The right of Third Sector entities: some comparison perspectives

" How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it"

Adam Smith, Theory of Moral Sentiments (1759)

1. Non-profit organizations and Italian Third Sector entities (ETS): introduction.

From 3 August 2017 the Italian legal system has a legal definition of Third Sector entities[1] . The choice is important if we consider that the concept of the Third Sector presents a sociological matrix rather than a juridical one, intended for it, at its origins, the set of non-profit bodies with social aims without, however, a clear identification of its boundaries.

The language of the Italian jurist of the middle of the last century was characterized by expressions such as moral bodies, first and non-profit bodies, then , and the doctrinal debates were concentred on the differential traits between the bodies of Book I and bodies of Book V of the civil code and on the nature of ideal or ultra-individual purposes [2] of the former . The first Italian contribution, dated 1985 [3], an important doctrine, analysing the US system, began to talk about *non-profit organizations* , a term that has since become common use also in legal language and, indeed, has become a favourite syntagm with respect to other local expressions. The framework terminology was, then , further enhanced by the expression third sector, coined already in 1973 by Amitai Etzioni in his book " *The Third Sector and Domestic Mission* " [4] and by Theodore Levitt[5] and from the most recent expressions " social cooperation " , " civil enterprise " or " social entrepreneurship " , just to name a few. Even though each of them is born in different contexts and with different shades of meaning [6] , it is true that overall the concepts that they express are indicative of a profound change in the perception of the sector and of the strategic importance, even under the socio-economic point of view, these entities are part of[7] .

In summary, in order to understand the recent Italian reform, there are two particular aspects of the evolution of the sector to be considered: the emergence of a teleological element of social-solidarity[8], on the one hand; the affirmation of a new business model[9], on the other.

As well know, the Italian Civil Code , affected by historical fears and prejudices towards the intermediate bodies, used to attribute them solely benevolent purposes and only slowly, thanks to the doctrine [10] , the distinction between " non- commercial entities " and " commercial entities " has been overcome. The topographic division[11] has been substantially superseded, admitting that associative and foundational bodies could exercise economic activities (as form of collective enterprise), thus abandoning the theories connected to the requalification in de facto companies.

At the same time, in the nineties of the last century there was a proliferation of special laws that recognized a number of non-profit entities characterized by the pursuit of specific purposes considered particularly meritorious [12], such as the so called voluntary organisations, social promotion associations and, again, the most recent social utility non-profit organisations. It was a set of provisions

(some of a private law nature, some of which were tax-related), which recognised a number of incentives, including the tax ones, because of the socially valuable purposes pursued.
Overall, though, the institutions of special laws were united by the same nature of legal entity as non-profit organizations and by the limitation of the economic activities they could carry: the exercise of the economic activity had to assume, from time to time , the characteristics of the non-prevalence , from the marginality , of the auxiliary and subsidiarity , of the accessory, on the basis of the specific tax advantages correlatively foreseen.
Only with the first formulation of the law relating to the social enterprise in 2006[13], the dual requirements concerning the legal nature of the institution and the definition of the activity carried out began to crack , recognizing, on the one hand, that all private organizations, including companies, could assume the status of social enterprise ; on the other the possibility (*rectius*: the necessity in order to obtain the qualification) that these entities could carried out economic activities without limitation in order to produce or exchange goods or services of social interest, aimed at achieve goals of general interest, under the ban on the distribution of profits.
In fact, many institutions were generally traced back to the Third Sector label[14] , meaning generally for it a reality other than the State and to the market ; in parallel, the special disciplines was unable to define, with sufficient accuracy, the sector [15] . In recent decades , then, the emergence of models such as foundations-enterprise, social enterprises and social cooperatives have causes to the rise, nationally and internationally, of new paradigms of social economy, showing an apparent metamorphosis of the so called modern economy, which has now assumed the post-modern traits of the relational economy [16] .
The presence of many (too many) special laws, layered and sometimes even each other in contrast , the'social enterprise failure of 2006 mainly due to the absence of tax incentives , the emergence of new forms of hybrid corporate such as innovative *start-ups* with a social vocation in 2012 and the *benefit* corporations in 2016, the continuous and important growth of the *non-profit* sector [17] have pushed the Italian legislator at a total rethinking of the sector and to a reorganization of it and, in August of 2017, the Legislative Decree no. 117 and 112 of 2017 (cd reform Third sector) entered into force[18] .

1.1 (continued): the boundaries of the Italian Third Sector

The Italian third sector reform is made up of two texts - the Legislative Decree no. 117/2017, called the Third Sector Code and Legislative Decree no. 112/2017 on social enterprise - that need to be read together, not only from a strictly legal point of view, but also and above all in terms of a wider a conceptual approach. The Italian third sector, in fact, encompasses within it also the social enterprise, which is characterized by being the most distinctly entrepreneurial model of the *non-profit*.
The formulation of the article 3 of the Third Sector Code dictates the constituent elements of the Italian Third Sector entity: (i) the non-profit purpose , (ii) the pursuit of civic, solidarity and social utility goals, (iii) the carrying out, exclusively or principally, of one or more activities of general interest in the form of voluntary action or the free provision of money, goods or services, or mutual aid or the production or exchange of goods or services, (iv) the registration in the National Register of the Third sector, and (v) the form or nature legal. With reference to the latter profile, the legislator makes the choice of including in the notion of third sector entity , alongside entities already known in the special legislation [19] or new social emergence[20] , also social enterprises, including social cooperatives.

The system of sources outlined by the reform, which is characterized by the existence of common rules provided for all Third Sector entities, is confirmed, also at a systematic level, alongside which there is a more specific discipline dedicated to each individual typology special entity: social enterprise shall, in addition to the provisions of Legislative Decree no. 112/2017, also the Third sector Code provisions (d. lgs. 117/2017); as well as, residually, the provisions contained in the civil code relating to the legal form the social enterprise is established with.

Thus, in 2017, the Third sector assumes a precise legal identifying traits that allow institutions to acquire a unitary identity, previously absent , and a discipline of the subject .

Very briefly, therefore, the Third Sector entities are all those subjects of private action[21] who pursue civic purpose, solidarity or social utility, carrying out a general interest-organized ; the social enterprise, instead, is born to exercise one or more activities (equally of general interest for the pursuit of civic, solidarity and social utility purposes) but of an entrepreneurial nature, on a stable and principal basis (meaning by it the situation in where the revenues from this activity are higher than seventy per cent of the total revenues of the social enterprise) or to occupy a minimum expected percentage of very disadvantaged workers or disadvantaged or disabled people (respectively under the terms of letter a) and the letter b) of the fourth paragraph of art. 2 Legislative Decree no. 112/2017).

Therefore, the category of the Third sector today embraces organizations that carry out mutualistic activities, supply or production activities; that operates by not providing services free of charge or at a political price , with reimbursement of expenses , using the economic method , or even with a lucrative method ; with the clarification , in the latter case , that the split between the so called "objective profit" and "subjective profit" (only the latter forbidden) makes the exercise of economic activity perfectly compatible with the *lato sensu* ideal purpose of the Third Sector (and, more generally, with the entities of book I of the civil code).

More specifically, the fiscal policies of the reform leave out a strong boost to the entities of the third sector , which carry out an economic activity in primary or exclusively mode (in the areas of general interest), to assume to the social enterprise status [22] .

The Italian legislature outlines , therefore, a broader framework in which one can identify a general category of business entities of the third sector "which includes social enterprises but is not limited to them, and that in turn could be back in the even broader descriptive category of "non-speculative" companies, recently developed by careful doctrine " [23] .

Although not fiscally and normatively encouraged[24] , in fact, *all* Third Sector entities can carry out activities of general interest also in the form of an enterprise pursuant to art. 2082 cc, without any qualitative or quantitative limit; further, even in relation to the so-called different activities, all the bodies will be able to carry out economic activity with the limit , in this case, of the secondary and instrumentality that will be better declined with a forthcoming decree of the Minister of Labour. Therefore, while in the social enterprise the pursuit of economic activity coincides with the statutory purpose, for the "other" Third Sector entities the business activity is optional and possible, but never legally precluded or incompatible with the purpose of the institution.

The current third sector , therefore , does not consists more exclusively of pure vocation or voluntary entities (although they maintain a central importance), but also of the entrepreneurial entities, thus recognizing, through the implementation of the principle of circular subsidiarity *ex* Articles 117 and 118 of the Constitution, the logic of the social economy in full public / private collaboration [25] in favour of civil action[26] .

The Third Sector Code, in fact, recognizes a tripolar economic model (State, market, Third Sector) and promotes productive economic realities of "other" values, in function of an economic biodiversity. "We need a market in which companies that pursue different institutional ends can freely operate in conditions of equal opportunities. Alongside the profit-oriented private enterprise and the various types of public enterprises, those productive organizations that pursue mutualistic and social ends must be able to take root and express themselves. It is from their mutual comparison on the market that we can expect a sort of hybridization of business behaviour and therefore a sensitive attention to the *civilization of the economy* " [27] .

Therefore, the reform recognizes full compatibility of civic purpose, solidarity and social utility with the organization of the Third sector entities with entrepreneurial vocation.

In this sense, the images of concentric circles and stratification[28] suffer , perhaps, from the historical vision of the Third sector for which the social aims were the exclusive preserve of the associative or foundational bodies . If it is true, in fact, that the supply / donation activities still remain typical of the bodies of Book I, since the companies can operate on a non-profit basis only where allowed by law [29] , the recent Italian reform takes two steps: it explicitly recognizes the entrepreneurial character of the bodies of Book I, for which the prohibition of profit distribution remains firm; includes the bodies of Book V, companies and cooperatives, in the notion of the social enterprise and, therefore, in the further notion of the Third sector.

A large part of the doctrine argue about neutrality of legal forms [30] and hybridization patterns: "the internal organization of the subject is not indifferent to social enterprise legislator, who is concerned about the coherence of *governance* over the purpose, and for this reason it identifies a common nucleus of norms that strongly reduces (without cancelling it) the difference among the different legal forms of the social enterprise " [31] and that applies "with priority over those of the type, unless [... the rules of the type] are not even more compliant with the objectives of the legislator than those of the category"[32] .

2 . A European perspective: the laws of Social Economy

It appears , therefore , a first peculiarity of the Italian reform in comparison with the evolution of other European legal systems, in which the most recent regulations have moved in the direction of the 'Social Economy'[33] or of the *social enterprises* , alternately in terms of type or qualification an entity may assume.

Again, the two concepts of social enterprise and social economy organizations tend not to be fully defined and, in part, overlapping each other.

But let's proceed with order.

Emerging for the first time in economic literature in 1830[34] , at the hands of the French liberal economist Charles Dunoyer[35] and completely reworked by Gidé[36] at the beginning of the last century, the concept of "social economy" is today at the centre of important European debates[37] , not yet conversed in a common overview[38] also due to the birth of " neo-concepts" : "in the 1970s the social economy was described using multiple terms, including the third system, "civil society" and non-profit. In the context of the economic crisis, a new wave of concepts emerged, such as social enterprises, the collaborative economy and the economy of the common good. It should be emphasized that these issues hide not only the lack of a consensus on the designation to be used, but also a hidden policy aimed at hindering progress in this field " [39] .

