Legal Innovation and Social Entrepreneurship Corporate Formats

Marc-Antoine Carreira da Cruz
Perelman Center for legal Philosophy
Faculty of Law, Université Libre de Bruxelles
Belgium

Abstract

This research project aims to determine which factors are needed in the development of new legal frameworks for social entrepreneurship, and more especially new format of corporate law dedicated to social entrepreneurship. We focus on the case of the US Low Profit Limited Liablity Company (L3C) format and the overview of developments in Belgium, the United Kingdom and Luxemburg. Our research demonstrates that an optimum legal innovation dedicated to social entrepreneurship encompasses different conditions. First, to watch over the compatibility between provisions (old and new) of tax law rules, corporate law regulations and constitutional law. Second, organizing coordinated and coherent public information around the legal security and the tax advantages of the new format for private actors interested in adopting the new format. Third, strengthen the channels between different levels of legislative powers especially when the competences related to corporate law and tax law are split. Finally, to promote the branding of the new legal format near private actors.

Keywords: law, tax, innovation, policy, branding

1. *Introduction*

Financing social entrepreneurship is a wide issue. Financing strategies and tools depend on various factors amongst which tax law and corporate law. These tax and corporate rules are influenced by a country's cultural relation to social entrepreneurship, as well as by the definition given to social entrepreneurship in each country. Legal innovation, and more specially the creation of new legal frameworks, is a temptation. It can serve different aims: filling the gap between the existing legal tax framework and the field reality of financing, promoting the brand, or simplifying administrative procedures. When it comes to financing and organizing social entrepreneurship, some countries have launched new legal frameworks, by introducing new legal corporate framework dedicated to social entrepreneurship. The case study for this paper is the American case of the Low-Profit Limited Liability Company (L3C) with a cross-national situation appraisal. Indeed, looking at what is happening beyond borders is crucial at a time of globalization. In this view, we will select the structuring elements of the US case to shed light on other selected national cases: the United Kingdom, Belgium, and Luxemburg.

2. *Objectives*

This research project aims to determine which legal and tax factors are needed in an effective public policy to help the development of new legal frameworks for sustainable entrepreneurship. In this contribution, we wish to determine the factors that crystallize the creation of these new legal formats of corporate law. Which are the elements, above national characteristics, that impede on, or improve the creation of new legal formats? Through case studies, we want to highlight the challenge for public policy of developing a coherent framework dedicated to sustainable entrepreneurship and above all social entrepreneurship.

3. *Methods*

First, we will present the framework of the US social entrepreneurship by developing the evolution of the relationship between funding strategies and legal format. Secondly, we will gather the elements that crystallized the debate around the L3C creation.

In the third part of the paper, we will briefly mention the experiences of legal format creation in the United Kingdom, Belgium, and Luxemburg. In order to find the factors that crystallize the creation of new legal formats dedicated to social entrepreneurship, we need to get into some technical aspects of tax and corporate law. Nevertheless, we have chosen to limit this technical analysis strictly to the only dimension of the tool. Aside from this, legal concepts cover strict legal realities, especially in corporate law and tax lax. The latter can be affected by misleading translations, all the more so as some legal concepts cannot be translated or transposable. While we tried our best to be rigorous, we were also concerned about keeping our analysis as approachable as possible.

4. The Framework of the U.S. Social Entepreneurship

4.1. Historical evolution of the financing and legal framework

In the United States, the definition of social entrepreneurship and social enterprises is structured by a division of approaches between academics and practitioners. Janelle Kerlin describes this polarization as follows: on the academics' side, it is generally accepted that social entrepreneurship covers a wide spectrum ranging from 1) profit-oriented businesses engaged in socially beneficial activities (corporate philanthropies or corporate social responsibility) to 2) dual-purpose businesses that mediate profit goals with social objectives (hybrids) until 3) nonprofit organizations engaged in mission-supporting commercial activity (social purpose organizations) (Kerlin, 2006). On the side of professionals (except consultancy), the concept of social entrepreneurship remains limited to the revenue generated by nonprofit organizations (Kerlin, 2006). To seize the concept of the development of the L3C, it is necessary to understand the context that preceded it. In this regard, the definition based on the practice approach strictly focused on generated revenue by non-profit organization seems to be a more relevant and useful track.

