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Social Enterprise Laws In Europe After the 2011 “Social Business Initiative”

**A COMPARATIVE ANALYSIS FROM THE PERSPECTIVE
OF WORKER AND SOCIAL COOPERATIVES.**

DECEMBER 2020



EUROPEAN CONFEDERATION OF INDUSTRIAL AND SERVICE COOPERATIVES



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PREFACE

Our organisation is extremely pleased to present this legislative analysis, which takes the form of a report prepared by Professor Antonio Fici, whom we charged with the task of carrying out a comparative analysis of the impact of the Commission's Communication on Social Entrepreneurship, which is known as the Social Business Initiative (SBI) and was published in October 2011.

This study has been compiled as part of the activities of the EaSI programme which have been entrusted to CECOP and has the aim of performing a comparative legal analysis of the legislation regarding social enterprises which is either already in force or is being prepared in the various European countries.

The report is completely independent and has been prepared using a methodological research approach based on the principles of the science of law. In other words, rather than being a document which expresses a political or cultural position reflecting CECOP's vision and objectives, it is intended to be a concrete and authoritative contribution towards the establishment of a better understanding of the phenomenon of social entrepreneurship in Europe from a legal point of view.

Indeed, due to the authoritative stature of the author and the intellectual independence with which the work has been carried out, we believe that the report's outcomes and contents are of considerable importance for the cooperative movement and, naturally, for our organisation.

Without wishing this to become a rhetorical celebration of the cooperative form, it quite clearly transpires from the report that economic organisations established upon mutual lines find themselves almost naturally at the centre of the social vocation of the companies which are created with the values and motivations which drive them to pursue a purpose which serves the general interest.

In fact, the author refers to the "virtues of the cooperative form" which contributes to the defining of a social enterprise, not only in relation to the presence of a declared solidarity scope or intention to respond to the needs of the most needy, thereby ensuring a high level of social impact, but it also embodies the

social dimension and the inclusive and emancipation function of the stakeholders within the same legal form and in the model of organisational operation.

Cooperatives, notably social cooperatives, are social enterprises not just on the basis of what they do, but also due to the way in which they organise themselves and are participated in, and governed by, their own members, who may not only be workers, beneficiaries or users, but also investors or funders.

This concept was considered in the definition of a social enterprise in the European Commission's SBI Communication and, in fact, is to be found in many of the pieces of legislation adopted by the European countries and which are analysed and commented upon in this publication.

However, it has to be recognised that there continue to be many differences in the definition of a social enterprise in the various nuances which have been adopted into legislation by the European countries.

This is the context in which one of the most important outcomes of Professor Fici's report can be placed, since the report confirms the usefulness and need for the States to furnish themselves with an appropriate legislative framework which is able to both promote and recognise the function of companies which pursue a social mission.

There are still many unanswered questions as to what characteristics may be identified with a "social mission" today or how it is possible to identify and measure positive social impacts in a continuously changing economic, cultural and social context.

In this context, the outlook is clearly more open and in this regard in particular, the vision and guidance which the representative bodies in Social Economy can and will express becomes even more important.

Therefore we, as an organisation which represents worker and service cooperatives, industrial cooperatives and social cooperatives, wish to affirm that the propensity of mutual companies to embrace a social vocation can only be confirmed as being an exemplary manifestation of social entrepreneurship. Indeed, in some countries, worker cooperatives also have an implicit social purpose which is expressed through the employment of fragile or disadvantaged workers, or through the maintaining of high employment levels, or even the redistribution of any profits

they may make to the surrounding community, perhaps through the promotion of entrepreneurial activities in disadvantaged rural areas.

If we accept the widely recognised principle that social enterprises have, as their purpose, the pursuit of a “common good” or the general interest of a community, then today we can and, indeed, must, affirm, for example, that “decent work” and “decent employment” (as envisaged in the SDGs) are a “common good” in themselves.

