

PURPOSE? GIVE US ASSET LOCKS!

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ORGANISATIONAL FORM, GOALS AND PURPOSES

ORGANISATIONAL FORMS

- in private law four main organisational forms:
 - company (partnerships and corporations; also cooperatives)
 - association
 - foundation
 - trusts (common law; *Treuhand, fiducie, ...* are less important)
- these organisational forms can be used for several goals:
 - asset management; asset, debt and risk separation (SPVs)
 - collective production of goods or services for a market, as a going concern (= enough profit to self-sustain)=firm
 - collective consumption (sports, wine or book club, musical ensemble,...)
 - idealistic non-profit pursuits: philanthropy, science, art, religion, ...

PROFIT V NON-PROFIT

- many such organisations, including non-profits, try to be **going concerns**: generate enough income through activities so that they don't need subsidies; others depend on subsidies
- a **for profit** seeks to **distribute profits among members**, at the latest when it is dissolved; a **non-profit reinvests profits** in whatever activity it pursues, in principle also when it is dissolved
- for profit may distribute all profit to non-profit
- **There is no rigorous, one-on-one link between organisational form and goals pursued**: both associations and companies and even foundations are often used as firms, i.e. for business activities; in some jurisdictions companies may be non-profit (although probably associations are always non-profit?)

PREDOMINANT USE

- still, there are predominant uses for certain forms:
 - companies will mostly be for-profit
 - capital-intensive or risky activities will usually be organised through corporations
 - majority of associations are non-profit, and some jurisdictions outlaw certain firm/business activities for associations
 - foundations are mostly non-profit distributing, and mostly used for asset management

GOAL AND PURPOSE

- **goal** in legal context: permitted or actually pursued activities as defined in objects clause of articles
- **purpose**= *raison d'être* (French)= ultimate goal pursued, is agreed between members as what gives meaning to the organisation
 - pure for profit, financially benefitting shareholders
 - pure non-profit
 - pursuing for profit purpose but without wanting to maximise it: e.g. environmentally sustainable pursuit of profit
 - mixed purpose: e.g. profit, but “social”, so that part of operational profit is invested in that social purpose
 - **we are interested in “hybrids”**: for-profits but with some additional purpose ; or for-profits controlled by non-profits

HYBRIDS: FOR PROFIT WITH PURPOSE

- I. **instrumental** purpose: for profit while...
 - being a **good corporate citizen**: taking people and planet into account even without being forced to do so by regulation; “voluntarily” internalising the costs of negative externalities
 - in order to attract and motivate certain type of employee
 - in order to improve image with customers
 - e.g. we want to produce “safe” or “healthy” or “most elegantly designed” products
 - eg. we want to be a diverse company or a sustainable one, or one that offers its employees a good work-life balance
- **win-win: we want to make billions by (allegedly) advancing the interests (determined by us, entrepreneur) of humanity (E. Musk, really):**
 - through the creation of safe general AI
 - by limiting climate change through electric cars
 - by developing technology to colonize Mars

HYBRIDS: FOR PROFIT WITH PURPOSE

- **II. Purpose with teeth/bite:**
 - we distribute (all, sizeable part of) our profits to a non-profit, eg philanthropic enterprise foundation
 - we have control vehicle to serve long-term interest of family: is egoistic, non-philanthropic and for profit, but still there is an ulterior purpose to creating and cashing in on profits: benefiting the family= long term owners who see the firm as more than a vehicle for financial engineering to the benefit of some financial investors like PE funds
 - we pursue “social goals” ourselves and devote part (5 % to 95%) of profits to those social goals (= our purpose)

SOME EXAMPLES OF HYBRID FORMS

- “real” cooperatives: essentially for profit but cooperation to save costs, create more efficient organisation, increase bargaining or market power
- Belgian “social enterprise”: for profit but may only distribute 4-6%, rest to reinvested in social goal;
- French company with *raison d’être*: regular for profit but formulates purpose and must devote funds to it
- French société à mission: for profit, no asset lock but must incorporate social or environmental *raison d’être* in articles of association and subject itself to external certification; also internal monitoring body with an employee representative; directors can be dismissed (by shareholders...) if they grossly fail to respect the purpose
- benefit corporation: for profit but social purpose; (reliable ?) certification possible as B corp by B Lab or similar private certifier