Although the features of Social Economy are not unique in the different normative experiences and its definition is controversial[40] , it has been observed that it is characterized, essentially, by the action of i) private bodies that ii) carry out an economic activity iii) for the pursuit of particular purposes (mutualistic or of general interest but, in any case , non-profit making) and iv) with a particular organizational and financial structure (primacy of the person over capital, democracy, participation, allocation to an indivisible reserve of a significant share of profits ...). Attention is therefore directed more to the subjective than objective nature of the entity.

The Spanish[41] , Portuguese[42] , French[43] , Romanian[44] and Greek[45] , which in the last few years has regulated the socio-economic phenomenon [46] are significant experiences.

The forerunner law on the subject is the Spanish one of 2011[47] that, setting itself the goal of creating a uniform legal concept of " social economy organization " that little weaves obtain his legal recognition also for the purposes of public support measures or promotion, identifies a number of requirements characterizing said subjects, which can be found both in the normative definition (art. 2), and in the guiding principles (art. 4) , as well as in the subjective identification (art. 5).

Starting from the latter, the law identifies the subjects of the *Social Economy* and among them indicates, in addition to a series of bodies subject to specific *regulations* (the *sociedades laborales* , the *mutualidades* , the *empresas de inserción* , the *centros especiales de empleo* , the *c ofradías de p escadores* and *to sociaciones the s ector de la d iscapacidad*) , cooperatives, insurance mutuals, foundations and associations, with two opening clauses so as to allow, over time, an allargmentdening of the subjects (Article 5) [48] .

The *concepto y denominación* - so the heading of Article 2 - of social economy (as a set of economic and commercial activities that in the private sphere are carried out by those institutions that pursue the collective interest of their members or the general economic or social interest, or both, in accordance with a series of principles enunciated by the law itself) allows , then, to identify, among the essential requisites, the *private nature of the entity* , thus subtracting the logic of management and control of the public sector , the *activity* that these institutions can carry out and the *purpose* that these institutions must pursue. The interest is, precisely, the collective of its members or the general economic or social or both, and the activity is of economic nature.

Last but not least, the institutions of the social economy law, in order to be such, must observe a series of "guiding principles" (Article 4) , such as a) the primacy of persons and of the social purpose over capital, which is declined in an autonomous and transparent, democratic and participatory management, in which the decision-making process enhances the people and their contribution to the work more than the capital ; b) the distribution of the results obtained mainly from economic growth based on work performance or services forint the by the shareholders or members rather than on the basis of return on capital; c) the promoting solidarity within the institution and to the community, as well as promotes the commitment to local development, equal opportunities between men and women, social cohesion, the inclusion of people at risk of social exclusion, the generation of stable employment and of quality, the reconciliation of personal, family and work and the sustainability ; d) the independence by public authorities.

Consistent with the stated regulatory objectives, the law does not identify a new regulatory type and, just as consistently, provides that each subject remains governed by its own specific legislation, given its substantial nature, identifying however the described set of principles which constitutes the lowest common denominator of *all* the institutions of the social economy, for which - together with the

economic and social function - the measures of development, promotion, diffusion and public support are justified .

Similarly, the Portuguese legislation of 2013[49] . In short, it consists of a framework law in which the legal framework of the institution of the social economy takes place through the definition of social economy (art. 2), the identification of the subjective nature of the entity itself (art. 4) and the identification of a series of guiding principles (Article 5).

Activities and end define the legal concept: only entities that carry out a socio-economic activity aimed at pursuing an aim of general interest of the company, directly or through the satisfaction of the interests of its members, users and beneficiaries, if of social importance [50], can be considered as bodies of the social economy. In particular, it was observed [51] that the precise lexical choice relating to the activity was determined by the desire to strongly emphasize that it must be, yes, economic (and therefore aimed at the production of goods or the provision of services) but, jointly, also social, thus highlighting the primacy of the person and the social objectives with respect to the logic of capital.

Among the subjects of the Portuguese social economy there are the mercies, the private institutions of social solidarity, the associations with altruistic aims that act in the cultural, recreational, sporting and local development, the entities belonging to the community sub-sectors and the self-management as well as the legal forms of cooperatives, mutual societies, associations and foundations. Finally, an open clause includes all those other entities which, jointly, have legal personality, respect the guiding principles of the social economy and are included in the relevant register.

Similarly to Spanish law, the Portuguese law also requires that each entity be governed by its specific substantive rules, due to its nature, while respecting the guiding principles that the law itself declines [52] .

The same trend also includes France, which has always been very active in promoting the social economy[53], officially recognized in 2014 with the law 856 [54] .

Actually, the French system, although moving in the same direction as the aforementioned countries, appears to be the outcome of a more far-reaching intervention.

Generally defined as "*mode d'entreprendre et de développement économique*" which unites all those entities that pursue a different purpose than just sharing profits and which, at the same time, boast democratic, transparent and participatory governance, the social economy is further identified with the activity of production, processing, distribution, exchange and consumption of goods or services (Article 1, first and second paragraphs, first paragraph) aimed at pursuing a una *utilité sociale* [55] (Article 2, first paragraph).

The French legislator, differentiating himself from the choices made by Spain and Portugal, decided to define the areas of activity in which the social economy organizations (ESS) must operate. Article 2, in fact, introduces a presumption of pursuit of social utility in favour of all those institutions whose main purpose is (i) to support people in situations of fragility, due to their economic, social and personal situation (in terms of social, medical, social or health assistance) or in the fight against their exclusion; (ii) the preservation and development of social relations or the maintenance and strengthening of territorial cohesion; (iii) citizenship education so as to reduce social and cultural inequalities; (iv) the development of sustainable energy, cultural promotion or international solidarity, when aimed at producing an impact on the objectives referred to in the previous letters. Furthermore, the management of the entity must be inspired by a priority logic of reinvestment of profits in maintaining or developing entrepreneurial activity and the prohibition of the distribution of compulsory reserves must apply.

The most markedly innovative choice [56] is, however, represented by the profile of the subjects involved, since alongside the institutions traditionally appointed to become *économie sociale et solidaire* institution, such

as cooperatives, mutual societies, foundations and associations, the 2014 *loi* includes among the actors of the socio-economic phenomenon also the commercial companies [57] on condition that they satisfy all the requisites established by the articles 1 and 2 of the law itself, among which, as mentioned, there is also the democratic governance, in addition to the respect of further and specific relative provisions to the destination of profits [58].

The logics of the social economy, centred on the primacy of the person over capital, the enhancement in people's decision-making processes and their contribution to work, the principles of democratic, participatory and transparent management and the reinvestment of profits in the institution's activity itself or in social actions or goals, traditionally and structurally belong to associative and foundational bodies that pursue "usefulness or social relevance" and, in the corporate sphere, are typical of the cooperative model, which are born ab originally characterized by these principles.

The compatibility between the requirement of democratic management and the nature of the corporate body was therefore questioned (except for the cooperative model only), observing how it would be difficult to understand "in which aspect (...) capitals] would differ from the cooperative societies. In reality, or this organizational requirement is not actually applicable to commercial companies that intend to qualify as entities of the ESS, or it should be concluded by stating that the same, distorting the organizational structure of corporations, would end up limiting the purchase of qualification as an ESS body for cooperative companies only " [59] .

Overall, all three regulatory experiences briefly retraced (Spanish, Portuguese and French) are linked by the importance of the defining aspect, the lack of which has historically slowed down the birth of a common and unitary policy of incentive and support for the sector, and from the common methodological approach on the basis of which it was decided not to establish a new type of entity but to provide for a qualification that can be assumed by all institutions with specific formal or substantial requirements and compliant with the principles - similar in the three jurisdictions - prescribed by the respective laws in terms of organizational and financial structure.

Two observations can be made. The first with a view to comparing concepts. The second with reference to the system of asset locks provided for by the civil economy laws.

The two concepts of the Third Sector and the Law of Social Economy tend, as is evident, to approach and partly to overlap, both for the subjects that they incorporate and for the centrality of the aims of social utility, to which the action of such institutions it is direct, without however exhausting one another [60] .

The Social Economy, including business entities, constitutes, in fact, a more circumscribed category than that of the Third sector (Italian), which includes, in addition to companies with a productive vocation, also those entities with a pure supplying vocation that constitute the non-market.

While for the social economy the exercise of economic activity, expressly set as a requirement by the different laws, is an essential and characteristic trait of its institutions, for third sector institutions the entrepreneurial vocation is possible but not essential since the notion of the Third sector embraces that of social enterprise but does not end there.

It follows that the notion of institution of the Social Economy does not even coincide with the national notion of social enterprise given that Italian social entrepreneurship emerges from the boundaries of Legislative Decree 112/2017: as previously mentioned, in fact, also associative and foundational bodies they can well carry out economic activities without, therefore, by choice or obligation, having to assume the status of a social enterprise.

Finally, the two concepts (social entrepreneurship and social enterprise) do not have perfectly overlapping perimeters since the social enterprise includes companies, excluded, instead, from the laws of the social economy (with the exception of the French experience); conversely, while in European legislation on the social economy the cooperatives have always been considered bodies of the social economy, so it was not in the Italian legislation on social enterprises, in which the only social cooperatives (but not even ordinary ones with scope mutual).
More generally, the laws of the social economy are aimed at the protection and enhancement of a system closely related to the notion of entrepreneurship of certain subjects. The Italian Third Sector makes a wider choice, on the one hand recognizing all social entrepreneurship, on the other giving visibility and encouraging all private institutions "that allow for the creation of precise constitutional objectives (such as those referred to in art. 2, with regard to the duties of solidarity, 3, in terms of substantial equality, and 118, paragraph 4 °, in relation to horizontal subsidiarity) [and which, as such,] cannot (...) receive less legislative attention to private entities that pursue economic-selfish goals, such as lucrative and mutual societies "[61] . Concluding on this point, the Third sector represents a broader concept than that of the social economy, to which corresponds, perhaps, a more ambitious desire to *reductio ad unitatem* of the social value of all these institutions, regardless of the criterion of profitability, economy or at a loss with which they can operate and by their supplying or productive nature: in short, an inclusive concept, aimed at creating a unitary promotion and support strategy[62] , with more or less intense gradations, of all that sector that pursues civic, solidarity or social utility, carrying out activities of general interest.
Clear is the logic of opposing the market economy aimed at maximizing profit and in favour of a democratization of the economy itself.
The non-perfect coincidence between concepts does not end in relation to the subjective profiles of the institutions but also extends to the wider system of asset locks, on which it will return shortly after having analysed in more detail the disciplines of some European countries in terms of social enterprise.

3. (continued): the social enterprise

Some recent studies [63] show that the concept of social economy is not uniformly widespread in Europe [64], depriving itself in most countries of the notions of non-profit, voluntary and social enterprise.
The many components of social enterprise legislation are dedicated to the market sector of the Third sector [65] , to which the disciplines relating to social cooperatives, now present in eighteen European countries [66] and, with a very different approach, also in the United States, are added and intertwined.
Similarly to what was found for the social economy, social enterprise is also not a completely unitary notion [67] and, lacking even in Europe a complete elaboration, recourse is made to unifying criteria developed within research centers [68] .
The comparison with the rules of the other European legal systems is now strongly facilitated by a series of study reports prepared on behalf of the European Commission, whose results from 2014 to the present allow us to map the similarities and the trends of the relevant legislation more precisely [69].
The traits recognized as typifying the social enterprise can be summarized as follows [70]: these are private organizations, independent of the State, which carry out entrepreneurial economic activity of production or sale of goods or services that are socially useful for purposes of general interest or public utility and subject to profit distribution constraints against a reinvestment of the same in the activity of the entity, with democratic or participatory governance rules and with the involvement of stakeholders.