Throughout their history, cooperatives have shown not only that they are the best at defending employment, but also that they know how to play a proactive economic role which is capable of producing significant results. We do not have the space here to refer to the host of data which demonstrates the positive economic impact generated by cooperative companies. If you are interesting in finding out more about this particular aspect, then please refer to the wealth of data and publications to be found on our website, as well as that of the ICA. It is, however, useful to remember that cooperatives are far from being a marginal economic phenomenon and nor are they the only remaining part of a 19th century economic romanticism based on participation. Rather, they are their own, authentic, complementary activity-generating form of the economy of which there is a particular need today in order to respond to the enormous inequalities which may well be made worse by the digital economy.

A further common good is access, under fair conditions, to energy, a starter home, culture and, today more than ever, to the digital dimension of the economy. In all of these contexts, cooperatives have shown themselves to be companies which favour and support the active involvement and participation of the citizens, regardless of whether or not they have capital available to invest in a company activity.

In a constantly changing economy and a context in which the propensity towards entrepreneurship would appear to be the main driver for the creation of new jobs, cooperatives may be a very important factor of development. Generating accessible and sustainable development, promoting new forms of entrepreneurship, expanding the participation of young people on the market, helping them to play a leading role in an economic activity, all constitute an important social function and create positive social impacts. Doing this in a cooperative helps to overcome two of the main obstacles which many people find blocking their way: the lack of capital to start an ordinary

company activity and the feeling of solitude which discourages many people, regardless of whether their intention is to start up a company activity or to carry out activities as a self-employed person.

Over the last few years, several cooperatives have launched initiatives to address these particular issues by bringing together self-employed workers, freelance professionals and individual micro-entrepreneurs, who form an increasing proportion of the active population in Europe. The risk that the transformation of work and the creation of major digital service brokering platforms may make work more fragmented and precarious is well-known. The barrier which, in the past, established a rigid distinction between employee and self-employed status, has become porous and the isolation felt by these new workers generates fragility and uncertainty which working in a cooperative can help to overcome. This could certainly be a new frontier in which it is possible to create those social innovations and opportunities for sustainable and inclusive development which the Commissions states it wants to favour thanks, in part, to social enterprises. There is no doubt that our cooperatives are ready to take up the challenge and they are united in the conviction that the social vocation of the mutual economy is an excellent starting point for a widespread entrepreneurship to give a future to new generations of Europeans.

I sincerely hope that the readers of this report find both insights and inspiration in the following pages. I would like to take this opportunity to thank Professor Antonio Fici for the valuable and authoritative work carried out. Furthermore, I would like to express my gratitude to the European Commission and to DG Employment, which is responsible for the implementation of the EaSI Programme, for the support they have provided to the preparation of this report.

Brussels, December 2020

Giuseppe Guerini,
President of CECOP





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1. Objectives and Scope of the Report

European Union (“EU”) Institutions show great interest in social enterprises (“SEs”) and their legal regime, at times even more so than Member States (“MSs”). One of the most recent manifestations of this attitude is the Resolution of the European Parliament (“EP”) of 5 July 2018 calling on the European Commission (“EC”) to introduce at the Union level a EU Statute for European “social and solidarity-based enterprises”¹, which was adopted having taken in to account, among other things, the recommendations contained in a Study of February 2017 drafted by the Author of this paper².

In particular, EU institutions have emphasized the need for a more precise definition of SEs, as a precondition for their better promotion and support through EU funds. It was in the EC’s Social Business Initiative (“SBI”) Communication of 2011 that a definition of SE first appeared, followed by those in Reg. no. 346/2013 (art. 3(1)(d)) on European social entrepreneurship funds (“EuSEF”) and Reg. no. 1296/2013 (art. 2(1)) on a European Union Programme for Employment and Social Innovation (“EaSI”), which were substantially in line with the previous one³. This definition has strongly influenced the development of the national legislation on SE, both encouraging its adoption and shaping its features and contents⁴.

The aim of this paper is neither to discuss the need for a legal framework on SE, nor to recommend specific legislation, rather it is solely to present and describe the evolution of SE law in the EU after the publication of the SBI Communication of 2011, in order to evaluate the real impact of this Communication on national legislation and detect the existing trends in the regulation of SE at the national legislative level. While doing so, special attention will be given to the existing models of SE regulation and the essential elements of an SE’s legal identity from a comparative perspective.