In the sixties, as the federal government launched the Great Society programs, a major fund invested in various programs was channeled through nonprofits operating in their field of activities (Defourny & Nyssens, 2008). However, the economic crisis (seventies) followed by the budget policy of Reagan's administration sounded the death knell for this approach. In this context, numerous charities and non-profit organizations faced dramatic cuts in funding. This happened precisely when the need for funding, because of the effects of the crisis, was huge. Traditional funding sources as donations and subventions were no longer sufficient to cover these needs. This situation opened the door to the development of commercial activities, increasing these kinds of resources in the total amount of resources. What was at stake in the diversification of funding strongly influenced the development of hybrid models (Doeringer, 2010). Nevertheless, hybrid models, still in minority towards nonprofit organizations during the seventies and eighties, have also evolved in their funding strategy. Until the eighties, the best way has remained to ask private foundations for money and/or subsidies to different levels of public authorities (city, State, Federal) (Emerson, 2000). In this context of budget cuts, a lot of non-profit organizations came to the conclusion that their own legal format was an obstacle to diversifying their financing resources (Kelley, 2009). A major problem for these operators was that tax-exempt nonprofits, according to federal and state law (Fed. Reg. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008)), exist to benefit the public, which means that all profits must be injected back into the organizations' charitable missions.

In a discussion draft on 2007, A.R. Bromberger of Perlman Perlman LLP, explained that without possibilities to issue stock or distribute profits to owners, the capacity to attract investments is reduced to its bare minimum, as there are significantly fewer chances for a capitalist venture or other for-profit investors to take an equity stake in a nonprofit social venture. Using debt tools is not more sustainable because of its less flexible and more expensive characteristics in comparison with equities. Traditional lenders were mistrustful towards the nonprofit sector because its creditworthiness was disadvantaged by the lack of access to other capital resources (Allianze, Dupont, the Skoll Foundation and sustainability, 2007). These difficulties led numerous nonprofit operators to leave their initial legal format and build up a for-profit profile. However, this did not mean the end of their financing problems. Indeed, on the one hand, these operators cut themselves off from the traditional resources that remained nevertheless necessary resources for operators with a social purpose (Kelley, 2009). On the other hand, the expectations of the capitalist venture and institutional investors such as pension funds, do not match the needs of hybrid social enterprises: they expect market rates of return which hybrid operators are generally unable to offer (Fleisher, 2009).

5. *The L3C : A Debate Around Tax and Legal Innovation*

5.1. The L3C : the creation and development of a legal format dedicated to social entrepreneurship

5.1.2. Fostering social entrepreneurship with new legal structure: a need?

The idea of the L3C model emerged following a debate organized in Washington in September 2006 by the Aspen Institute. A central question was at the centre of this debate: is the growth of social enterprise being hindered by the limitations of traditional corporate structures and non-profit tax laws? And, in relation to this issue, are new legal forms and tax structures needed to accommodate the next generation of social enterprise organizations? (The Aspen Institute - Billiteri Report, 2007). Indeed, it can be observed that a growing number of specialists have insisted on the idea that new business models and possibly new tax incentives or structures are needed to effectively bridge the “sector” gap. These new models would eliminate the need for social entrepreneurs to either choose between the for-profit and nonprofit business models or create and manage both (Woodrow and Davis, 2009-2010).

5.1.2. The L3C as key-tool for reenergizing PRI

At the occasion of the Aspen meeting, Robert Lang, CEO of the Mary Elizabeth & Gordon B. Mannweiler Foundation uncovered the L3C concept that he developed with the help of Marcus Owens, Associate at Caplin & Drysdale and former director of the Exempt Organisations Division of the IRS (Internal Revenue Service), and also Arthur Wood, Director at Ashoka. The creation of this new legal format was based on a double assessment: there was an important part of the for-profit sector which, while self-sustaining, produced too low a profit to attract normal for-profit investors to engage on their own- but this area is where a lot of socially beneficial enterprises could fit. At the same time the PRI (Program Related Investment), a rarely used tax tool, could be used to help the financing of social entrepreneurship (Coren & Lang, 2009-2010). PRI is therefore a key-tool to mobilizing the wide portion of market-rate investment capital that remains for now in the hands of philanthropies and nonprofit charities, to achieve socially beneficial goals. *Going out for* the classic way of money given out to the nonprofit sector as grants and charitable donations, the objective was to encourage patient, low-interest investments in ventures that would create jobs, reverse economic declines, provide access to affordable and needed services and meet environmental sustainability standards (Coren & Lang, 2009-2010). The PRI investment of a foundation into an L3C could be the leveraging tool that would make it possible (Coren & Lang, 2009-2010).