From the theoretical definition to the practical variation the step is important. Although the notion of social enterprise is in fact known in almost all the countries of the European Union, the phenomenon must be read according to two directives: the existence of a series of entities that, using already existing organizational forms, carry out entrepreneurial activities with goals or purposes of public or social benefit, in fact implicitly qualified as a social enterprise where the requirements set by the European operational definition are integrated (think of the traditional hypothesis of non-profit bodies that carry out commercial activities with entrepreneurial methods); the existence of institutionalized forms of social enterprise.

The legislation on the subject of social enterprise is, on the whole, a rather recent phenomenon and many countries are adopting strategies for the exploitation of this new form of entrepreneurship. In any case, three are currently the roads pursued for the implementation of the social enterprise[71]: some countries, valuing the historical function of the cooperatives, have identified in them the legal type of reference for the social enterprise; others, including Italy with a choice made in 2006 and reconfirmed in 2017, have instead chosen to decline the social enterprise as a qualification that an entity can request in the presence of certain requirements or that is recognized *ex lege* to certain types of institutions already existing; finally, the third option is the introduction of a new type of social enterprise body.

What is of interest is investigating the choice between the three aforementioned options as well as the rules imposed in terms of governance and asset lock in relation to the control of the pursuit of the "social" purposes.

The choice of the enhancement of the cooperative model is not surprising considering that, as has been observed, the "milestone"[72] of European legislation on social enterprise was precisely the Italian law on social cooperatives of 1991. The cooperative model, characterized by rules of corporate ownership and control tempered by criteria of participation, transparency and democracy, it has always appeared as the type of entity that best suited the logic of social entrepreneurship and that could better reconcile the corporate soul with the social one.

Within this first line - in which social cooperatives are recognized and regulated as a reference model for social entrepreneurship - a series of countries are included, including Croatia, the Czech Republic, Hungary and Poland[73] and (partially) Greece[74]. These are those that could be defined as first generation legislation, due to the absence, in fact, of a broader regulatory reference framework.

The setting of countries such as France, Portugal and Spain[75], in which the discipline on social cooperatives is placed in the broader system of the social economy, with a double standardization level, is different. Similarly, in Italy, the legislation concerning social cooperatives is characterized by the identification of an organizational and productive model - but not the only one - which is then qualified, *ex lege*, as a social enterprise, and, further, as a body of the Third sector. A triple normative and conceptual level [76] .

The social purpose was thus declined in the employment of disadvantaged people and workers or, in other systems, in a wider scope: in the Italian experience, for example, type A cooperatives [77] operate in the management of social services health and education; in France the *Société Coopérative d'Intéret Collectif* (SCIC) *ont pour objet the production ou the fournensis of biens et de services d'intérêt collectif, here présentent a caractère of social utility* [78] , in Portugal the *cooperative de solidariedade social* pursues forms of integration of fragile or vulnerable people[79] and, again, in Spain the social cooperatives of social initiatives also operate in the sectors of health, education, culture or carry out other activities that have as their object *the satisfacción of necesidades sociales no atendidas por el mercado* [80] and in the

Republic Czech[81] in a variety of social purposes including sustainable development and environmental protection[82]. In non dissimilar terms the Polish forecasts are placed. Not least, in Greece three models of social cooperatives have been envisaged[83]: while in the first the aim is mainly aimed at job inclusion (Inclusion Koin SEP.), In the Social Care model Koin SEP and Koin SEP of Collective and Productive Purpose, the purpose is aimed respectively at the production and supply of goods and services in the field of social assistance to specific groups of the population (the elderly, infants, children, people with disabilities or chronic diseases) and the production and supply of goods and services for the satisfaction of "collective needs".

The second option, actually covered more recently by most European countries[84], including Finland, Denmark, Lithuania, Luxembourg, Romania, Slovakia, Slovenia and Italy, declines the social enterprise as status, as a transversal qualification to a series of types of bodies.

What varies is the breadth and transversely of the types of institutions that can obtain the status of social enterprise: in Italy, in fact, book I and Book V entities both fall among the subjects considered by the legislator, in a similar way to what happens in France for the institutions of the social economy; otherwise, placing itself at the antipodes with respect to the Portuguese or Spanish approach according to which, as seen, are exclusively social economy organizations, foundations, mutual societies and cooperative societies, in Luxembourg the qualification of ***société d'impact sociétal***[85] can be obtained only by limited liability, cooperative societies and *anonyme* companies[86] and, similarly, in the Belgian experience before 2019 the qualification of ***sociéte à finalité sociale***[87] can be obtained by all companies with legal personality but not by cooperatives, associations or foundations[88].

What differs most significantly from the legislation mentioned is the presence or absence of criteria or rules set up to protect the social purpose and rules that require and guarantee inclusive or participatory governance.

In Luxembourg, the law on companies ***d'impact sociétal*** was adopted in 2016[89] in order to give social and solidarity entrepreneurship a legal and fiscal framework favourable to the creation and development of adequate structures which, in compliance with the needs and specificities of the sector , could reconcile the social vocation with the entrepreneurial one. The ***société d'impact sociétal***, in fact, must carry out entrepreneurial activities aimed at the pursuit of social goals (according to the broader indications that the legislator identifies in the context of the concept of social economy[90]), which consist in providing support to people in fragile situations or contribute to the conservation and development of the social bond, to the fight against exclusion and to health, social, cultural and economic inequalities, to gender equality, to the maintenance and strengthening of territorial cohesion, to the protection of the environment, to the development of cultural or creative activities or training activities. Quite peculiar however is the Luxembourg declination in terms of limitation of the distribution of profits and reinvestment of the same of the corporate purpose [91] : the legislation does not adopt the classic logic of the cap for each shareholder but chooses to intervene by dividing the corporate shares into two categories. The capital of the ***d'impact sociétal*** companies can be composed of a share of "yield shares" which, as the name suggests, attribute a right to the distribution of profits if at the end of the financial year the corporate purpose has been achieved; at the same time, the law requires that at least 50% of the capital must be composed of impact actions, ie shares whose profits are necessarily reinvested in the social activity of the institution.

Therefore, in companies made up entirely of "impact shares" it is in no way possible to distribute dividends to shareholders or shareholders; otherwise, for those made up of a non-integral percentage of

"impact actions", the distribution of dividends related to the different category of shares is permitted, provided that the institution has effectively carried out its economic activity from a social point of view o social, according to a verification carried out through the performance indicators obligatorily present in the statutes. In the event of a positive evaluation, the holders of the yield shares will be entitled to the payment of dividends in proportion to the number of units or shares held.

Not unlike the company of impact sociétal, it was the Belgian société à finalité[92], repealed, however, on 28 February last.

The *sociétés en nom collectif, en commandite simple, privée à responsabilité limitée, coopérative, anonyme and en commandite par actions* could obtain the status of a company with social impact on condition that they carried out an activity with a social purpose.

However, the Belgian legislation did not clarify either the concept of a social purpose or the type of activities that can be exercised, merely stating that the main purpose could not be the production of a benefit for the shareholders and that the mutual aim should be excluded or limited[93]. Depending on the preference of the members, to be indicated in the statute of the institution, it was possible to establish a *société à finalité sociale* with total absence of profit sharing or with a low profit distribution[94]. The choice was therefore left to the autonomy of private individuals, exactly as in the Luxembourg model, where the option is determined by the choices of type and number of shares (impact or repayment); quite different, on the other hand, from the current Italian model in which the possibility of distributing profits, even within a certain limit, is not left to private autonomy but is related to the choice of the type of entity (admitted for corporate models, prohibited by associations and foundations).

The société à finalité sociale was a juridical solution combining the exercise of commercial activities without limitations and the social purpose that the administrative body was obliged to promote in priority with respect to maximizing returns for shareholders; so much so that, in order to protect the purpose, it was envisaged, in the event of liquidation of the sociétés à finalité sociale, the allocation of any residual assets to non-profit organizations or to a company with a social purpose as close as possible to those pursued by the extinct company[95] . As for the rules of governance, while maintaining each type of company its own discipline[96], the law provided for a maximum number of votes per member in the shareholders' meeting [97] and the obligation to indicate in the statutes the methods with which to allow the worker to become a partner[98], thus enhancing logic democratic and open management, lacking, however, forms of direct involvement of workers and stakeholders.

At the beginning of the year, however, an important reform initiative was approved[99], structured around three main pillars: 1) the limitation of the number of company forms[100]; 2) the incorporation of the law of associations into the Company Code [101]. In particular, the new Code des sociétés et des associations, which came into force on May 1, 2019 for new organizations and which will apply to those already existing only from January 1, 2020 (except for the exercise of the opt-in by the institutions), yes consists of five parts: the first contains general provisions and rules relating to the name of the legal entity, the formalities of constitution and publication, invalidity, administration, resolution of disputes, dissolution and liquidation, applicable to companies, associations and foundations (unless otherwise indicated otherwise); the second part is dedicated to corporate bodies; the third part to the associations and foundations; the fourth part declines the rules regarding restructuring and transformation and, finally, the fifth part dictates the forms of European companies.

Overall, the new legislation aims to modernize and simplify the existing framework and unify the rules for the same type of activity, reason for which associations, foundations and companies are governed by

the same code, which, if on one hand, distinguishes with strict rigor between commercial and non-profit organizations, on the other hand, recognizes the possibility also for associative and foundational bodies to carry out commercial activities without quantitative limitations and, therefore, à titre principal. The condition is, however, that the profits are then fully reinvested for the pursuit of the corporate purpose and not distributed among its members[102].

The new Code contains, in fact, a re-coding of the rules on associations and foundations, replacing the loi of June 27, 1921 on les associations sans but lucratif, the foundations, the European political partitions and the foundations of European policies (loi sur les ASBL) [103]. Once the distinction between civil and commercial acts and between civil societies and commercial companies has been eliminated[104], the new and unitary concept of "enterprise" within the Code de droit économique (CDE) has led to a re-examination of the classic distinction between commercial companies, on the one hand , and (non-profit) associations, on the other, since both of these entities can be businesses (and, as such, go bankrupt and be subject to the jurisdiction of the "Business Court"), with the consequent possibility also for associations and foundations to carry out any type of activity aimed at obtaining the resources necessary to finance their "but désintéressé".

The new approach fades profit as the distinctive criterion of the two forms of grouping: once the distinction between sociétés avec et sans but commercial, the purpose of profit is replaced by the criterion of direct or indirect distribution of profits to members, determining that the only distinction criterion is henceforth the distribution of profits and not the nature of the activity, the objective or the altruistic purpose[105]. Every organization, therefore, including associations and foundations, can carry out an economic activity but, while companies can provide for a remuneration of the members, any distribution is forbidden to non-profit organizations.