The other main objective of this paper is to ascertain the role and position of cooperatives in this new legislation, namely, how the cooperative legal form relates to social enterprise and its legislation, whether cooperatives are considered within this legislation and, if this is the case, how are they considered, also taking into consideration the two main models of legislation on SE that may be found in the EU (and that may even co-exist within the same national jurisdiction):

i) the first model in order of appearance – but also the one that (though spread in Europe at the turn of the last century) seems now to be recessive – is that in which the SE is a specific legal type (or sub-type) of entity, either a shareholder company (like the UK Community Interest Company) or a cooperative (like the Italian Social Cooperative)⁵;

ii) the second model – which is increasingly more diffuse – is that in which the SE is conceived of as a legal “status” (or “mark”, “qualification”, “certification”, “label”, etc.) available for private organizations that – though incorporated in different ways (as companies or cooperatives, or even in certain cases as associations and foundations) – meet certain legal requirements taken as indicators (or “criteria”) of their “sociality”⁶.

This legislation attributes a legal identity to SEs with sufficiently clear traits, although these do differ according to the national jurisdiction.

This identity is the result of the elements employed by law to identify SEs, which in general relate to:

- a) the private nature of the organization⁷;
- b) the purpose pursued and the way in which profits and assets are allocated⁸;
- c) the nature of the activity performed⁹; and
- d) the forms of governance¹⁰.

In order to properly understand and evaluate the legislation on SE from the perspective of cooperatives, especially worker and social cooperatives, previous consideration of the relative models of legislation and variables of the identity mentioned above is required¹¹.

1.1. The Definition of Social Enterprise in the SBI Communication of 2011

This report deals with the legal regime of SEs: but what exactly is the “social enterprise” that defines its object?

In recent decades, the term “social enterprise” has been increasingly used to designate a particular type of private organization whose distinguishing features concern the purpose pursued, the activity conducted to pursue this purpose and the structure of internal governance. However, a universally recognized and commonly-shared precise definition of SE does not yet exist (and nor is there any reason to believe that it will exist in the near future).

Especially at the European level, one of the most influential attempts to define an SE in socio-economic research is that of EMES, which identifies nine indicators, falling into three subsets, to describe the “ideal-type” of SE. These indicators depict an organizational form with three combined dimensions:

- an entrepreneurial dimension, which connotes its activity;
- a social dimension, which qualifies its purpose; and
- a participatory dimension, which characterizes its governance¹².

EMES’ work has clearly influenced the European Commission which, in the Communication “Social Business Initiative” (SBI) of October 2011, adopted the three key dimensions to describe (though not to define with precision) an SE.

According to the EC,

a social enterprise is an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities¹³.

This operational definition (or general concept) of SE has influenced subsequent European Union (EU) legislation, in which SEs had to be more precisely defined to become recipients of specific funding.

Indeed, in “EaSI” Regulation no. 1296/2013 of the European Parliament (EP) and of the Council¹⁴, an SE is understood (for the purposes of the same Regulation) as

an undertaking, regardless of its legal form, which:

- (a) *in accordance with its Articles of Association, Statutes or with any other legal document by which it is established, has as its primary objective the achievement of measurable, positive social impacts rather than generating profit for its owners, members and shareholders, and which:*
 - (i) *provides services or goods which generate a social return and/or*
 - (ii) *employs a method of production of goods or services that embodies its social objective;*
- (b) *uses its profits first and foremost to achieve its primary objective and has predefined procedures and rules covering any distribution of profits to shareholders and owners that ensure that such distribution does not undermine the primary objective; and*
- (c) *is managed in an entrepreneurial, accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activities (art. 2(1)).*

A similar notion of SE appears in art. 3(1)(d) of the “EuSEF” Regulation (EU) no. 346/2013 of the European Parliament and of the Council¹⁵, namely an undertaking that

(ii) has the achievement of measurable, positive social impacts as its primary objective in accordance with its articles of association, statutes or any other rules or instruments of incorporation establishing the business, where the undertaking: - provides services or goods to vulnerable or marginalised, disadvantaged or excluded persons, - employs a method of production of goods or services that embodies its social objective, or - provides financial support exclusively to social undertakings as defined in the first two indents; (iii) uses its profits primarily to achieve its primary social objective in accordance with its articles of association, statutes or any other rules or instruments of incorporation establishing the business and with the predefined procedures and rules therein, which determine the circumstances in which profits are distributed to shareholders and owners to ensure that any such distribution of profits does not undermine its primary objective; (iv) is managed in an accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activities.