Therefore what motivated the creation of the L3C was the wish to make PRI procedure for foundations simpler, less costly and more accessible. But what is a PRI? Following the rules of the *Tax Reform Act* de 1968-1969 (I.R.C., § 4944., § 4944(a)-(b). , 4944(c), IRC §4944, Treas. Reg. § 53.4944-1(a)(2)), private foundations can engage in Programs Related Investment. PRI are investments in the form of debt or equity that support socially beneficial activities. PRI is exempt of taxes in accordance to the rules related to the « Jeopardy investments » of the Federal Code on Revenue (cfr.supra). This exemption allows a private foundation to make an investment in a for-profit operator without incurring taxes, provided that they respect the following conditions: Firstly, the foundation must be motivated solely by a desire to accomplish its exempt purpose (Treas. Reg. § 53.4944-3(a)(1)(i)). Second, the production of income or the appreciation of property may not be a significant factor motivating the foundation’s investment (Treas. Reg. § 53.4944-3(a)(1)(ii)).

Third, the foundation has to demonstrate that the investment or loan would not have been made but for its relationship to the foundation’s exempt activities (Wexler, 2006). PRI includes various financing techniques as the lending, index-linked deposits, and in some case equities. Nevertheless, PRI is widely underused as tax tool by foundations (The Foundation center, 2008; Ragin jr., 2006) and represents a very small percentage of the total amount of their expenses: on average 1% (in 2001, 232.9 million dollars on a total amount of 30.5 billion dollars) (Gottesman, 2007; Falkenstein, 2003). Indeed, a lot of private foundations hesitate or refuse to invest in for-profit ventures. Determining the good momentum of a PRI with operators targeting an exemption purpose, with for profit purpose, is a true gymkhana and there is a real uncertainty around the qualification of the investment as a PRI. There are two options to evaluate a PRI qualification and both are time- and resource-costly (Minningh, 2009). The first option is to request a *Private Letter Ruling* to the IRS, with the latter deciding on the qualification of the investment after the explanations of the foundations.

The decision of the IRS is binding and may not be relied on as precedent by other taxpayers or IRS personnel (IRS, Understanding IRS Guidance, Private Letter Ruling, 2012). The main advantage of the PLR is the legal security but its disadvantages constitute the cost and time of the procedure. The second option is to establish a PRI outside the PLR framework, by asking a legal opinion to a *counsel*. However, aside from the costs, it is a risky game: there is a huge legal risk because a legal opinion, however strong it is, is not binding the Federal tax administration. In addition, if not PRI qualified, the investment can be considered as a *jeopardizing investment* – it means an investment that does not fit the exemption purpose and that is not an economically safe investment (Treas. Reg. §53.4944-1 (2007). Consequences can be very important for the foundation if IRS conclude to a jeopardizing investment: the foundation and its administrators can incur heavy punitive taxes on the value of the investment (IRC§4944).

5.2. The legal and tax characteristics of the L3C

The legal format created by Lang, Owens and Wood is based on an already existing legal format of US corporate law: the *Limited Liability Company* (LLC). It is paramount to remember that the L3C is not a charity or a non-profit organization. As LLC, the L3C has the liability protection of a corporation and the flexibility of a partnership. But on contrary to LLC, it is explicitly formed to first, further a socially beneficial purpose and second, earn a profit. At the tax level, the L3C cannot be qualified as tax exempt organization because the part of its for-profit activities is superior to an insignificant part (IRC§501 (c) (1986 amended), although the L3C has charitable purposes and the profits generated by the businesses will be subject to taxation of the tax that apply to their investors. In a note of J. Miklosi on 2010 based on documents sources Attorney M.J. Lane and R. Dinning of Colorado Bar Association, it is outlined that In a similar fashion to the LLC, no federal income tax is imposed on the entity itself but items of income and expense are allocated among the members of the L3C and reported on their returns as the income is earned. The L3C bases itself on the law of the State in which the LLC is registered, by deposing its statutes near the State Corporation Commission. Indeed, US Corporate Law depends on the State level and not on the Federal level. The corporation is under the rules of the State in which it has registered and not under the law of the State in which it has its social headquarters. The statutes of the L3C must include mandatory provisions regarding three principles: 1) it must significantly further the accomplishment of one or more charitable or educational purposes within the meaning of the Internal Revenue Code (I.R.C. §170 (c) (2) (B)), and be formed solely as a result of its relationship to the accomplishment of charitable or educational purposes; 2) it cannot have the production of income or the appreciation of property as a significant purpose, although the actual production of significant income or property appreciation is not conclusive evidence of an inappropriate purpose; and 3) its purpose is not to influence any legislation or political campaign (Schmidt, 2010).