STEWARD OWNERSHIP

- As I understand it from mainly Dutch literature (I'm Belgian, but would like to be Dutch except in my culinary preferences 😊) and A. Sanders:
 - business, for profit
 - but pursues some other purpose as well, often: maintaining a business **in the long term**
 - in fact often to the benefit of a controlling family
 - => **split between cash flow rights and control/governance/voting rights**
 - control rights often in hands of foundation, that uses them to make sure profits are first reinvested in purpose and only then do investors get a “fair” reward through profit distribution
 - sometimes: external reporting duty on pursuit of purpose

ENFORCING PURPOSE

- management theorists and the like do not seem to realize we lawyers are intellectually superior 😊: we always think of “the bad man” (O.W. Holmes) and do not care for texts (words, words, they are patient) or rules or intentions or goals (like purposes) that cannot be enforced or are not enforced

MAKING PURPOSE BINDING

- instrumental purpose can be mere management culture thing, or founder or board setting tone at the top => fragile and not enforceable
- if formulated in documents, charters, bylaws that can be amended by board: not enforceable
- same problems as with enforcing stakeholderist approach to “corporate interest” (next slide)

MIXED PURPOSE

- guideline, “north star” for board, management, perhaps even members (shareholders at general meeting)
- but organisations can be good at pursuing specific targets, and perhaps unidirectional purpose, like maximise profits or do as much good for malaria patients as possible; will not be good at mixed purpose
- as soon as **mixed purpose: large discretion required for governance bodies** => no external evaluation possible=> no enforcement possible
- mixed purpose allows rhetorically dexterous board to justify any action
=> may actually decrease accountability
- mixed purposes may be invoked by corporate sector against effective regulation (hard law): “we”re already doing what mandatory regulation would require us to do”

INCORPORATE PURPOSE IN ARTICLES ?

- makes it binding for governance bodies
- but articles of association can be changed by members/shareholders
- articles can only be enforced by members or “the company” (= board decision)= > at mercy of shareholders or boards, and courts will be confronted with discretion of governance bodies

LEGAL ENFORCEMENT OF GOAL GENERALLY

- ex ante:
 - charter amendable by board
 - articles of association
 - government/agency permit (cf Belgian social enterprise)
- ex post:
 - allowing public prosecutor/agency/third party to sue for nullity of certain corporate actions
 - allowing same persons to sue for forced dissolution of organisation that does not respect purpose
 - allowing same persons to sue directors (liability)
 - allowing supervisory authority to intervene in governance
 - auditing and certification (on basis of disclosures)
 - allowing tax authorities to revoke beneficial tax status

WE NEED ASSET LOCKS

STAGES OF ASSET LOCK

- law mandates non-distribution and reinvestment in purpose of profits:
 - all profits
 - certain percentage
- dissolution:
 - only with court approval ?
 - transfer of net assets to similar purpose-organisation, checked by external authority (court, notary, supervisory agency)

STAGES OF ASSET LOCK (2)

- transformation: only into similar purpose-form
- mergers and related “universal succession” operations: only either as absorbing entity or into similar form
- if government recognition is required: no discretionary possibility to hand back permit and lose=be freed of “purposeful” status
 - cf problems with Belgian soccer clubs that were “social enterprises” until shareholders wanted to sell them

CONCLUSION

- do not regulate purpose as such, except for pure non-profits; but allow hybrid purposes in corporate forms
- you need asset locks to enforce purpose, otherwise it will be meaningless/depend on goodwill of governance bodies, who may be Holmesian “bad men”
- perhaps in addition you need disclosure of reports on how purpose is pursued, and audit (private auditor or government agency) or certification (idem)