Given its limited purpose, this report will only analyse the legislation regarding organizations that may be included in the operational definition of SE provided by the EC, also taking into account the recent attempt to operationalise the concept presented in the EC’s Mapping Study of 2020¹⁶.

Furthermore, this report will not consider legislation in general, but only laws specifically dealing with SEs as previously identified¹⁷.

1.2. Laws on Social Enterprise in the EU

The positive socio-economic impact that EU Institutions have attributed to SEs has led them to repeatedly express the need for their promotion and to take concrete actions in this direction¹⁸. An ade-

quate legal framework is often included among the conditions for the growth and development of SEs (and more generally, of the entities of the social economy). It is significant that improving the legal environment is one item in the 2011 EC Communication on SBI for which a key action is envisaged¹⁹. In addition, as pointed out in the previous section of this report, there are currently even discussions underway on an EU statute on SE.

This approach, together with other factors (such as the increasing crisis of the Welfare States in satisfying social and general interest needs of their citizens), has led, in the EU, to a significant growth in the number of national laws institutionalising SEs, particularly starting from the 2011 SBI Communication up to the present day.

If we focus our attention on *ad hoc* legislation, then today at least 20 EU countries (still including the UK in this list) have specific laws on SEs (and some of them have even more than one) which, depending on the model of legislation adopted – as we shall clarify in the next section of this report – include laws on social enterprise and laws on social (purpose) cooperatives or social (purpose) shareholder companies. Notwithstanding the still perceivable differences across jurisdictions, this tailor-made legislation shapes a common identity of SEs based on the requirements that will be described in section 3 of this report.

Table 1 below presents this *ad hoc* legislation. To facilitate the subsequent analysis, the table makes reference not only to the legislation in force, but also, in certain cases, to repealed legislation (such as in Belgium) and proposed legislation (such as in Malta, Cyprus and Czech Republic): this may make it easier to identify the existing trends and potential prospects of the legislation on SE in the EU. In contrast, the Table does not make reference to private SE certification/labelling systems, which are diffuse in some countries²⁰, nor to national strategies and programmes in favour of organizations with the characteristics of SEs adopted in the absence of a law that recognize them²¹.

Table 1: Laws on Social Enterprise in the EU

COUNTRY	LAW	SUBJECT
BELGIUM	Articles 661 ff., on the <i>société à finalité sociale</i> (social purpose society, or SFS), of the Company Code of 1999 (already provided for by Law, 13 April 1995, subsequently repealed) REPEALED ----- Article 8:5 of the Code of Companies and Associations of 2019 (and articles 6 ff., Royal Decree 28 June 2019)	Social Purpose Company ----- Cooperatives Accredited as Social Enterprises
BULGARIA	Act 240/2018 on Social and Solidarity-Based Enterprises	Social Enterprise (in any legal form)
CROATIA	Art. 66 on <i>socijalne zadruge</i> (social cooperatives), of Law of 11 March 2011, no. 764, on cooperatives	Social Cooperative
CYPRUS	Draft Law on Social Enterprise PROPOSED	Social Enterprise
CZECH REPUBLIC	Articles 758 ff., on <i>sociální družstvo</i> (social cooperative), of Law no. 90/2012 on commercial companies and cooperatives ----- Draft Law on Social Enterprise PROPOSED	Social Cooperative ----- Social Enterprise
DENMARK	Law no. 711 of 25 June 2014 on <i>registrerede socialøkonomiske virksomheder</i> (registered social enterprises)	Social Enterprise
FINLAND	Law of 30 December 2003, no. 1351/2003, on <i>sosiaalisen yrityksen</i> (social enterprises)	Work Integration Social Enterprise
FRANCE	Articles 19- <i>quinquies</i> ff., on the <i>société coopérative d'intérêt collectif</i> (collective interest cooperative society, or SCIC), of Law no. 47-1775 of 10 September 1947 on cooperatives, as introduced by Law no. 2001/624 of 17 July 2001 and last amended by Law no. 2014/856 of 31 July 2014 on the social and solidarity economy ----- Art. L3332-17-1 of the Labour Code, on the <i>entreprise solidaire d'utilité sociale</i> (Solidarity-Based Enterprise of Social Utility), as modified by art. 11 of Law no. 2014/856 of 31 July 2014 on the social and solidarity economy	Collective Interest Cooperative ----- Solidarity-Based Enterprise of Social Utility
GREECE	Laws no. 2716/1999 and no. 4019/2011 on <i>Κοινωνικοί Συνεταιρισμοί</i> (social cooperatives)	Social Cooperative
HUNGARY	Articles 8, 10(4), 51(4), 59(3), 60(1), 68(2)(e), on <i>szociális szövetkezetnek</i> (social cooperatives), of Law no. X-2006 on cooperatives	Work Integration Social Cooperative