5.3. The legislative path of the L3C

Following the most complete legislative census report conducted in March 2012 (Bishop, 2012), L3C format was introduced in the law of eleven States (California, Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont et Wyoming) and also in *some* tribal law. Eleven other states are preparing its introduction and others are pondering this possibility. At the side of its integration in the corporate law of the States, the law-making stake is also at the Federal level. An overhaul of the Federal rules on PRI could allow the L3C to evolve in a safer and attracting legal framework for foundations. To this end, ACD (American for Community Development, the organization promoting the development of the L3C) is lobbying at the Federal lawmaking entity, with the *Program-Related Promotion Act* of 2008. This proposed legislation has been discussed with Senate Finance Committee Staff on December 2008 and with the Joint Committee on Taxation staff on January 2009.

More recently, the *Philanthropic Facilitation Act* of 2010-2011 goes in the same direction (H.R. 3420 - Philantropic Facilitation Act to amend the Internal Revenue Code of 1986 to facilitate program-related investments by private foundations, 2011. Open Congress, 2012). It was proposed by Republican and Democrat representatives (Rep. Aaron Schock (R-IL), Rep. Cory Gardner (R,CO-4), Rep. Maurice Hinchey (D,NY-22), Rep. Jared Polis (D,CO-2), and Rep. Paul Tonko (D, NY-21) at the House of the Representatives in November 2011; it is for now in consideration at the House Committee on Ways and Means of the House of Representatives. The objective of both propositions is to facilitate PRIs by private foundations, partly through the amendment of section 4944 (c) of the Code.

In a note of J. Miklosi on 2010 based on documents sources Attorney M.J. Lane and R. Dinning of Colorado Bar Association, it is outlined that the goal is to provide a process through which an entity seeking to receive PRIs can receive the determination that below-market foundation investments in such entity will qualify PRIs. For the purposes of the determination process, entities organized under the state or tribal laws as L3Cs would be entitled to a rebuttable presumption that below-market foundation investments qualify as PRIs.

6. Findings

6.1. The debate around the new hybrid legal format

Since its very beginning, the L3C has been at the centre of intense debates and sometimes extremely fierce reactions (Chernoff, 2010; Kleinberger, 2010). We tried to shed light on the more salient points of the debate. Three poles of interrogation can be identified: the compatibility with tax law, the real value added of the new legal format and its attraction capacity as a brand new legal format.

6.1.1. The compatibility with other tax and corporate laws

A central dispute around L3C is the question of its compatibility with Federal tax rules. Mainly at stake in this debate is of course the legal safety of the new legal format. On this point, opinions differ, notably on the following question: does the L3C provide enough guarantees to overcome the PLR procedure for the PRI qualification (Maslow & White, 2010). Ronald Schultz, Senior Tactical Advisor at the Tax Exempt and Government Entities Division of the IRS states that at the Federal level, nobody has given any final guarantees on this crucial point yet and that IRS is still studying this issue (Bloomberg BNA, 2009). In a letter on the 8th July 2009 of Caplin & Drysdale LLP to Ronald Schultz, Marcus Owens, former director at the IRS answer that the IRS provided considerable guidelines on PRI in for-profit entities,including the LLC, which are totally applicable to the analysis of investments in L3Cs. In a letter on 3rd March 2010 to Douglas Shulman, I.R.S. Commissioner, Stuart M. Lewis, Chair of Taxation Section of American Bar Association tally with this interpretation as they conclude that if a loan or an investment in a LLC is qualified as PRI, it would be *a fortiori* the same in the case of a L3C.By contrast, Schmalbeck, Law Professor at Duke University, agrees with Schultz by maintaining that the PRI qualification in a L3C is not to this day automatic because there have not been any amending positions or new rules in this direction made by the Congress, the Treasury or the IRS (Schmalbeck, 2009).

Carter Bishop, Law Professor at Suffolk University, as well as Allan Vestal, Professor at Drake University and J. William Callison, Partner chez Faegrie & Benson LLP, go further, warning about the problematic nature of the L3C (Callison & Vestal, 2011): introducing the Federal PRI statutory qualifications inside the statutory definition of the L3C could be constitutionally problematic because federal PRI regulations have always worked as follows: no state law will exempt or relieve any person from any obligation, duty, responsibility, or other standard of conduct applicable to jeopardy assessments (Bishop, 2010). This debate is not closed and it is probable that it will go on as long as there is no clear position of IRS and the adoption of the Federal legislative propositions made by the ACD (*cf. supra*)

