in the United States, a further specification of the stakeholder interests is not necessary in the Netherlands to counterbalance against the existing doctrine in jurisprudence and literature. The open standard of the corporate interest provides sufficient room for substantiation of what is in the corporate interest depending on the particular circumstances of the case and the public role and function of a company.[32] Where in the United States specification of the different stakeholder interests provides flexibility, I consider such specification as a limitation in the Dutch context.

3.2.2 The (general) public benefit interest prioritized

As a corollary the question arises whether there is a certain hierarchy between the different interests to be considered. For the benefit corporation, the Model Legislation determines explicitly that this is not the case, unless the articles of association provide otherwise. In view of American jurisprudence the question remains therefore whether, without other stipulation, the board will in practice appreciate public interests on an equal footing with the shareholders interest or may, whether or not under pressure from an impending dismissal, still neglect the public interest in favor of the shareholders interest. Also in the Netherlands there is in principle no binding hierarchy between the different interests, "none of the interests prevail in advance". [33] However, in view of discussed Dutch case law, the aforementioned uncertainty will not be at issue in the Netherlands as often as in the United States. Nevertheless, I believe that in this respect possible Dutch legislation for the introduction of a social enterprise as a modality for existing for-profit legal forms can have added value. I would argue that such legislation should provide explicitly that, if chosen for the modality of a social enterprise, the

[30] See article 2:140 BW/article 2:250 lid 2 BW.

[31] Eijsbouts 2010, p. 100.

[32] H.J. de Kluiver, 'Vennootschappelijke repliek op Timmerman's grondslagen', *Ondernemingsrecht* 2009/4.

[33] M.J. van Ginneken & L. Timmerman, 'De betekenis van het evenredigheidsbeginsel voor het ondernemingsrecht', *Ondernemingsrecht* 2011/123.

public interest should in principle prevail over other stakeholder interests, unless the interests of such other stakeholders would in that case be disproportionately disadvantaged. In my opinion this is also consistent with the premise of social entrepreneurs; entrepreneurship with a public benefit purpose, but practiced with the resources of an entrepreneur. The public benefit purpose is paramount. This justifies the prioritization of public interests above the interests of other stakeholders. Furthermore, such prioritization strengthens the accountability of directors; they will have to explain why the public interest in a particular case has not been the decisive factor, but why other stakeholder interests were.

3.3 Transparency Requirements

The third important pillar of the Model Legislation is the requirement for a benefit corporation to report in detail to its stakeholders on its social and environmental achievements. The Model Legislation requires benefit corporations to draft a 'benefit report' annually. This report must be delivered to its shareholders, published on the company's website and filed with the responsible department of state. The benefit report must contain information on the ways in which and the extent to which (general) public benefit has been created. The circumstances that have hindered creation of the public benefit purpose must be mentioned as well. In addition, the performance of the benefit corporation in the public, environmental and social area must be assessed against an 'independent' third-party standard.[34] The Model Legislation does not prescribe a specific standard, but it describes in detail the requirements to which the standard must comply. In sum, the standard must be sufficiently comprehensive, credible, independent and transparent. The drafters of the Model legislation mention the Global Reporting Initiative, ISO 26000 and B Lab as examples of a suitable third-party standard. [35]

3.3.1. The mandatory assessment of overall corporate social and environmental performance

The Model Legislation attempts to strengthen the accountability of the benefit corporation in relation to its public stakeholders by setting extensive transparency requirements. Dutch social enterprise legislation should include similar transparency requirements. Many (Dutch) companies already disclose their social and environmental performance voluntarily by publishing social and environmental reports. However, the content of these reports differ widely and such reports are often mainly used for PR-purposes. [36] Because of the latter, these reports are often of limited value. The Model Legislation tries to overcome this problem by introducing a mandatory annual assessment of the overall corporate social and environmental performance against an independent standard. According to the drafters of the Model Legislation, this may create a useful benchmark. On the basis of this benchmark, shareholders, investors and consumers are able to form a clear picture of the social and environmental performance of the benefit corporation.[37]

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[34] Article 401 Model Legislation.

[35] Clark Jr. and Vranka 2011, p. 24.

[36] Eijsbouts 2010, p. 65.

[37] Clark Jr. & Vranka 2011, p. 19.