ITALY	<p>Law of 8 November 1991, no. 381, on <i>cooperative sociali</i> (social cooperatives)</p> <p>-----</p> <p>Legislative Decree of 3 July 2017, no. 112 (replacing Legislative Decree of 3 July 2006, no. 155) on <i>impresa sociale</i> (social enterprise)</p>	<p>Social Cooperative</p> <p>-----</p> <p>Social Enterprise (in any legal form)</p>
LATVIA	Social Enterprise Law of 12 October 2017	Social Enterprise (in the form of limited liability company)
LITHUANIA	Law of 1 June 2004, no. IX-2251, on <i>socialinių įmonių</i> (social enterprise)	Work Integration Social Enterprise
LUXEMBOURG	Law of 12 December 2016 on <i>sociétés d'impact sociétal</i> (social impact societies, or SIS) as amended by Law of 31 August 2018	Social Enterprise (in the form of company or cooperative)
MALTA	Draft Social Enterprise Act of June 2015 PROPOSED	Social Enterprise (in any legal form, but primarily limited liability company)
POLAND	<p>Law of 27 April 2006 on <i>spółdzielni socjalną</i> (social cooperatives)</p> <p>-----</p> <p>Draft Act on Social and Solidarity Economy of 2017 PROPOSED</p>	<p>Work Integration Social Cooperative</p> <p>-----</p> <p>Social Enterprise</p>
PORTUGAL	Law-Decree no. 7/98 of 15 January 1998 on <i>cooperativas de solidariedade social</i> (social solidarity cooperatives)	Social Solidarity Cooperative
ROMANIA	Articles 8 ff., on <i>întreprinderea socială</i> (social enterprise), of Law no. 219 of 23 July 2015 on the social economy	Social Enterprise
SLOVAKIA	<p>Art. 50b, on <i>sociálny podnik</i> (social enterprise), of Law no. 5/2004 of 4 December 2003 on Employment Services</p> <p>-----</p> <p>Act no. 112/2018 of 13 March 2018 on Social Economy and Social Enterprises</p>	<p>Work Integration Social Enterprise</p> <p>-----</p> <p>Social Enterprise (in any legal form)</p>
SLOVENIA	Law no. 20 of 2011 on <i>socialnem podjetništvu</i> (social entrepreneurship) as amended in 2018	Social Enterprise (in any legal form)
SPAIN	<p>Art. 106, on <i>cooperativas de iniciativa social</i> (social initiative cooperatives), of Law no. 27/1999 of 16 July 1999 on cooperatives</p> <p>-----</p> <p>Law no. 44/2007 of 13 December 2007 on <i>empresas de inserción</i> (integration enterprises)</p> <p>-----</p> <p>Art. 43 ff., on <i>centros especiales de empleo</i> (special employment centres), of Royal Legislative Decree no. 1/2013 of 29 November 2013</p>	<p>Social Initiative Cooperative</p> <p>-----</p> <p>Work Integration Social Enterprise</p> <p>-----</p> <p>Work Integration Social Enterprise</p>
UNITED KINGDOM	Sections 26 ff., on the CIC, of the Companies (Audit, Investigations and Community Enterprise) Act of 2004, as well as the Community Interest Company Regulations of 2005	Community Interest Company





2. Models and Trends of Social Enterprise Legislation

Specific laws on SEs began to be approved in Europe in the 1990s. Indeed, Italian Law no. 381 of 1991 on social cooperatives is often considered the cornerstone of this kind of legislation²². Evidently, legislators found the cooperative legal form to be the most appropriate place to house the phenomenon of SE.