6.1.2. The real value added as new legal format

The issue of the value added of the L3C as new legal format is part of the wider debate on the necessity of new legal structures to facilitate the developing and financing of the social entrepreneurship exposed by the 2006 Aspen Institute meeting in Washington (*cf. supra*). There is a stream – or the perception of a stream – arguing that the inherited framework of legal structures and legal format hamstring the socially transformative Plans of social enterprises (Mac Cormac & al. 2007). Some lawmaking levels, academics and professionals are exploring new legal framework to promote for-profit social enterprise. In recent years, a number of jurisdictions have enacted or are studying a variety of legal forms intended to foster the creation of for-profit social enterprises and the activities of social entrepreneurs seeking equity investors (Katz & Page, 2010). The crystallizing debate of compatibility and legal safety that we have already gone through is the product of the main debate. Again, opinions differ: John Simon, Augustus Lines Professor Emeritus of Law at Yale University, important figure of the "skeptics" points out that current law, by the PRI as it exists, already enables nonprofit groups to operate broadly at the intersection of philanthropy and business (The Aspen Institute, Billiteri, 2007).

John Tyler, Vice-President of the Ewing Marion Kauffman Foundation also opposed the « necessity track »: he insists on the fact that neither the better accessibility to PRI, nor the pursuing opportunities that PRI and LLC together might present for creative approaches to financing appropriates ventures, necessarily required new business form (Tyler, 2010). For Wood, the debate on the necessity of new legal formats stems from the government's realization that it does not have enough money: "One of the benefits potentially of the L3C structure is that if it [can] bring the tax-paying corporate sector to address what is a cost to the government, [then] it can create a process [that is] potentially tax-neutral to tax-positive. In the current environment, where there is not enough money, this situation whereby our sector can simply go out and ask for more tax breaks, is not credible" he said (Wood, 2010). This would be the reason why there is a need for a new kind of legal structures as L3C is a mechanism that allows the bringing additional capital and additional corporate expertise into the marketplace of social entrepreneurship (Wood, 2010). This opens the door to the third pole of debate: the capacity of attraction of the new legal format.

6.1.3. The attraction capacity as brand new legal format

Aside from the purely tax technical aspects, the capacity of attraction of the capital strongly depends on the legal safety/security - and the perception of this legal safety – as well as on the perception of the real added value of this new legal format. Indeed, as one of the first field research (Skirman, 2011) made on L3C demonstrated it, the legal safety and the impact of the apparition itself weight a lot in the results of capital attraction toward L3C. Jordan Shirkman synthesizes this situation by explaining that investors at the market level are discouraged by the concept of "low profit" and foundations can be reluctant in investing in L3C because of the not 100% clear situation around the PRI guarantees (Skirman, 2011). In fact, the attraction capacity is linked to the branding of the new legal format: the identity aspect is crucial in the analysis of its potential value added. The capacity for the L3C to be identified as "The" legal format dedicated to social entrepreneurship financing and organization is fundamental: its capacity of development depends not only on its potential intrinsic values but also on its advertizing organization (Skirman, 2011).

7. Beyond the Us Case : A Perspective

7.1. Overview of developments for Belgium, the United Kingdom and Luxemburg

The creation of a new corporate format dedicated to social entrepreneurship is not the prerogative of the United States. This issue existed in both Common Law and Civilist/continental Law systems. In this contribution, we have focused on the case of the United Kingdom (CIC), Belgium (SFS), and Luxemburg. As we will see, these three cases have encountered various levels of success.

7.1.1. Belgium : the Société à Finalité Sociale (SFS)

In Belgium, a Bismarck-influenced state with a corporatist tradition (Esping-Andersen, 1999), there is an important presence of nonprofit organizations in the field of social services and those ones are widely financed by public institutions (Salomon & Sokolowski, 2004). The social entrepreneurship is strongly influenced by this framework and it can be found in a distinct sector, at the side of public and private sectors (Defourny & Nyssens, 2008). The creation of a new legal format, the *Société à finalité sociale* (SFS) in 1995 (Defourny & Nyssens, 2001) aimed to propose a legal structure allowing the development of commercial activities. Indeed, the historical omnipresent format of the ASBL (Associations sans but lucratif) (de Wolf and al., 2001) was very restrictive for this kind of possibilities. Following the art.661-669, chap.1 and 2, livre X of the Belgian Corporate Code, the statutes of a SFS are based on the limited (or the absence of) for-profit purpose, the limit of the sharing of every generated profit, and its redistribution to an annual rate of 6% of the investor's capital, and finally in case of the winding-up of the corporation, the reinvestment of the total amount of the investors' capital in a charity or corporation which purposes are in keeping with those of the disbanded SFS. As a legal format, the SFS has known a very weak success, as quantitatively as qualitatively (Navez, n.d.). Some factors can explain this lack of success. First, technically, the SFS is a label and not a true new legal format: the Law of 1995 made it a complementary statute in opposition to a law proposal of 1988 that wanted to make a full-fledged legal format. Secondly, the SFS has never managed to impose itself neither to be well-known *in front of* the historical weight of the ASBL legal format. Finally, it did not provide any real tax advantage: no rate reduction applicable to ASBL for the registration fees on the donations that it received; the same goes for inheritances taxes and fund raising (Navez, n.d.).