The Model Legislation relies on the public (consumers and investors) to penalize the corporation if it scores poorly on the aforementioned benchmark or if it does not comply (sufficiently) with the transparency requirements of the Model Legislation. An audit or certification of the benefit report by an independent third-party is not required under the Model Legislation. Nor does the Model Legislation provide for the establishment of a regulatory authority, which reviews or verifies whether the benefit report is actually published (in accordance with the Model Legislation) or not. Finally, the Model Legislation restricts the group of persons for which a legal remedy is available to enforce the obligations of the benefit corporation under the Model Legislation. I will discuss this in more detail in the next paragraph. I doubt whether the disciplining effect of the judgment of the public will be sufficient to hold the benefit corporation accountable for its social and environmental performance. [38] The lack of legal remedies may undermine the confidence of the public in the (concept of the) benefit corporation.

3.3.2. A regulatory authority?

In the United Kingdom a customized legal form similar to the benefit incorporation has been introduced, the Community Interest Company (the "**CIC**"). In order to guarantee the confidence of the public in the CIC, the CIC Regulator has been introduced in the United Kingdom. [39] The CIC Regulator has extensive powers to intervene in a CIC if a CIC does not meet the particular (statutory) requirements that apply to the CIC. De Jongh, Schild and Timmerman follow this example and propose the introduction of a regulatory authority to supervise companies that make use of the customized legal form for social enterprises.[40] While I acknowledge that a regulatory authority can contribute to the maintenance of the public confidence in this kind of legal form, I hesitate to introduce a (new) regulatory authority to supervise these companies. In my view the disciplining effect should originate from available (civil) legal remedies.

3.4. Exclusive legal remedy

The Model Legislation introduces an exclusive legal remedy to enforce compliance by the benefit corporation and its directors with the requirements under the Model Legislation. It is explicitly stated that the benefit corporation and its directors are under no circumstances liable for monetary damages.[41] On the basis of the Model Legislation it is only possible to bring an action for injunctive relief requiring the benefit corporation to simply live up to the commitments it voluntarily undertook. [42] This legal remedy is exclusively available for the corporation itself, shareholders, directors, investors with an indirect interest of 5% in the benefit corporation and people to whom this power is granted in

[38] See also D. Brakman Reiser, 'Benefit Corporations – a sustainable form of organization', *Wake Forest Law Review* 2011/46.

[39] See for a more detailed explanation of the CIC: De Jongh, Schild & Timmerman 2010, p. 225 e.v.

[40] De Jongh, Schild & Timmerman 2010, p. 238.

[41] Article 305 (a) (2) and 301 (c) Model legislation.

[42] Clark Jr. and Vranka 2011, p. 27.

the articles of association or rules of procedure. It is explicitly stated in the Model Legislation that no other parties have a right of action under the Model Legislation.

3.4.1. The (civil) disciplining effect

Is the regulation of the Model Legislation sufficient to achieve the aforementioned (civil) disciplining effect? Social entrepreneurs with the right intentions will not have trouble with providing for a legal remedy in the articles of association to a specific public stakeholder. They might consider this an appropriate means to account for its public stakeholders. However, those who want to use the benefit corporation (mainly) for marketing purposes will probably not make use of this possibility in the articles of association. In that case, only shareholders and certain investors have a legal remedy against decisions and policies of the benefit corporation, which are contrary to the Model Legislation and/or its public benefit purpose. If the board of directors sets aside the company's social objectives to the benefit of the (financial) interests of shareholders and investors, they will not be interested in voluntarily providing a legal remedy to certain public stakeholders. If the directors succumb to the pressure of shareholders and investors, there is no possibility to prevent this under the Model Legislation. Given the purpose of the Model Legislation (chapter 2), this seems to be incorrect. To guarantee the public benefit objective within a benefit corporation, there should be adequate legal remedies available for public stakeholders to hold the benefit corporation and its directors accountable for decisions and policies in violation of this public benefit objective.