In parallel, the reform has redefined the cooperative societies and has provided for the abolition of the social sociétés à finalité as a distinct legal form[106]: the current sociétés à finalité sociale will flow into the cooperative model or that of the non-profit association. All in a new regulatory framework in which only cooperative societies can be registered as social enterprises[107]: companies with a social purpose must, in fact, to benefit from the term agréée comme entreprise social, transform themselves into a cooperative companies, confirming their adherence to cooperative principles (participatory governance, free membership) before the end of the 5-year transition period[108]; otherwise, they will be transformed into a limited liability company.

Therefore, the reform replaces the concept of a company with a social purpose as a cross-company qualification in favour of the new concept of social enterprise, which can only be acquired by the cooperative. Essential conditions[109] for taking on its status are the presence of a main purpose of general interest, aimed at producing a positive social impact for man, the environment or society and the distribution of profits among members within the normatively fixed interest rate[110], with the obligation of devolution of the residual assets in case of liquidation of the institution in favour of entities that pursue similar purposes.

The entry into force of the legislative text is very recent but from a first analysis it would seem that the Belgian system has moved in the direction of a separation between for-profit and non-for-profit, not because of the activity or the purpose but exclusively in reason of the principle of non distribution constraint, following an entrepreneurial approach of the sector, which found its culmination in the choice of incorporating the forecasts within the same company code. At the same time, the legislation related to the qualification of social enterprise would seem prima facie to move in a perspective very similar to that

of social cooperatives, in which the legislator has exclusively identified the cooperative model as the basis for adaptation to social purposes.
Moreover, even the French system, oriented as mentioned in the regulation of the social economy, seems in any case to fit in a direction very similar to that of the countries that have regulated social enterprise as a transversal qualification model. This is in consideration of the provision relating to the possibility for the French social economy bodies to add to the status of ESS, in the presence of certain conditions, also that of entreprise *solidaire d'utilité social* (ESUS) [111].
The qualification of ESUS, attributed ex lege to some institutions [112], can also be obtained by cooperative companies, mutual societies and mutual insurance companies, associations, foundations and commercial companies[113]: in this case the institutions must comply with all the conditions imposed on the subjects of the social and solidarity economy with additional requirements. Article L.3332-17-1 of the labor code, reformed by art. 11 of the l. 856/2014, provides, in fact, that, in order to obtain the status of a body with social utility, (i) the institution of the social economy must pursue the pursuit of social utility as its main objective; (ii) the exercise of the aforementioned activity must have a significant impact on the financial statements or on the financial profitability of the entity; (iii) the institution must comply with certain rules regarding the remuneration of employees and managers [114] so as to ensure that the gap between the sums received from the most highly paid individuals and those who receive the minimum wage is contained and, finally, (iv) i shares of the company, if existing, should not be admitted to trading on a financial instruments market. Furthermore, as has been observed in terms of profits and dividends, the "general prevalence clause envisaged for the social and solidarity economy enterprises and, in the case of commercial companies, the additional limits on the destination of a fraction of the profits to the development fund, on the deduction of a further fraction for the reserves, in addition to that provided for by law for the generality of the companies, and on the prohibition of repayment or reduction of the capital " [115].
The structured asset lock system and the need for social utility to be pursued as the main objective make a strong similarity with the normative models of the social enterprise we are discussing evident, being able to formulate a parallelism between the broader concepts of the Third Italian sector and of the French social and solidarity economy bodies (albeit with the subjective differences already noted), on the one hand, and the concepts respectively included of Italian social enterprise and French ESUS, on the other.
That said, as it had already been in 1991 in relation to social cooperatives, even today the Italian legislation on the subject of social enterprise appears to be the most developed and close to the doctrinal definition model.
Three, in particular, are the identifiable profiles in relation to which the reformed Italian social enterprise appears particularly effective in protecting its aims: the presence of rules aimed at protecting the social purpose and rules regarding distribution constraints[116]; the criteria and limits set to safeguard the entity's autonomy from the State and from for-profit organizations[117]; the provision of additional governance rules or modifications with respect to the types considered and valid transversally [118].
The legislation is, therefore, as a whole aimed at enhancing the logic of the social economy, as a bearer of peculiar principles that make it possible to delimit the field of social enterprise (and social economy) from the entrepreneurial forms of Book V[119].
This logic also includes the English legislation on CIC (Community Interest Company) [120] which is the main example of a different regulatory choice: the United Kingdom has, in fact, preferred to introduce a real new regulatory sub-type based on a corporate model different from the cooperative company, a

"new off-the-peg" corporate structure. Although, in fact, the social enterprise can take the forms of the association, of the joint-stock companies, of the business partnerships, of the charities, of the cooperative and of the trust, the English regulation provision introducing the c.d. CIC[121], which are the only legal form specifically designed to enable and regulate social enterprise in the United Kingdom[122]. It was in fact observed that "companies that did not have a charitable status found it difficult to ensure that their assets were protected for public benefit. There was no simple, clear way to socialize their assets. The community interest company form meets the need for the model is transparent, flexible, clearly defined and easily recognizable " [123].

Thus, companies limited by guarantee without share capital or limited by shares can be set up as CICs, while companies limited by guarantee with share capital can only be transformed into CICs[124].

They are defined as a new type of limited company for people to establish businesses which trade with social purpose, to carry on other activities for the benefit of the community[125], with prevailing reinvestment of profits in the business of entity itself, for the benefit of the community and with recognition by a Regulator[126], responsible for supervising the meritorious purposes of the activities performed.

As the name already suggests, the purpose of these bodies is to satisfy a community interest. From a first point of view, a first significant difference in the normative approach, in addition to the choice of creating a real legal type, is constituted by the definition of the aforementioned interest. In fact, there are no sectors or lists of activities that the legislator considers socially useful but a community interest test is envisaged, that is a flexible and broad criterion that allows concrete evaluations of the activity carried out. The section 35 (2) of the Company Act of 2004, in fact, requires that a reasonable person might consider that his activities are carried out for the benefit of the community or a section of the community.

Except for a list of activities that the Community Interest Company Regulations of 2005 qualify as incompatible with a common benefit assessment[127], the evaluation of the pursuit of community interest is very flexible.

The broad formulation allows not only the activity directed to a social utility but also the activity that consists in allocating the profits produced to a social purpose, including the support to a charity, to be considered of interest to the community. In fact, even if indirectly, the attribution of profits to an entity that in turn pursues social goals is considered to be of benefit to the community, thus shifting the analysis of judgment from the activity exercised by the CIC, which could be any activity economic productive of profits and therefore not necessarily social, to the allocation of profits towards social purposes, pursued by the charities[128]. The approach is very different from that typically found in continental European countries and recalls the US phenomenon of the c.d. feeder company (on which below). The comparison between English CICs and US feeder companies, however, ends in a fundamental differential profile: the community interest companies, unlike the charities, do not hold any tax exemption.

The absence of market distorting logics does not prevent the British system that the company that devotes its profits to another entity for socially worthy purposes (provided that asset-locked) can overcome the community interest test.

The system of guarantees of the pre-eminence of the meritorious purpose is confirmed by the forecasts regarding the sale of goods and the distribution of profits[129]: a CIC cannot transfer its assets if not to their market value, with the exception of cases in which the assets are transferred to asset-locked bodies, which pursue meritorious purposes, identified by the deed of incorporation or by the statute of the CIC

[130]or any other asset-locked body subject to the consent of the Regulator. Similarly in terms of asset destinations[131].
Also significant are the forecasts regarding asset lock and stakeholder involvement.
With reference to this last profile, for example, it is prescribed that the c.d. CIC annual report details the forms and methods adopted for stakeholder consultation as well as the results deriving from such involvement[132]; moreover, section 172 of the Companies Act 2006 requires a director of any company to act in a way that considers, in good faith, the most likely to promote the company of its members as a whole. The doctrine[133] then questioned whether the provision should read as an implicit duty to take into consideration the interests of the stakeholders, also indicated in the section itself (workers, suppliers, customers, the community and the environment) in a logic of promotion of the cd enlightened shareholder value principle[134], coming to observe how, in reality, the norm consists in a mere codification of the duties of the directors so as not to be provided for enforcement mechanisms[135].
As for the other profile, the law declines two limits for the CICs both with reference to the possibility of distributing dividends and in relation to the payment of interest[136].
While the limited by guarantee without a share capital do not have shareholders to distribute dividends, in companies limited by shares[137] the presence of shareholders has necessitated the introduction of limits: thus, section 30 of the Companies Act 2004 refers to the Regulator, which, in turn, after repealing the previous maximum dividend per share and the ability to carry forward undistributed profits up to a maximum of five years, from October 1, 2014 it identified the maximum measure of distribution of profits among the shareholders in 35% of the annual net profits[138], thus maintaining only the cd maximum aggregate dividend cap or m.a.d. [139] .
The 35% limit therefore expresses the maximum percentage - obviously not mandatory - of distributable profits, excluding any distributions in favor of asset lock bodies that are not only not subject to this limit, but neither are they, as exempt, in the calculation of the amount of annual profits on which to calculate the aforementioned threshold. Similarly, the interest payment is subject to the c.d. interest cap equal to 20% of the average amount of its debts. Finally, with regard to the possibility for CICs to dispose of their assets, in addition to the aforementioned prohibition of assignment below market value, it is envisaged that, in the event of liquidation of the entity, residual assets must be transferred to the identified asset-locked bodies in the deed of incorporation or in the articles of association or, in the absence, to other asset-locked bodies according to the decisions of the Regulator[140], thus delineating a system aimed at maintaining the benefit of the community as the main purpose of the entity. A set of rules, therefore, aimed at protecting the peculiar identity of that company that combines economic activity and social goals. The establishment of the social enterprise in a non-cooperative company model and the absence of requirements such as democracy, participation and openness to third parties or, again, the absence of limits and bans on control positions make, however, said model can also be controlled by a single person or hetero controlled and governed according to the capitalist criterion and in hierarchical form[141]. Indeed, this was precisely the requirement underlying the birth of the CIC: allowing the founders to maintain control of the entity, without any difference with respect to the equivalent corporate model of the capitalist economy[142].
While rules that foresee and protect the company's social mission, which place limits on the distribution of profits and assets, even in the event of the institution's liquidation, and rules of prevailing reinvestment of profits in the activity of the institution are almost contained in all the regulations analyzed, is in the area of forecasts (i) overseeing a democratic and open structure, (ii) of control and (iii) of stakeholder

involvement that articulate the different regulatory choices: this body of rules is essentially inherent to the cooperative model and, therefore, is present in the systems that have declined the social enterprise using the cooperative as its elective structure. Otherwise, these forecasts are absent in those systems that have admitted the corporate models of capital among the forms that can assume the status of social enterprise or that have used these models as structural reference of their regulations (United Kingdom and Luxembourg, as well as before 2019 Belgium), unless we have provided, like France or Italy, expressed rules to protect the civil economy.