7.1.2. United Kingdom : The Community Interest Company (CIC)

In the United Kingdom, the social entrepreneurship model has gone through considerable evolutions. At first influenced by the liberal tradition where a wide sector of charities compensated a stand back State (Salomon & Sokolowski, 2004), the post World War British model became characterized by the development of social programs by public authorities (Lewis, 1999). After this period, the rise of the New Public Management (end of seventies and eighties) created pressure to impose market or quasi-market mechanisms in the management of social services (Legrand, 1991). This last model reconfigured the relation between the public sector and the "independent" sector in which social enterprises evolve. In this framework, the sector of social entrepreneurship is extremely developed in United Kingdom (KMU, Austrian Institute for SME research, 2007) and it has the particularity to be subject to a specific assessment. The legal format landscapes of social entrepreneurship, initially composed of LLC and Charities, were completed with the creation of the CIC (*Community Interest Companies*) with the Companies (Audit, Investigations and Community Enterprise) Act in 2004. This creation follows a long preparatory study of the Social Enterprise Unit of the Cabinet Office, recommending the introduction of new corporate format in the British corporate law (Cabinet Office, office of the Third sector, 2002). Qualitatively and quantitatively successful (Frasey Valley centre, 2008.Defourny and Nyssens, 2008.

The Regulator of Community Interest Companies, 2010), the CIC is similar to a LLC but must accomplish a social purpose. The CIC can be inflected either as a company limited by guarantee, where all profits are reinvested in the enterprise, or a company limited by shares, where the company can raise equity and issue limited dividends to its shareholders (The Regulator of Community Interest Companies, 2008). The singular characteristic of the British case is that lawmakers established a double-monitoring system of the CIC. Indeed, the government created a regulator specifically responsible for the registering and the compliance of the rules related to the CIC. This one has important powers in case of major problems: it may appoint or remove directors and managers and also take measures to protect the CIC's property (The Regulatory of Community Interest Companies, 2009); lawmakers also introduced the obligation for every CIC to follow an annual assessment test and the obligation to publish its results. The British approach is therefore characterized by the intervention of the public authority at all steps of the development of the legal format (initiative of the lawmaking, monitoring and correction measures safeguarding the integrity and durability of the new legal format).

7.1.3. Luxemburg : a stillbirth project

In Luxemburg, the idea of the creation a specific format for enterprises of « économie solidaire » was frozen in the wider context of a huge legislative reform of the legal framework of the nonprofit associations. The objective was to mend the gap between the rules and the field reality of the ASBL (Ministère de l'économie, 2011). The official literature constantly mixed up the two issues (Ministère du travail, 2008). The few that were specifically developed on the social entrepreneurship legal format mention a kind of social purpose corporation that would be constituted under a Commercial Corporation format (S.A., S.AR.L., société coopérative) (Ministère de la Justice, 2010). The model would be based on the new Luxemburg statute of collective interest and on the base of Belgian legislation related to the « grandes ASBL » (Ministère de la Justice, 2010). However, to our knowledge, this project went unheeded. Very few works have been published on this question at all the different steps of the process. Nevertheless, we can still offer some observations. In the context of a heavy reform, the development of the debate dedicated to the only point of new legal formats of social entrepreneurship was strongly disabled. Another point is that the governmental communication, that can play a crucial role in the rise of the debate, did not help clarify and compartmentalize the debates, only settling for brief examination of foreign experiences.

8. Implications and Concluding Observations

After the exploration of the L3C case and a short synopsis of other national experiences, we are able to note the key elements structuring the debate around legal innovation and more specifically the creation of new legal format dedicated to social entrepreneurship. Aside from national specificities, what would be worth mentioning to ensure that legal innovation is dealt with in the best possible way? Our research demonstrates that an optimum public policy fostering innovative legal initiatives dedicated to entrepreneurship must necessarily take some crucial questions into account before any major initiative. Trying to answer these questions is a condition to building the potential added value of a new legal format.