Almost 30 years later, at least 20 EU Member States have specific organizational law on SE, but the contemporary landscape is more variegated and complex, also because different general models of SE legislation may now be identified.

The most relevant and increasingly used criterion of classification of the existing legislation on SE is that between:

- i) laws according to which the SE is a particular type (or sub-type) of legal entity, i.e., a specific legal form of incorporation, and
- ii) laws according to which the SE is a particular legal “status” (or “mark”, “qualification”, “certification”, “label”, etc.) that entities meeting certain requirements may acquire, regardless of their legal form of incorporation.

Laws belonging to the first group provide a specific legal form of incorporation for SEs, which is distinct from all the other legal forms and usually constitutes a special sub-type (or modified type) of either a shareholder company or a cooperative. Under these laws, therefore, an organization incorporates (or re-incorporates) as an SE, which may have different legal denominations across jurisdictions, depending on the legal structure of incorporation. The social cooperative, and similar legal denominations, such as collective interest cooperatives and social solidarity cooperatives, which are provided for in many jurisdictions – namely, Croatia, Czech Republic, France,

Greece, Hungary, Italy, Poland, Portugal, Spain (as well as Belgium after the reform of 2019, though in a partially different manner that will be described later in this paper) –, and the UK community interest company (CIC), are the most prominent examples of this sort of legislation (see Table 1 above).

On the other hand, laws belonging to the second group establish a particular legal category of entities – that of “SEs” – in virtue of some common requirements. Under these laws, an organization qualifies (and disqualifies) as an SE and the “social enterprise” is, therefore, a legal qualification (or legal status). Hence, in principle, in each jurisdiction, this category may be comprised of entities incorporated under various legal forms (of a shareholder company, a cooperative, an association, a foundation, etc., depending on the jurisdiction), provided they meet the relevant legal requirements for qualification. This sort of legislation may be found in many Member States, such as Denmark, Finland, Italy, Romania (see Table 1 above).

Another important criterion of classification of the laws on SE is that between:

- a) laws that recognize as SEs only work integration social enterprises (WISEs), and
- b) laws according to which the SE is identified by the performance of several activities of social utility or general interest, including, but not limited to, work integration of particular disadvantaged persons or workers.

This distinction regards the scope of an SE’s activity and may apply to both the typologies of laws previously identified *sub i)* and *ii)*. Thus, depending on the characteristics of the national legislation, one may find laws that provide only for the establishment of work integration social cooperatives (e.g., in Poland) and laws under which work integration is the only activity that an organization can perform to be qualified as an SE (e.g. in Lithuania).

As there is no apparent reason to reduce, by law, the scope of SEs to work integration, with work integration of disadvantaged persons and workers being only one of the possible activities of social utility (or general interest) that an SE may, in theory, conduct,

recognition must be given to the legislative trend of enlarging the scope of institutionalized social enterprises beyond work integration, as has recently happened in Slovakia where, by decoupling the concept of SE from work integration, the new law of 2018 on social economy and social enterprise overcame the limits of the law of 2004 which, since it only supported WISEs, was unable to capture those *de facto* SEs that were not focused on work integration²³.

2.1. Social Enterprise as a Legal Form of Incorporation

Those treating SE as a specific legal form of incorporation represent the first generation of laws on SE. More precisely, the specific legal form found across EU jurisdictions is either a particular type (or, if one prefers, a modified type or sub-type) of cooperative or a particular type (or, if one prefers, a modified type or sub-type) of shareholder company. Italian social cooperatives and British community interest companies are the most well-known and – in light of the considerable number of social cooperatives and CICs respectively established under these laws – the most successful of these legal forms.

2.1.1. The Social Enterprise in the Cooperative Form

Beginning with Italy in 1991, many EU jurisdictions have provided for the establishment of SEs in the cooperative form. These cooperatives assume the legal denomination of “social cooperatives” or similar (e.g., “social initiative cooperatives”: see Table 1 above).