The North American context is widely different[143]. In the US system, in fact, also due to the different origins of the concept of nonprofit organizations, anchored to the single principle of non distribution constraint, non-profit organizations have always been rigidly opposed, on the one hand, and corporate bodies aimed at to the maximization of profit due to the principle of shareholder primacy, on the other. Thus the social enterprise was born in the overseas sense, with very blurred boundaries and includes entities of a for-profit nature, of which the Low-Profit Limited Liability Company (L3C), the Benefits or Public Benefit Corporation (BCorp), Flexible purpose corporations or Social Purpose Corporation (SPC) are the most recent, but not exclusive[144], events[145].

The US social enterprise, in fact, represents a broader category than the European one and "includes all those private organizations, including lucrative companies, which carry out commercial activities - with an economic method - in order to pursue social and environmental objectives, as well as economic" [146]. The phenomenon is very recent and originates from the initiative of a private entity (B-Lab), which first took the strategic and "image" impact anchored to corporate social responsibility. Thus was born in 2006 the model of the c.d. "B-Corp" as a certification issued by a nonprofit, B-Lab for the note, regarding the quality of the business operation respectful of the stakeholders involved[147]. The attestation has exclusively "social effects" and not legal but its success shows how corporate social responsibility can become an integral part of a corporate objective and part of the corporate purpose of the chosen business model[148]; so much so that the B-Lab, together with the American Sustainable Business Council, then elaborated the Model Benefit Corporation Legislation, as a model of legislation.

In 2010[149] comes the first regulatory recognition, in Maryland[150], of the "Benefit Corporation" as a real legal qualification. In the same years, Vermont was the first to recognize the L3Cs[151], giving way to the possibility of setting up low-profit limited liability companies in other countries and in 2011 California introduced Social Purpose Corporations, followed by the State of Washington, from Florida and Texas.

In all three cases, these are laws that use the limited liability company model as a reference form and the related regulations apply, with the exception of the exceptions that each state law regarding the benefit corporation, L3C or SPC envisages, by setting up models of regulatory adjustments required by the fact that all the companies were strictly bound to the principle already expressed in 1919 with the well-known Dodge vs Ford judgment, according to which the shareholders have the right to profit maximization and, therefore, have the right to carrying out a liability action against the directors if they deviate from this objective by pursuing aims that are extraneous to the interests of shareholders only.

Thus, in the case of the L3Cs it is stated that the main purpose of the institution is, rather than generating an economic profit, that of creating a social benefit, pursuing aims of an altruistic and social nature through the conduct of beneficial or educational activities within the meaning of Internal Revenue Code.

Similarly, in benefit corporations the pursuit of a public benefit is added as an additional purpose to the production of profits, generating a social object with a dual purpose: profit-making and "common benefit" according to the scheme c.d. "Triple bottom line" (3P: people, planet, profit).
Last but not least, a "special" purpose of social or environmental utility is added to the Social Purpose Corporations for profit, which administrators must or can take into consideration, depending on the legislation.
While companies maximize profit and nonprofit organizations have an absolute ban on the distribution of profits, the regulatory models mentioned above combine the soul of the for profit with that of the non-profit.
Despite the presence of a multiple social purpose, new standards of conduct for the directors and particular obligations of transparency, what makes the US system significantly different from the European panorama is the absence of a system of protection of the corporate purpose. On the contrary, the "social" purpose tends to be *a quid pluris* of the classic profit-making purpose and does not represent, as it is in the legislation of European social enterprises, the primary purpose that must be pursued. The only model in which the social purpose appears to be more pronounced is that of the L3Cs in that many of the related laws affirm that they must be constituted exclusively for the pursuit of social purposes. However, beyond the statement of purpose, no system of asset locks is envisaged to protect the latter, nor are there rules for limiting distributable profits or even principles regarding the reinvestment of the same in the business of the asset. 'body; likewise, governance rules or democratic requirements or participation are absent.
It is therefore a concept of social enterprise very far from the European one, of a for-profit nature, which accentuates the reflections already formulated by authoritative doctrine in relation to those systems in which the social enterprise was declined on the basis of the capitalist corporate model without temperaments o protection systems of the section that typifies the civil economy.

4. The US nonprofit organizations

Having analyzed the response and the regulatory evolution of the various legal systems with reference to third-sector forms with an entrepreneurial vocation, we now intend to examine the non-market Third sector component (so-called donative organizations or charities organizations) in common law systems.
The concept of non-profit organization, of Anglo-Saxon origin, not exhausting itself in charities ("charities") and philanthropic foundations ("philanthropic foundations"), indeed includes all private organizations whose statute prohibits the distribution of profits to the founders or those who they control or finance them. Central to this is, therefore, the requirement of the absence of subjective profit-making, which determines the exclusion from the category of non-profit organizations of all those bodies that distribute, in any direct or indirect way, profits.
As seen, the non distribution constraint does not constitute, instead, an essential requisite for the institutions of the social economy or of the social enterprise, with respect to which the criterion of the social purposes and the activity carried out together with a set of assets blocks are privileged and rules governing democratic forms of organization; rules, in contrast, absent or completely irrelevant in the US approach to non-profit organizations.
The non-distribution constraint identifies, in the North American system, the true element of distinction between non-profit and for-profit organizations, as it requires the controllers, administrators and

managers of the organizations not to proceed with the distribution of any sum of money by way of profit, since the latter must be allocated in full to the statutory purposes indicated by the institution.
The American doctrine, and in particular, the school of Johns Hopkins University have tried to provide a structural-operational definition of the non-profit sector: it would include those subjects (i) of a non-governmental nature who (ii) possess some degree of institutionalized organization, that (iii) govern themselves with their own bodies (iv) also involving volunteers for the achievement of the statutory purposes and (v) in the presence of a constraint of non-distribution of any profits. It must be said that the US national legislation, in the field of non-profit organizations, has in fact incorporated, especially in recent years, the proposals and trends of the States of New York and California, essentially focused on the exclusive requirement of non-distribution constraint .
Some preliminary observations: in US law (as well as in English) there is no distinction typical of civil law countries between foundations and associations, in favor of a unitary concept of corporations, differentiated by themselves or aggregated (the latter based on membership), which can also take the form of companies limited by guarantees.
The institutions then distinguish themselves as incorporated or unincorporated depending on whether or not they are recognized as a legal entity, which is connected to the active and passive procedural capacity and the possibility of entering into contracts or own property in its own right.
Essentially the non-profit sector is governed in three respects: organization and governance; taxation; other regulatory law.
The first concerns the regulation of the types of non-profit organizations, the incorporation procedure, establishment and termination of institutions, the regulation of fiduciary profiles and the responsibilities of the institution and its directors, while in the other regulatory law the profiles are included of tort, contracts, insolvency, labor, guarantees and antitrust. Since the United States is a system of federal government and the institution and the regulation of non-profit entities among the subjects of state competence, the legislation can clearly vary and differ from state to state.
Otherwise, the profile relating to the tax treatment of institutions, which consists of the regulation of exemptions relating to income, real property, sales or other types of specific taxation, deductibility of contributions or donations received (income taxes and related exemption for charitable nonprofits) , is primarily dictated by the federal regulation, whose compliance is guaranteed by the Internal Revenue Service.
Thus we are witnessing a split in the definition of civil and fiscal non-profit concepts and, although state laws on the subject are characterized by broad similarities, they vary significantly in the more technical and detailed aspects, determining a situation of system complexity which, in recent decades, an attempt has been made to remedy by encouraging the adoption of non-profit corporation Acts models, so as to generate greater uniformity between the various States: think in this sense of the historic Model Nonprofit Corporation Act of 1952 (amended in 1957 and 1964) or the Revised Model Nonprofit Corporation Act, approved by the American Bar Association in 1987 and the more recent Model Nonprofit Corporation Act (3rd ed.) of 2008.
Moreover, while some States regulate non-profit organizations within the general corporate law in the section dedicated to nonstock corporations, others, such as the State of New York and California, have adopted specific and distinct statutes.
Significantly, it has been observed as "while the states have some common themes in their nonprofit corporate statutes, there are many differences. All the state statutes prohibited the payment of dividends.

Most prohibit the issuance of stock; however, some do permit it. State statutes do not prohibit the making of a profit by a nonprofit corporation. Most members receive payment for non-cash benefits to their members. In addition, some states permit the distribution of assets to members upon liquidation or upon final dissolution, except for charitable organizations. Some states classified non-profit corporations in two categories, whereas most do not. Some states provide standards of conduct for the officers and directors; other do not. The new state statutes provide for member derivative actions, whereas many of the states do not have such provision ".

Only States can determine the conditions for the establishment of a corporation and the rules for incorporation, a procedure by which the entity obtains the recognition of legal existence, very similar to the recognition of our legal personality. Since each state has its own not for profit corporation law the content of the memorandum or statute as well as the control procedures may vary, while the authority that grants the legal personality is the same both for for-profit and for non-profit organizations. The state laws are, in any case, substantially similar in this respect and the institution is then registered in the relative registers kept by each State, to which is added the register kept by the IRS (Internal Revenue Service) relating to all the organizations that they are recognized as tax exempt; register searchable online so as to guarantee the lenders to verify if the contributions given to a particular organization are tax deductible. The register is also supplemented by a series of annual reports that each entity must file, containing information on activities and finances, according to a logic of transparency and control by third parties.

Turning attention, in particular, to those non-profit organizations that are also beneficiaries of forms of tax exemptions, the legal forms that are relevant are the corporations, the trusts, and the unincorporated associations: the formula adopted by the Federal Tax Code speaks more properly of "corporation, community chest, fund or foundation" but the trust, not expressly mentioned, has always been considered part of the concept of fund or foundation. The regulation of each type of subject is then referred to the state legislation, excluding that individuals can act as non-profit organizations both individually and in partnership.

The form of unincorporated association, widely distributed, does not enjoy an independent subjectivity with respect to its members and cannot be the holder of contracts or property rights; in any case, most of the legislation recognizes the active and passive legitimacy as well as the right to share pro rata of the wrecked assets among the associates in case of dissolution. An attempt of greater uniformity is represented by the Uniform Unincorporated Nonprofit Association Act of 1992 and the subsequent Revised Uniform Incorporated Nonprofit Association Act of 2008, adopted however by a limited number of States.

The second legal form consists of the charitable trust, governed by the Restatment (third) of Trusts §§ 2, 76, which, historically most used in the United Kingdom, has gradually found widespread also in the US system, traditionally anchored to the corporate model (whose differential trait with respect to business corporations consists, as mentioned, almost exclusively of non distribution constraint.

However, because "the distinctions between fundamental forms are not particularly relevant in determining what kind of regulation is appropriate to a given organization, it depends on such features as an organization's size, sources of funding, manner of operation, and purposes" , some States, including in particular California in the California Corporations Code, distinguish non-profit entities not so much for their legal form as for the purpose they pursue, thus discussing public benefit entities and mutual benefits. Similarly, the State of New York since 2014 distinguishes between charitable non-profit corporations and noncharitable.

Nor does the distinction escape the tax system, since specific provisions are laid down for the various categories of non-profit organizations. In particular, the broader category taken into consideration by the tax legislator includes almost all non-profit organizations and the section 501 of the Federal Tax Code is dedicated to them, from which a tendentially general exemption from the corporate income tax is derived. Within this macro-set, the second fiscally identified category is constituted by the mutual benefit organizations, that is, those entities that provide benefits to their members, exempted from the corporate tax but which cannot receive deductible contributions.