Firstly, every debate on the creation of new legal format is structured by the question of the DNA of the new legal format: is it full-fledged or complementary? Does it introduce a whole new format or a label? This is more than just an aesthetic question because it has influenced the next questions. Secondly, how can one ensure an effective compatibility between provisions (old and new) of tax law rules, corporate law regulations and constitutional law? It is crucial to strengthen the channels between different levels of legislative powers especially when the competences related to corporate law and tax law are split. Without considering this dimension, the risk of controversies will grow. Controversies can dig a gap between the legal safety of the new legal format and the perception of this safety. Thirdly, legally and on the branding how can the hybrid nature of the new legal format be managed? If the hybrid nature plays on the addition of the advantages of different formats, it can be a risky game on both promotional dimension and legal technicality, with heavy consequences on its attraction potential. The hybrid nature of the new format will easily spark off interrogations on its capacity to distinguish itself as "The" legal format dedicated to social entrepreneurship. Promotion and pedagogy are therefore two challenges in any creation of new legal format (cf. the various national cases we analyzed). An efficient public policy must focus on fostering coherent public information around the legal security and the tax advantages of the new format. In the case of private actors interested in adopting the new format, it is also crucial to promote the branding of the new legal format near private actors.

References

Bishop, C.G., (2010) The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion? *Arkansas Law Review*, 63, 243-267

Bishop, C.G., (2012) Fifty States Series: L3C & B Corporation Legislation Tables. *Suffolk University Law School Research Paper*, (10-11), 1-55

Callison, J.W., and Vestal, A. (2011) The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures. *Vermont Law review*, (35), 273-293

Chernoff, D.S. (2010) L3Cs: Less Than Meets the Eye. *Taxation of Exempts*, 22 (6), 3-6

Coren, C., and Lang, R.M.,. (2009-2010) The L3C : The For-Profit with the Nonprofit Soul [Online] Available: http://www.stlouisfed.org/publications/br/articles/?id=1848 (July 15, 2012)

Defourny, J., & Nyssens, M. (2001) Belgium : Social Enterprises in Community Services. In Borzaga, C., & and Defourny, J. (eds.) *The emergence of social enterprise* (p.47), London : Routledge

Defourny, J., & Nyssens, M. (2008) Social Entreprise in Europe : recent trends and developments, *Social Entreprise Journal*, 4, 202-228

Defourny, J., and Nyssens, M. (2008) Conceptions of Social Enterprises and Social Entrepreneurship in Europe and the United States : Convergences and Divergences. *Journal of Social entrepreneurship*, 1, (1), 32-53

De Wolf, M., De Wolf, P., Nicaise, P., Stas de Richelle, L. (2001) *Le Code des SA et SPRL expliqué*. Liège : EdiPro

Doeringer, M.F. (2010) Fostering Social Enterprise: an historical and International analysis. *Duke Journal of Comparative & International Law*, 20, 291-329

Emerson, J. (2000) The Nature of Returns: A Social Capital Markets Inquiry into Elements of Investment and The Blended Value Proposition. *Harvard Business School Social Enterprise Series*, 17, 1-46

Esping-Andersen, G. (1999), *Social Foundation of Postindustrial Economies*. New-York: Oxford University Press

Gottesman, M.D. (2007) From Cobblestones to Pavement: The Legal Road Forward to the Creation of Hybrid Social Organizations. *Yale Law and Policy Review*, 26 (1), 345-350

Fleischer, V. (2007) Urban Entrepreneurship and the Promise of For-Profit Philanthropy. *Western New England Law Review*, (30), 93-102

Katz, R.A., & Page, A. (2010) The role of social enterprise. *Vermont Law Review*, 35 (59), 59-103

Kelley, T.A. (2009) Law and choice of entity on the social enterprise frontier. *Tulane Law Review*, 84, 337-377

Kerlin, J.A. (2006) Social Enterprise in the United States and Europe: Understanding and learning from the differences. *International Journal of Voluntary and Nonprofit Organizations*, (17),

Kleinberger, D.S. (2010) A Myth Deconstructed: The "Emperor's New Clothes" on the Low Profit Limited Liability Company. *William Mitchel College of Law Legal Studies Research Paper Series*, (3),

Legrand, J. (1991) Quasi-markets and Social Policy. *Economic Journal*, 101 (408), 1256-1267

Lewis, J. (1999) Reviewing the relationships between the voluntary sector and the State in Britain in the 1990's. *International Journal of Voluntary and Nonprofit Organizations*, 10 (3), 255-270

Maslow, S.A., & White, T. (2010) Enlightened Capitalism and L3Cs. *New Jersey Lawyer*, 63-69