Why is an SE perceived by legislatures as a modified form of cooperative? Why is the cooperative form considered to be the appropriate “legal dress” for SE?

The answer lies in the fact that, notwithstanding its particular purpose, the social cooperative remains, at its core, a cooperative, of which it shares the general structure of internal governance and other specific attributes that are particularly consistent with an SE's nature and objectives.

The social cooperative is, in fact, a cooperative with a non-mutual purpose²⁴, because – as, for example, Italian Law no. 381/91 explicitly states – its “aim [is] to pursue the general interest of the community in the human promotion and social integration of citizens”, either through the management of socio-health or educational services (so called social cooperatives of type A) or through the conduct of any entrepreneurial activity employing disadvantaged people (so called social cooperatives of type B which belong to the category of WISEs)²⁵. Of great interest in this regard, is the recent provision in Belgian law, where cooperatives may be accredited as social enterprises if their “main objective is not to provide their shareholders with an economic or social advantage, in order to satisfy their professional or private needs”, but “to generate a positive societal impact for human beings, the environment or society” (art. 8, para. 5, Code of Companies and Associations of 2019)²⁶.

Whilst a social cooperative's “soul” (i.e., its main purpose) is that typical of an SE (and not that of an “ordinary” cooperative pursuing a mutual purpose), its “body” (i.e., its organizational structure) remains that of a cooperative. Consequently, in addition to the distinctive traits common to all SEs (including, in particular, the total or partial profit non-distribution constraint and the disinterested devolution of residual assets upon dissolution)²⁷, the SE in the cooperative form is:

a democratic SE (since cooperatives are, in principle, managed according to the “one member, one vote” rule, regardless of the individually paid-up capital; this is also the primary reason why it is commonly stated that, in cooperatives, the capital plays a purely “servant” role, since the organization is person, rather than capital-centred);

open to new members, whose admission is favoured by the variability of capital (the principle of the “open door”, if effective, is a manifestation of present cooperative members' altruism towards future cooperative members or, if one prefers, towards the next generations of cooperative members);

jointly owned and controlled by its members (given that, usually, all or at least a majority of the directors must be members of the cooperative, and the external (i.e., non-member) control of a cooperative or the control by a single member are not permitted by law);

and, by its very nature, supportive of other cooperatives (cooperative system), its employees and the community at large²⁸.

It is therefore not by accident that the cooperative is considered in specific constitutional provisions that recognize its social function and provide for state support²⁹.

The social function of cooperatives may even be considered more intense when a cooperative aims to pursue the general interest of the community (rather than the economic interest of its members). Essentially, the combination of cooperative structure and objectives of general interest may result in increased social relevance of the organization, given that the sociality of the cooperative structure is added to the sociality of the enterprise's objectives.

Undoubtedly, the SE in the cooperative form is an entity with a strong(er) identity as SE, because its governance has the participatory (and human) dimension that characterize the “ideal-model” of SE and the concept of an SE adopted by the EC (in the SBI Communication, these words are used to describe an SE: “it is managed in an open and responsible manner and, in particular, involves employees, consumers and stakeholders affected by its commercial activities”). Moreover, the democratic nature of the SE in the cooperative form makes it perfectly compatible with the notion of an entity of the social economy that is becoming increasingly common in Europe and in the laws on the social economy approved thus far in Europe. Indeed, under these laws, democratic governance is a key identifier of the entities of the social economy³⁰.

A truly participatory and democratic governance, together with the constraint on profit distribution, can be a key factor in achieving the special “identity” of an organization capable of identifying those

who work within it, thus giving rise to a virtuous circle that, through the personal satisfaction that identification with the organization produces in the individuals who belong to it, results in the organization's more effective and efficient pursuit of its statutory and institutional objectives, to the benefit of the ultimate beneficiaries of the organization³¹.

Given these premises, there are two examples in the most recent legislation that may be appreciated for the prominence given to the cooperative form in the regulation of SEs.

The first, and most relevant, is the case of Belgium. Indeed, this country completely changed its legislative approach to SE in 2019 by repealing the “social purpose company” (SFS) and introducing, in its place, the “cooperative accredited as social enterprise”.