There is then a third category, to which the section 501 (c) (3) of the FTC is specifically dedicated, consisting of organizations that have charitable or philanthropic purposes: they pursue an external benefit to the circle of their members, addressing the community, and the deductibility of the amounts disbursed from personal income or from the company is recognized in favor of those who donate to them. Although of interest here, section 501 (c) (3) identifies the type of entity closest to the concept of Third Sector entity through a series of requirements: (i) from the point of view of form it must be a corporation , or any type of community chest, fund, foundation; furthermore (ii) it must be organized and operate exclusively for religious, charitable, scientific, support and research purposes, for public, literary or educational health or to organize national or international sports competitions at amateur level (...) for the prevention of cruelty towards children and animals; finally (iii) no share of income must be allocated to a private member, thus giving "preventive position to do so from siphoning off any charity's income or assets for personal use", and (iv) not even addressed in part substantially for political propaganda for or against a candidate for public offices or for lobbying activities.

There are two tests that the institution must pass in order to benefit from the favor contained in the aforementioned section: according to the c.d. organizational test, the statute must expressly provide that the activity of the organization is limited to one or more of the sectors listed by the code, having to relegate to the character of marginality all the activities not necessary for the achievement of the social purpose; the operational test requires that the activity carried out concretely by the body in a primary and primary manner be among those envisaged by the code and that it is aimed at a public interest, since, otherwise, if addressed to the benefit of its members, the institution would be excluded from the benefits.

The reality of the entities that make up this third category is varied, since public charities and private foundations are distinguished in this by the origin of the entity's revenue: multiple donations from the public sector and / or from physical or legal persons, in the first case; a patrimonial endowment basically coming from a small number of subjects, in the second.

With a legal presumption, all the aforementioned organizations are considered private foundations, unless they are such by express provision or are able to pass the public support test. According to the provisions of the IRS, in particular, an organization is a publicly supported charity if it meets one of two tests designed to measure : alternatively, the organization (broad publicly supported organizations), pursuant to section 509 (a) (1), must receive a substantial part of its support in the form of contributions from public charities, governmental units or the general public (for example, through public fundraising campaigns, federal fundraising campaigns or government subsidies); or, pursuant to section 509 (a) (2), the organization ("gross recipits" and membership charities) must not receive more than one third of its investment income while it must receive more than a third from contributions, membership fees and proceeds from activities related to institutional ones.

In both cases the reference is to the economic results of the last four years and the consequent benefit is valid for two consecutive years with respect to the request, regardless of the fact that for the second year

the institution passes the test again. Furthermore, testing for public safety organizations, organizations created exclusively for religious, charitable, scientific or educational purposes (so-called traditional public charities) and those operating to bring a benefit to a public charity (so-called supporting organizations) are not private foundations. defined by section 509 (c) (3): the latter, in particular, are exempted from compliance with the public support test, for tax purposes, when it is exceeded by the supported organization.

Between the two types of institutions, public charities and private foundations, the percentage of the deductibility of donations from donor subjects varies (in particular from the fiscal point of view) (up to 50% if carried out in favor of a public charity; up to 30 % if paid to private foundations), but above all a series of tax rules and impositions applicable only to private foundations vary (with some exceptions for operating private foundations), including, for example, a tax on income deriving from investments; the obligation to make donations equal to a minimum percentage of one's annual income (c.d. distributions qualified to achieve the objective of social statutory relevance); the prohibition of holding property rights with the right to vote of a commercial company beyond certain thresholds; or, again, the prohibition of performing or performing certain operations.

To this end, the IRS can carry out checks on the institution not only at the time of the request for the recognition of the exemption but also subsequently, during the life of the entity itself, in relation, in particular, to two profiles: the limitations to the activities that this can perform and its instrumental activities. In fact, in order to guarantee the charitable or educational purpose of the institution, US federal law has provided a series of prohibitions for non-profit organizations, which are divided into the four complementary concepts of private inurement, private benefit, excess benefit and prohibited transactions, which includes benefits and compensation limits and prohibitions on operations such as loans of money or assets at an inadequate interest rate; payment of unreasonable high compensation; preferential availability of services; purchase of securities or property at an unreasonably excessive price; sale of securities or property at an unreasonably low price; other conduct that results in a substantial distraction of non-profit activities or revenues; operations that even today are prohibited in our system as they are considered indirect forms of distribution of profits. The performance of unauthorized activities entails the revocation of the tax exemption together with some financial penalties.

In the face of these prohibitions, however, it is recognized that the entity can also carry out economic activities that are not aimed at pursuing those charitable or educational purposes that constitute the social purpose. In fact, the entity can also carry out a series of instrumental activities with the specification that the tax exemption does not concern the entire span of activities exercised but only the main activity and those strictly complementary to it (so-called related business) .

The so-called unrelated activities, ie not directly related to the statutory purpose and exercised for the purpose of obtaining financial means, are permitted but subject to taxation. It is therefore a question of commercial activities conducted regularly but not substantially related to the purposes of the entity, as it is not sufficient for the related revenues to be reused for the main purpose, otherwise generating an unfairs competition with for-profit entities.

Overall, therefore, and in a very different way from what happens in our legal system, the distinction between for-profit and non-profit organizations is not constituted by the legal form, which is very broad and flexible enough to include corporations as well, but from non-distribution constraint jointly with the pursuit of a charitable purpose.

This purpose is interpreted in a broad sense if we then consider the treatment of feeder corporations, ie organizations that only carry out a commercial activity in function of allocating the profits to a charitable organization. Before 1951, in fact, the organizations called "feeders" were considered fiscally exempt from federal income tax, according to the previous formulation of section 501 (c) (3), as recognized in the case of Roche's Beach, Inc. v. Commissioner, first and in the C.F. Mueller Company v. Commissioner, then, given that the profits were devolved entirely to charitable organizations, which in turn were fiscally exempt from the income tax: the courts considered that "the exclusive purpose required by the statute , charitable, or educational, without regard to the method of obtaining funds necessary to effectuate the objective ". Thus, the company C.F. Mueller, whose only activity was to produce macaroni but which all his profits were destined to the parent entity New York University, fiscally exempt from the income tax, was assimilated to the latter in tax treatment and considered an equally charitable organization within the meaning of section 501 (c) (3).

The issue of extending tax breaks also for those who do not pursue socially meritorious goals as their primary objective has clearly posed a problem of competition with for-profit companies. In fact, the result was that, with the same activity carried out, the "feeder" organizations enjoyed a privileged tax regime with respect to their for-profit competitors, generating logic of unfair competition on the market. The issue has been overcome through two regulatory interventions: on the one hand, the current section 502 has been modified, providing that an organization managed for the main purpose of carrying out a commercial activity for profit can not benefit from the tax exemption even if all its profits are donated to charitable organizations; on the other hand, in parallel, to prevent the exempt organizations from transferring the commercial activities from the subsidiaries to themselves, enjoying the relative tax exemption, the Congress issued sections 511-514, providing for full taxation on income derived from non-commercial activities related to the corporate purpose even if carried out directly by the charitable organization.

Therefore, today, an organization "does not have the requisites to enjoy also of the same exemption. The devolution, even integral, of profits is therefore not sufficient to allow an assimilation of goals. Beyond the interpretations developed in relation to the terms "trade or business" which do not present significant problems, are instead the concepts of "primary purpose of carrying on trade or business" and of "payable" which define the contours in a more narrow sense of a feeder organization: it is in fact necessary that, and at the same time, , that the institution "is obliged to turn over its profits to one or more designated exemptions organizations".

Therefore, if an entity, in addition to economic activity, also carries out other "significant charitable activities" or maintains a discretion in deciding whether and to whom to allocate its profits, it is not qualified as a feeder and can therefore be the beneficiary of the income tax exception pursuant to section 501 if, in the specific case, the conditions are met.

Unlike the traditional Italian approach, the US model demonstrates as a whole the distinction that characterizes the concept of non-profit is represented essentially by the principle of non-distribution constraint: the structure of the entity appears, as seen, to be completely irrelevant, since it can assume the status of non-profit organizations also the companies, which, indeed, turn out to be the predominant choice in the field of supporting organizations.

In this regard it has been observed how the US system would seem to move towards an enhancement of the output produced by the institution and would seem to "pay more attention to the service provided than to the provider for which the non-profit would be more the service made that is not the entity that

makes it. Hence the further consequence that the tax benefit must be guaranteed not so much to the organization as such as to the social output in and of itself, payable by all organizational forms. Therefore, in the US system, it is the criterion of output that tends to prevail over that of organization; it is evident, then, as the potential outcome of this order is in the sense that the qualification of the non-profit is eventually exhausted in an accounting data, that is in that of a separate accounting for each service rendered ".

In fact, the centrality of the US tax legislation (centered on the selective combination of charitable purposes and non-distribution of profits) is significant, which, adopting a functionalist criterion, also recognizes the qualification of public charities to supporting organizations on the basis that they "warrant "public charity status because they have a relationship with their supported organization."

Against this, the attention of the legislator from overseas seems rather to focus meticulously on the limit of the approach itself, to ensure that the protection of non-profit does not lead to situations of pathological unfair competition: reconciliations with the centrality of the output have been placed on of feeder corporations on the basis of the fact that "one cannot convert for-profit business into charity simply by contributing to profits to charitable organizations", since, on the other hand, it is necessary for the entity to actively and concretely pursue a of the charitable purposes, that is, that, for a feeder organization to benefit from the exemptions, any trade or business in which it is the organization without compensation, or any trade or business which is the selling of merchandise, substantially all of which has been received by the organizer ion as gifts or contributions. The attention of the legislator is also focused on the possible relationships of direct or indirect control on non-profit entities by external subjects, having foreseen their relevance both in relation to public charities and private foundations and with reference to support organizations in order to avoid compromising or altering the altruistic logic and independence of the non-profit sector.

Last but not least, it can be seen that US social enterprises do not enjoy, unlike Italian ones, tax benefits since they distribute profits: the choice to maintain the centrality of the nondistribution constraint as a discretive criterion is directed to the protection of the non-profit sector with respect to dynamics and contexts of for-profit organizations that carry out commercial activities of interest to the community in the face of the fact that a part of the American doctrine claims for these last for some time a full equalization in terms of tax breaks, arguing the greater efficiency of the cd for profit philantropy.

5. The UK charities

In the English system the non-profit organization takes on important aspects in the charity sector.

Until 2006, the United Kingdom also discussed charity, as in Third sector Italy, as a mere synonym of an entity dedicated to charity or, more generally, to activities with a social purpose.

The 2006 reform, on the other hand, introduces the concept of charity as a status that can be recognized in the hands of a series of bodies that pursue certain purposes deemed to be particularly worthy, with the consequent application of a specific discipline and a favorable tax treatment. Launched in 2001 under the Blair government, the reform intervention led to the Draft Charities Bill of 2004, which was followed in 2006 by the definitive approval of the Charities Act, revised in 2011: this last change, which came into force on March 14, 2012 , represents the basis of today's English non-profit sector, proposing in an organic way much of the Charities Act 1992, 1993, 2006 and the Recreational Charities Act 1958, with the aim of providing a discipline adequate to the changes in the sector.