3.4.2 Legal remedies under Dutch corporate law

Does Dutch corporate law already provide enough possibilities for public stakeholders to enforce policy that is in line with the public benefit objective included in the articles of association of a company? As described in section 3.1.2, the public benefit objective gives substance to the open standards included in Book 2 DCC. In view hereof, I would argue that those who have a direct interest in achieving the public benefit objective included in the articles of association of a company, fall within the scope of 'stakeholder' as defined in article 2:15 paragraph 3, under a DCC. By the anchoring of the public benefit objective in the articles of association, they are recognized as such by the social enterprise. These stakeholders have access to the avoidance proceedings of article 2:15 DCC in conjunction with 2:8 DCC.[43] However, only in cases where a board resolution harms the pursued public benefit disproportionately, these avoidance proceedings may produce a result. The board has a broad discretion in balancing the interests of all stakeholders and a judge will be reluctant to test this balancing of interests too penetrating.[44]

Steins Bisschop goes one step further and argues that certain public stakeholders can bring an independent action on the basis of article 2:8 DCC to stand up against antisocial behavior of a social

[43] Steins Bisschop 2004, p. 98.

[44] *Maeijer/Van Solinge & Nieuwe Weme II-2** 2009/791.

enterprise.[45] Leaving aside the question whether article 2:8 DCC provides an independent basis for a legal action, [46] only institutional stakeholders may invoke article 2:8 DCC. Institutional stakeholders are those who have a direct organizational connection (*organisatorisch verband*) with the company. I would argue that this circle of persons is more restricted than the circle of persons, who as a stakeholder, is entitled to a legal action on the basis of article 2:8 DCC in conjunction with article 2:15 DCC. In view of case law and literature, it does not seem possible to stretch the concept of institutional stakeholders further.[47]

Lastly, Dutch corporate law provides for the right to institute inquiry proceedings under article 2:345 DCC. However, public stakeholders do not have recourse to this legal remedy, unless otherwise stipulated in the articles of association or granted to them by agreement. While indeed, the *advocate-general (advocaat-generaal*) at the Court of Appeal in Amsterdam may, for reasons of public interest, file an application for the institution of an inquiry, this facility is used rarely.[48]

In conclusion, there are, under Dutch corporate law, limited options available for public stakeholders to enforce the policy of a company to be in line with the public benefit objective included in the articles of association of that company. Therefore the (civil) disciplining effect, as described in the previous section, is rather limited. To prevent this, future Dutch legislation for the introduction of a social enterprise as a customized legal form should provide for a facility on this matter. This was also recognized in the Bill Legal form public enterprise (*Wetsvoorstel Rechtsvorm maatschappelijke onderneming)*, in which the right to institute an inquiry was mandatorily assigned to certain public stakeholders.[49] Other possibilities would be to oblige social enterprises, which make use of the aforementioned customized legal form, to assign the right to institute an inquiry to their acknowledged public stakeholders[50] or to activate the role of the advocate general at the Court of Appeal in Amsterdam by a broader interpretation of the concept 'reasons of public interest'.[51]

3.5 Preservation of the public objective

The foregoing discussion makes clear that that the Model Legislation is too noncommittal on certain matters. This may lead to a lack of confidence from the public in the benefit corporation. This applies even more so because the Model Legislation provides that shareholders, by a resolution adopted by a majority of two thirds of the votes that all shareholders are entitled to cast, can resolve to terminate the benefit corporation status with immediate effect.[52] Shareholders can, thus, simply avoid the obligations of the Model Legislation when the area of tension between the public benefit objective of the company

[45] Steins Bisschop 2004, p. 78 *et seq*

[46] F.J.P. van den Ingh, *De Naamloze Vennootschap* 1994/72, p. 22.

[47] J.B. Huizink, *De Groene Serie Privaatrecht, Rechtspersonen*, at article 8 Boek 2 BW, note. 6 Deventer: Kluwer (losbl.).

[48] K. Cools e.a., *Het recht van enquête; een empirisch onderzoek*, Deventer: Kluwer 2009.

[49] *Kamerstukken II* 2008/09, 32 003, nr. 2, article 2:346 BW (new).

[50] See for a similar obligation for certain healthcare institutions, article 6.2 Uitvoeringsbesluit WTZi.

[51] See also Eijsbouts 2010, p. 101 and Steins Bisschop 2004, p. 81.

[52] Article 105 in conjunction with article 102 Model Legislation.

and the financial interests of shareholders and investors actually becomes apparent. This does not seem correct to me. If there is no specific regulation, also in the Netherlands, a public benefit purpose of a company may be set aside by a resolution of the shareholders to amend the articles of association of that company deleting the public benefit objective from the articles of association. To prevent this, any Dutch legislation similar to the Model Legislation should provide for a system to safeguard the public benefit objective. Examples of such a system can be found in the run-off period in the context of the two-tier board regime (*structuurregeling*) of article 2:154 paragraph 2 DCC or the objections procedure, as used in the context of a merger, conversion and division of a company.