Mac Cormac, S., Glass, J., Cook, J., (2007) *The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial and Social Missions*. In White, A., & Kelley, J. (eds.) Summit on the Future of the Corporation: Paper series on Corporate Design, paper n°9, 88-99

Minnigh, E.C. (2009) Low-Profit Limited Liability Companies : An Unlikely Marriage of For-Profit Entities and Private Foundations. *Tax Management Estates, Gifts and Trusts Journal*, 1-9

Navez, F., (n.d.) SFS (Société à finalité Sociale). [Online] Available: http://www.ces.ulg.ac.be/ (July 15, 2012)

Ragin jr, L.M. (2006) *The Evolution of PRI's*. Program-Related Investments Conference, Stanford University, 19 January 2006

Salomon, L.M., & Sokolowski, S.W., & al (eds.) (2004) Global Civil Society: Dimensions of the Nonprofit Sector. Kumarian Press, vol.2

Schmalbeck, R. (2009) *Financing the American Newspaper in The Twenty-First Century*. Duke Conference on Nonprofit media papers, 4-5 May 2009

Schmidt, E. (2010) Vermont's Social Hybrid Pioneers : Early Observations and Questions to Ponder. *Vermont Law Review*, 35, 164-210

Shirkman, J., (2011) The Viability of the low-profit limited liability company: what it will take for the L3C to become social entrepreneurship's next big thing. Thesis presented to the Honors Tutorial College, Ohio University.

Tyler, J. (2010): a framework for L3C fiduciary duties and accountability. *Vermont Law Review*, 35, 117-161

Wexler, R.A. (2006) Social Enterprise: a legal context. *The Exempt Organizations Tax Review*, 53 (3), 233-244

Wood, A. (2010) New Legal Structure to address the social capital famine. *Vermont Law Review*, 35, 45-52

Woodrow, S., & Davis, S. (2009-2010) The L3C: A new Business Model for Socially Responsible Investing. *Bridges - The Review of the Community Development Department of the Federal Reserve Bank of Saint Louis*, 5-8

Publications from a corporate body and government publications

Allianze, Dupont, The Skoll Foundation & Sustainability (2007) *Growing opportunity: entrepreneurial solutions to insoluble problems*

Bloomberg BNA, Daily Tax Reports (2009) *IRS Tax Exempt Official urges Caution for Groups Eying Low –Profit LLC Investment*, n°126, G3, 6th July 2009

Falkenstein, J.A, The Foundation Center, The PRI Directory (2003) «*Charitable loans and other program-related investments by foundations*

Frasey Valley Center For Social Enterprise (2008) *Analysis of L3C and CIC Social Enterprise Models*

KMU Forschung Austria, Austrian Institute for SME Research (2007) *Study on practices and policies in the social enterprise sector in Europe*

Ministère de l'Economie et du Commerce extérieur, Département de l'économie solidaire (2011) *L'opportunité d'un nouveau type de société pour l'économie solidaire au Luxembourg (la révision du projet de loi n° 6054 portant réforme de la loi de 1928 sur les a.s.b.l. et fondations)*. Luxemburg City.

Ministère du travail et de l'Emploi, Réseau plein emploi (2008) *L'association d'intérêt collectif, un nouveau statut pour les entreprises de l'économie solidaire au Luxembourg. Le fonds pour l'économie solidaire, une source de financement mixte*. Luxemburg City.

Ministère de la Justice (2010) *La réforme de la législation sur les associations sans but lucratif et les fondations : Présentation d'un plan d'actions de la réforme envisagée par le Ministre de la Justice François Biltgen*. Press file. Luxemburg City.

Solidarité Alternatives Wallones (2003) *Quel avenir pour la SFS ? Contribution de SAW au chantier de la réforme du statut de Société à Finalité Sociale*

The Aspen Institute (2007) *Mixing Mission and Business: Does Social Enterprise Need A New Legal Approach? Highlights from an Aspen Institute Roundtable*, (Billiteri T.J. Report)

The Foundation Center, (2008) *Aggregate Data by Private Foundation Type 2006*

Cabinet Office, Office of the Third sector (2002) *Private action, public benefit: a review of the charities and the wider not-for-profit sector*

The Regulator of Community Interest Companies (2010) *List of Community Interest Companies*

The Regulator of Community Interest Companies (2008) *Incorporating a new community interest company*

The Regulator of Community Interest Companies (2009) *Frequently asked questions*

The Regulator of Community Interest Companies (2009) *Incorporating a new community interest company*

The Regulator of Community Interest Companies (n.d) *Information Pack: Community interest Companies*