The reform, at the beginning, in section 1, defines the charities as the set of institutions established for charitable purposes, confirming that the charity is a qualification that can be assumed by non-profit organizations established in the form of the unincorporated association, the (charitable) trust, the company limited by guarantee and the charitable incorporated organization (so-called CIO), according to what the same law clarifies (section 9 (3) and 204).

The English reform, following an approach similar to that of the Italian reform, requires, in addition to the legal form, that the institutions pursue a charitable purpose, which declines in two requisites: it is necessary that the aim pursued falls within those indicated in a long list of activities identified by the legislator himself and that this purpose is aimed at pursuing a public benefit. In fact, while before the discernment for the qualification of charity was represented by the object of the charitable activity, the concept of public benefit takes on a new centrality, which has become a criterion for the evaluation of interests and aims.

The definition of charity and the contextual declination of the list of activities and the purposes of the sector is certainly one of the points of greatest novelty of the reform since, until 2006, the evaluation of the nature of an entity as a charity was put to the test of jurisprudence, first, and by the Commissioners, then, with the procedure of registration of the institutions through an analysis of the charitable purpose.

Historically the first charity law provision is identified in the Charitable Uses Act 1601 (Statute of Elizabeth I) which in its Preamble provided an interpretative guide to the aims c.d. charitable and provided a list in which they were included "the relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids; support, aid, and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption or prisoners or captives; and the aid of a few inhabitants, setting out of soldiers, and other taxes. "

The importance of the Preamble was twofold: on the one hand, it constituted the point of reference for the selection of interests worthy of protection, so that for over 200 years after the promulgation of the statute the list of the purposes considered charitable has in fact determined an effect binding on the jurisprudential activity in the evaluation of the nature of the institution; on the other, as has been observed, it "inaugurated a methodological technique of selection (...) [of the existence of a fine charitable by reason of which] the privileged nature of the single entity does not represent (it goes) more a benefit obtained from the order , but a real subjective right of individuals to develop their business thanks (also) to the tax benefits acquired ". The centrality of the historical list was confirmed both at the normative level, when the Mortmain and Charitable Uses Act of 1888 abrogated the Charitable Uses Act Act 1601, but without prejudice to the Preamble, both at a jurisprudential level since the judges recalled the "spirit and amendment" of the Preamble as an evaluation criterion for all those situations not expressly included in the list. The aforementioned charitable purposes, in fact, have never constituted a closed category and, indeed, the judges, with their interpretative activity, have made it a flexible and elastic list, able to accommodate the new demands of practice.

It goes back to the case of Morice v. The Bishop of Durham a first attempt to rationalize the charities on the basis of four aims (relief of the indigent; the advantage of learning; the advantage of religion; the advantage of the object of general public utility); followed in 1889 the second judicial case, still today considered of fundamental development of the sector (Commissioners of Income Tax v. Pemsel), in

which, just on the base of the content of the Preamble, Lord Mac Naughton proposed a further classification of the charitable purposes: beside to the first three categories already elaborated by Sir Romilly, he added a fourth one, of an open nature, aimed at encompassing those entities that pursued other purposes useful to the community not falling within the other three categories, pointing out "the need to move away from the popular meaning of charitable purposes to identify a concept that accords more with the technical legal meaning of such purposes ".

In the absence of a definition of charities, the jurisprudence and above all the Commissioners believed that the institutions, in order to assume the relative status, should "exist for the benefit of the public, be exclusively charitable" and that "the purpose of the institution had to be within the spirit and the preamble to the Charitable Uses act 1601 ". It has been observed that "these two points of escape (activism of the courts and selection of interests by the Commissioners), if on the one hand have guaranteed the evolution of the system, on the other they have created a considerable fragmentation of the matter".

The 2006 reform, completed in 2011, moves precisely in the direction of completely reorganizing the discipline of the sector and bridging the gap that was created over time between the "normative" and jurisprudential (or administrative source of the Commissioners) source.

Innovatively, the English legislator chooses to offer, as has been said, a statutory definition of the concept of charity, focused on the finalistic profile of the institutions, moving away definitively from the Preamble.

Section 3, in fact, lists twelve sectors of activity which, while on the one hand stand in continuity with the evolutionary interpretation of the sector and therefore constitute a legal transposition of jurisprudential approaches, on the other hand confer autonomous dignity to sectors and activities of a charitable nature that until before 2006 found a placement at times forced within the historical categories already mentioned.

At the same time, the legislature across the Channel has guaranteed the flexibility of the law by introducing a thirteenth point where it indicates as charitable purpose any other purpose that can be considered analogous (or whitin the spirit) to those expressly listed or, furthermore, similar to those charitable , in turn recognized as such by way of interpretation.

Thus, while the Italian legislator preferred a closed listing system in which the need for regulatory adaptation to social changes is guaranteed by the extent of the sectors identified and the procedure for updating the list referred to a decree by the President of the Council of Ministers , in the English system the analyticity of the system is balanced by the open clause that enhances, once again, the interpretative-evolutionary role of the judges and the Charity Commission with express recognition of the role of the instrument of analogy in relation to the category of "any other purposes ".

The further element of strong innovativeness is given by the requirement of pursuing a public benefit: the law requires that all charities demonstrate that their activities are aimed at pursuing a public utility, similar to the Italian requirement for the pursuit of civic, solidarity aims or of social utility.

The public benefit has always been a necessary requisite for the charitable purpose but, with reference to the classification referred to in the Pemsel case, the activities of "relief of poverty", "advancement of education" and "advancement of religion" enjoyed a presumption of existence of the pursuit of public utility and of the benefit for the community or for a part thereof. Thus, for the aforementioned purposes the public benefit test was automatically passed on a presumptive basis; on the contrary, the institutions that pursued other purposes beneficial to the community had to provide proof of the social utility of

their activity. With the reform, the presumptive mechanism has disappeared and all the bodies operating within each of the thirteen heads must pass the public benefit test, equating all charitable purposes for that purpose.
The evaluation of public utility therefore becomes central and takes on a renewed value in the reformed system. As noted, "the recognition of charitable activity in an institution is therefore subject to strict compliance with a two-step test: alongside the traceability, directly or by analogy, of the purpose pursued in the statutory list, it is also required that one demonstrates that the purpose indicated pursues the public benefit ".
At the same time, with a choice very similar to the Italian one, the reform does not define the public benefit, preferring that the term is understood for purposes of the law to charities in England and Wales, in order not to stiffen a concept with a wide scope : on this point two pronunciations have already been registered, School Council v. Charity Commission for England and Wales and other Charity Commission for England and Wales Her Majesty's Attorney General, who, by explaining a concept already present in the evolution of the courts of the last hundred and forty years, recognize for the first time the distinction between 'public benefit in the first sense', which requires the nature of the purpose to be a Community Benefit, from Public Benefit in the Second Sense, which Benefits from the Charity to Be Sufficiently Numerous to Build a Section of the Public.
The public benefit, therefore, as also indicated in the Charity Commission's guidance, must be for the benefit of the community or a sufficiently large number of people to be able to consider them as a section of the public, not being able, on the other hand, to be aimed at pursuing the benefit of a few individuals or primarily directed to the internal benefit of its own components. At the same time it must be identifiable and capable of being proved by evidence, meaning a benefit investigated in an objective key.
In addition to the renewed finalistic profile, the reform introduces an important new innovation in relation to the legal forms of the third sector bodies. Among the accepted forms stands out, above all compared to the common law tradition, the presence of the trust, historically the most used tool by charities. On the one hand, in fact, there are undeniable advantages of the trust in terms of flexibility as regards subjects or assets that can be bound and managed; to the possibility of providing forms of control by the financiers, who could play the role of guardians or beneficiaries, so as to be entitled to exercise formal control over the activity of the trustee; to the lower costs that this entails with respect to the establishment and management of companies characterized by limited liability or a foundation, against the same segregation effect.
The ductility and efficiency of the trust for social purposes (which in the English system constitutes an exception to the general rule of invalidity of purpose trusts) is not, indeed, escaped even by the Italian operators and legislator. Thus, on the one hand, there are now numerous cases of internal trusts, based on the 1985 Hague Convention, which operate in Italy for social purposes; on the other hand, the legislator in the 2007 Finance Act has included trusts between taxable persons pursuant to art. 73, first paragraph, letters b, c, d of the Tuir (following the amendment made by the law of 27 December 2006, n. 296 art. 1, paragraphs 74-76) and in 2011 the Agency for the Third Sector acknowledged that the trust, considered for tax purposes as an entity, could well fall under the category of "other private entities" with or without legal personality as per Legislative Decree 460/97 and obtain the status of non-profit organization.
Of course, it cannot be denied how the new approach to the Italian reform of 2017 poses many problems in this regard. While the legislation of the Fantozzi decree was of an exclusive tax nature and identified

requirements of a civil law nature for the application of the related favor regime (not presenting particular problematic profiles in relation to the subjectivity of the institutions as it was a matter of tax subjectivity), the new Third sector code reverses the perspective. Legislative Decree 117/2017, in fact, adopts a civil law approach on which tax law is shaped and calibrated. Ordunque, with reference to the definition (civil law) of the Third Sector entity that must be looked at. Although the art. 4, first paragraph recognizes the possibility of acquiring the status of ETS also by "other private entities other than companies" established for the purposes and with the methods already mentioned, it is also true that the use of the term "entity" recalls a notion at least of legal subjectivity of which the trust is devoid. However, also in the light of the strategic role now assumed by the trusts in the field of c.d. "After us", one could imagine a large-scale interpretation of the aforementioned definition, evaluating the possibility of including trusts according to a mechanism similar to that provided for religious bodies, on the condition that, as was envisaged for non-profit organizations under the Legislative Decree 460/97, the rules contained in Legislative Decree 117/17 are respected.

The charity trust, while assuming the legal structure of the trust, differs very significantly in terms of discipline from the private trust. In the traditional English system, in fact, the trust is indissolubly focused on the c.d. human beneficiary principle for which the trustee must exercise his function in favor of one or more identified or identifiable beneficiaries (since it is one of the c.d. three certainties of the trust that constitute a validity condition). It follows the nullity of the c.d. purpose trusts (or "purpose trust") in the absence of a person who can claim fulfillment from the trustee: the English legal system, in fact, does not recognize any effect to the trusts that give exclusive relevance to their purposes without identifying some beneficiary who has the right to learn the utility of trust property and who can exercise the related powers, such as intervention and control over the work of the trustee. It is a matter of «trusts of imperfect obligation and void». However, starting from a ruling at the end of the nineteenth century, a distinction was made between ordinary private trusts and trusts in the "higher sense", the latter characterized by the fulfillment of duties connected to prerogatives and public functions by subjects, with respect to whom could set up a fiduciary responsibility similar to that of a trustee of a "private" trust. On this trail, it has distinguished itself between "private trusts, public charitable trusts, public interest trusts, and trusts implied by law". The charitable trusts, therefore, are public interest trusts set up for charitable, charitable and charitable purposes and represent the only type of purpose trust admitted by the English legal system not affected by nullity. Therefore, deprived of the beneficiary subject and removed from the principle of certainty of objects, they must pursue a charitable purpose, in favor of which there is a heritage conservation obligation (c.d. permanent endowment).