3.6 Public capital

The Model Legislation contains no provisions to preserve the 'public capital' within a benefit corporation. It can be argued that a part of the capital, the public capital, will have to be used for the achievement of the public benefit objective of the benefit corporation. As described in section 3.2, the public benefit purpose of the company is paramount for social entrepreneurs. It may be argued that this justifies the introduction of capital maintenance rules to prevent that shareholders withdraw capital from the social enterprise, at the expense of the possibility to achieve the public benefit objective of the company. Any legislation for the introduction of a social enterprise in the Netherlands should - in my opinion - provide for some sort of capital maintenance rules.[53] However, these capital maintenance rules cannot be too stringent, since in case of too stringent capital maintenance rules, a company will most likely not be interesting (enough) for investors who (at least) want a (sustainable) yield on their investment. The desired access to the capital market would as a result be too limited.

3.6.1 Dividend cap

To cope with this problem, De Jongh, Schild and Timmerman propose a flexible asset lock inspired by the English model for the CIC.[54] An important part of the asset lock is the dividend cap.[55] The dividend cap restricts the maximum annual dividend per share, the maximum total dividend and the maximum carry forward of unused dividend capacity. These maxima are set for the CIC by the CIC-Regulator. This provides the flexibility to adapt these maxima to changing market conditions and the needs of social entrepreneurs.[56] However, the same flexibility can be achieved, without the use of a regulatory authority, by providing that those maxima are determined by royal Decree (see for example article 2:153 DCC). As a corollary, safeguards should be included to preserve the public capital in case of dissolution, merger, conversion and division of the company. De Jongh, Schild and Timmerman propose to use the system of 'tied-up' capital, which is currently also used for the foundation (article

[53] These particular capital maintenance rules obviously do not exclude that sectorial regulation (education, healthcare) set further restrictions on the distributable capital.

[54] De Jongh, Schild & Timmerman 2010, p. 241-242.

[55] Article 18-20 Companies (Audit, Investigations and Community Enterprise) Act 2004.

[56] De Jongh, Schild & Timmerman 2010, p. 229.

2:18 paragraph 6 DCC). The 'tied-up' capital is in that case equal to the part of the capital, which is not freely distributable according to the dividend cap.

3.6.2 Mitigated forms of capital maintenance rules

Mitigated forms of capital maintenance rules are also conceivable. An example of this can be found in the Bill on the distribution of dividends in care institutions (*Wetsvoorstel Winstuitkering zorg)*. This bill introduces (prior) internal and external approvals for dividend distributions, it fixes a period of three years following the initial investment by an investor before a first dividend can be distributed, and relies for the amount of the distribution on the existing capital maintenance rules on dividend distributions of Book 2 DCC. Criticism at this bill focuses on the fact that after three years following the initial investment, (large) dividend distributions are insufficiently restricted, which may lead to further pressure from shareholders/investors on the public objective of care institutions.[57] Dutch legislation for the introduction of a customized legal form for social entrepreneurs as described in this article may prove to be a solution to this concern.

4. Conclusion

It follows from the above that the Model Legislation is too noncommittal on some important matters, which houses the risk of abuse ('greenwashing'). The Model Legislation seems to be particularly focused on providing opportunities for directors to also consider other interests than the shareholders' interest in their decision- and policy-making. In our stakeholders model this is less necessary. However, I do support the notion that traditional for-profit legal forms are not always appropriate for achieving the hybrid objectives of social entrepreneurs. As outlined above, also in the Netherlands there are ways to safeguard a public objective within the traditional for-profit legal forms.
The question whether this actually justifies a separate legal form in Book 2, can, however, only be answered in the affirmative if the demand from the broad group of social entrepreneurs for such customized legal form is large enough. The rules of the market also apply to Dutch corporate law; in case of sufficient demand, corporate law will have to facilitate this demand.

[57] S. Olsthoorn, 'Ziekenhuizen na drie jaar vogelvrij voor durfkapitaal', H*et Financieele Dagblad* 28 februari 2012, p. 4.

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