Among the other legal forms that the charities can assume, there are, in addition to the unincorporated associations (without, similarly to the trust, the legal personality for which the registration is necessary), the companies, in particular limited by guarantee. These are entities that are characterized by their social composition (members and non-shareholders), for the non-distribution of profits or profits and for the failure to divide the assets among its members in the event of extinction, resulting perfectly compatible with the logic underlying charities of not-for-profit organizations.

The undoubted advantage of the companies is represented by the legal personality they obtain through a two-step registration procedure: at the Registrer of Companies of Companies House for incorporation, which confers a limited liability for those acting on behalf of the entity in addition to the possibility for the entity itself to be the owner of assets, to enter into contracts and enjoy active and passive legitimacy in court; with the Charity Commission to obtain the status of a charitable company.

Obviously the charity configuration in terms of qualification implies that each entity is subject to the discipline concerning its status (and therefore to the charities act) as well as to the discipline related to its legal type (so in the case of charitable trusts to the trust law and in the case of companies to Company Acts).
Due to the expected costs for the companies, for which, as seen, there is a double registration and registration procedure, against the lack of an organizational structure created and designed specifically for the non-profit organization that confers the advantages of legal personality, in the 2006 the legislator has foreseen the charitable incorporated organization (cd CIO). It is an entity that can be set up on the basis of two models developed by the Charity Commission, one of a foundational nature and the other of an associative nature, requiring only registration with the Charity Commission: a new type of entity that the English legislator has established by combining the advantages of a corporate figure with legal personality with a simplified and unique registration procedure with the charities control body (which at the same time confers the status of charity organization and incorporation).
The Italian legislator, while not introducing a new typology of entity as opposed to what happened in the English system, has likewise grasped the need for simplification for Third Sector entities: not only has it provided for automatic transmigration of data, thus avoiding that the institution must proceed with double registration (think, thus, of the social enterprises for which the registration with the Business Register also fulfills the obligation of registration with the Single National Register of the Third Sector), but has also introduced a new procedure simplified and ad hoc for the recognition of the legal status of Third Sector entities. This is a mechanism reserved for Third Sector entities, as an alternative to the one already in force for non-profit organizations, characterized by the presence of minimum normatively identified capitals and by the centrality of the notary, thus subtracting the Third sector from (albeit limited) administrative discretion, both in terms of purpose and in terms of capital adequacy, and identifying a more certain, lean and fast path, which confers contextually, to use categories from across the Channel, incorporation and charitable status to the institution.
Last but not least, the third fundamental point of the English reform concerns charity control systems.
The tasks and powers of the Charity Commissioners, born in 1853 to compensate for the inactivity of the Court of Chancery, at the time the court of charities, were redesigned in the section dedicated to the Charity Commission, with powers redefined and more penetrating and, instead of the competence of the High Court of Justice regarding disputes between the Charity Commission and charitable institutions (or aspiring ones), the CD was established Charity Tribunal, a special Court with ad hoc competence.
The Charity Commission is a non-ministerial government department that regulates charities registered in England and Wales and maintains the central register of charitable organizations, carrying out the main function of verifying that the resources available are actually allocated by charities to pursue an interest public, as required by law. Established in the form of a corporate, the Charity Commission is not subject to the direction or control of the Ministry, the Crown or other government departments, resulting in an independent and independent organization, with a significant difference with respect to the Italian reform approach. The latter, in fact, provides for a State Office of the Single Register of the Third Sector with functions in part similar to those of the Charity Commission, especially in relation to registration in the Register and the related recognition of the status of Third Sector, established, otherwise from the English setting, at the Ministry responsible for the matter (Ministry of Labor and Social Policies), resulting therefore lacking the character of independence.

The Charity Commission has multiple objectives and various functions, among which, in particular, to encourage and facilitate a better administration of the charities, "obtaining, evaluating and disseminating information in connection with the performance of any functions of its objectives" , or, again, to provide information, advice or proposals on matters relating to the functions of the Commission itself or to the pursuit of its objectives.

The main function remains, in any case, to determine whether institutions are not charities, maintaining an accurate and updated register of the relative organizations, to which is connected the control of capital allocation constraints and fiduciary obligations relating to correct administration, with the possibility of accessing the documents of the institution, of investigating the management and administration of an institution and of taking the relative corrective or protective actions that can also lead to the cancellation of the charitable organizations from the register.

The registration, from which the status of charity derives, is mandatory since 2006 for all institutions with a gross income of 5,000 pounds or more: unlike in Italian law, it is not a registration of a constitutive nature. The English register, in fact, presides over an advertising function towards third parties, guaranteeing the knowledge and transparency of the data of the registered bodies. The registration then determines the application in favor of the entity of some tax-related benefits, reason for which the Commission is granted powers of investigation, verification and verification both in relation to the registration phase and in relation to the maintenance of the charitable status during the life of the institution. Finally, while in the Italian system it is foreseen that the refusal to register in the register and the cancellation order from it can be reclassified before the administrative judicial authority, in the English system, against the negative provision of the Commission, the recurrence is expected before the Charity Tribunal , ad hoc authority established, as mentioned, in 2006 with the function of second instance with respect to the provisions of the Commission and supplementary role in case of omission of provisions by the latter.

Last but not least, it can be observed how English charities, similarly to the Italian Third Sector entities, can carry out business activities, since this is not incompatible in itself with the charitable aims on the sole condition of not distributing profit among its members. subjective.

They can in fact carry out economic activities if this coincides with the corporate purpose of the institution (c.d. primary purpose trading), enjoying the income or corporation tax exemption on profits, provided that they are applied solely to the objects of the charity. The provision of educational services or the provision of housing for residential assistance for a fee are the most common examples.

At the same time, charities can also carry out non-primary purpose trades provided that it is ancillary to the entity's purpose, ie indirectly connected to the entity's main purpose (think of selling food or drinks to visitors in a museum run by a charity) or on condition that the activity performed does not involve significant risk to the resources of the charity; risk which is evaluated in consideration of the following parameters: the size of charity; the nature of the business; the expected outgoings; the turnover projections; the sensitivity of business profitability to the market. In the aforementioned two cases of non-primary purpose trading, the institution benefits from the income tax exemption, similar to the primary purpose trading hypothesis, provided that profits are reinvested in the institution's socially meritorious activity.

The hypotheses outlined fall entirely into the concept of trading by charities. Alongside these, when the economic activity does not pursue the main purpose of the institution, the most widespread way in which the charities carry out commercial activities is then represented by the trading by subsidiaries. The

business activity concerning non-primary purposes, where carried out beyond the limits of the secondary nature or when it qualifies for a high economic risk, is exercised by a commercial company (trading company or subsidiary), set up ad hoc by the charity organization, and by this subsidiary, with the obligation to allocate the profits made to the parent company so that, in turn, it can be used for its charitable purposes.

To this end, the separation of the liability profiles from which the full safeguarding of the capital structure of the parent company with charitable purposes derives is obtained; at the same time, despite the application of the corporation tax for the subsidiary, the system allows access to subsidized taxation deriving, on the one hand, from the deductibility from the income of donations made to charitable institutions such as gift aid, on the other, from benefit granted to the controlling charity, for which the revenues deriving from the sale of goods donated to it are not classified as trading profits.

Overall, the English system, although characterized by a neutrality between the forms that can qualify as charities, appears to be firmly focused on the finalistic aspect that does not ease into a generic charitable purpose as it is necessary to pursue the public benefit as normatively positivized, and on the non-derogability of the ban on the distribution of profits.

Similarly to the Italian approach, in fact, the overseas system "retains a certain attention for the structural aspect" since it qualifies the charities on a civil level (attributing, as seen, to the Charity Commission the task of verifying and attributing the relative qualification) and, only afterwards in logical terms, it recognizes the same tax benefits. Thus, differing significantly from the North American afflatos, the sector does not exhaust itself in the fiscal profile, resulting in the central structure of the institution and the concrete contribution to the public benefit so as to determine and justify quantitative-qualitative limitations to the economic activity that the charities can carry out . The restrictions on the possibility for charities to carry out business activities in fact derive from the consideration that the performance of a nonprimary purpose trading may entail risks for the heritage of the charity, addressed primarily to the pursuit of social utility and, for this purpose, protected.

6. Conclusions

The Italian reform of 2017, as seen, has ambitiously regulated the Third sector both in the entrepreneurial component and in the more typically non-profit donative component and has provided the opportunity for a (tentative) comparison with the transalpine conceptual counterparts.

Overall, it emerges how the market component of the sector is governed independently from the non-market one and how the choice of different legislators prevails to frame both social enterprises and charities in terms of qualification. It has been observed, in fact, that "the" type "is increasingly losing the ability to dominate the complexity of reality and satisfy legislative objectives. On the contrary, elements traditionally extraneous to the definition of the type and characterized by greater concreteness, such as the object and the way in which the activity is carried out, become fundamental for this purpose, rising to the requirements of the category and justifying its institution ".

The social enterprise, despite the diversity that has emerged, finds correspondence in the concept of social enterprises that places the requirement of pursuing social aims at the center of attention, in the various regulations. It is true that the declared objective do not always correspond to forecasts of effective protection of the same with respect to possible internal or external distortive dynamics of profiteering or control, especially in non-democratic governance models. In this sense, "the Italian legislation on social

enterprise (...) within the [comparative panorama] is among the most advanced and convincing, setting itself as a possible reference model for legislators interested in dealing with the subject".
The Third sector with a predominantly non-entrepreneurial vocation lacks, on the other hand, a conceptual consideration that is widespread. The most significant experience of comparison in this sense appears to be the English one of the charities for the normative choice in terms of the qualification that the institutions can obtain, for the simplification of the juridical figures suitable to allow the carrying out of solidarity purposes, for the presence of a supervisory and control body of the sector itself (comparable in sum to the Office of the National Single Register of the Third Sector) and, last but not least, due to the presence of a tax favor regime for the charities which, in the pursuit of the public benefits, carry out economic activities.
On the other hand, even in the face of the single notion of non-profit organization, the US system does not have a system comparable to that of the Italian Third Sector since the unitary discipline is of an entirely fiscal nature and entirely focused on the criterion of non-distribution constraint, disregarding, to such end, of the internal organization of the subject and leaving, at the most, to the legislation of the various States the provision of civil law rules governing the different organized types.
As seen, the Italian legislator moves from an opposite perspective, operating first on the civil and only later on the fiscal level, with the creation of a general category of third sector entity through a reductio ad unitatem of the entities according to the unifying criterion of the activities to these items and the aims pursued; at the same time, however, it has recognized and enhanced the typological traits that the various entities can take on due to the legal form, governance and organizational methods with which the activity of general interest is carried out and the subjects to whom it is addressed or destined .
The choice therefore is not oriented in the direction of the neutrality of forms since, as has been finely observed, "the concept of" neutrality "is elaborated with regard to the type, and expresses indifference, or rather" neutrality ", of the organizational structure with respect to the purpose pursued and in particular that possibly typical by law "while the Italian legislator shows no disinterest in" the internal organization of the subject, but on the contrary is concerned about the consistency of his governance with respect to the institutional purpose ".