The second is the case of Italy. In this country, the “social cooperative”, as provided for by Law no. 381/1991, is now recognized as *ope legis* social enterprise in Legislative Decree no. 112/2017 (which replaced Legislative Decree no. 155/2006) and continues to be the recipient of better treatment (not only under tax law) than SEs established in non-cooperative legal forms.

These recent changes in the legislation are perfectly in line with the idea that the cooperative form is the “most natural” form for an SE or, at least (when a jurisdiction allows and recognizes SEs established in several legal forms), the legal form that makes SE more virtuous than others.

2.1.2. The Social Enterprise in the Company Form

In the context of the first model of legislation – namely, SE as a specific legal form of incorporation – the cooperative is the legal form usually chosen by legislators to house the SE. The company legal form was chosen only by the UK (where the CIC legislation has had great success given the considerable number of CICs established) and more recently, in 2017, by Latvia (though in a partially different manner that will be described later in this paper)³². The Maltese draft law on SE shows a clear preference for the SE in the form of a limited liability company, although in effect it does not exclude the possibility for entities incorporated in other legal forms (including the cooperative form) to qualify as SEs³³.

An SE in the company form is a particular type of company established with the intention of pursuing the interests of the community, rather than to maximize shareholder value. In itself, the company form does not raise particular concerns for the pursuit of an SE's purpose on the condition that the law is sufficiently clear in assigning a social or general interest objective to (and in restricting the distribution of profits in) these companies. Furthermore, the SE in the company form has, in theory, more financial capacity than an SE established in other forms, since an organization based on the amount of capital individually held (“one share, one vote”) may attract more investors than an organization, such as the cooperative, in which paid-up capital is irrelevant to governance (“one member, one vote”).

However, what mostly changes with respect to the SE in the cooperative form, precisely because of the different legal form adopted, is the structure of ownership and control. An SE incorporated as a company is, in principle, a capital-driven organization led by investors as shareholders, which may, moreover, be subject to control, even by a single shareholder³⁴.

The SE in the company form could also be a manager-run enterprise, since members' control and active participation are not required in the way that

they are for the SE in the cooperative form. One must add to this consideration some recent findings from behavioural law and economics. Laboratory experiments have shown that, under certain conditions, managers prove less inclined to transfer resources to third party beneficiaries (e.g., charities) not only than the owners of the company, but also than they would be if they were not acting as agents. This is probably due to the fact that managers tend to curvy favour with company ownership in order to satisfy the interests of shareholders as their principals and thus retain their offices³⁵.

In conclusion, an SE in the company form is a type of organization whose identity as SE is weaker and at risk if limits are not set on control by a single member or if precise rules on ownership and control are not adopted by legislators³⁶. This happens, for example, in Italian Legislative Decree no. 112/2017, which stipulates that an SE may be participated in, but not controlled or directed by, a for-profit entity³⁷. This approach resolves the issue almost completely, making the SE in the company form an option, especially as a structure of second-degree aggregation among primary SEs (even in the cooperative form). Another interesting provision to this effect is the one found in art. 9, paragraph 1, of Slovenian Law no. 20/2011 on social entrepreneurship, which limits the potential for for-profit companies to establish SEs, by providing that they may do so only in order to create new jobs for redundant workers (and explicitly providing that they may not do so in order to transfer the enterprise or its assets to the SE)³⁸. A further interesting measure related to the Belgian *société à finalité sociale* (SFS) (now repealed), in which no shareholder may have more than one-tenth of the votes in the shareholders' general meeting³⁹.

2.2. Social Enterprise as a Legal Status/Label/Qualification

The laws in which the SE is a specific legal status (or label or qualification) represent the second generation of laws on SE. As already observed, in these laws the SE does not constitute a particular legal form of incorporation, but a legal qualification that may be acquired by entities complying with certain requirements, regardless of the legal form in which they are incorporated.

More precisely, in some jurisdictions, such as Finland and Italy, the law allows entities incorporated in any legal form (company, cooperative, association, foundation) to qualify as SEs⁴⁰, while in other jurisdictions, such as Luxembourg, the law restricts the SE status to entities incorporated as companies or as cooperatives⁴¹.

Two brand new laws adopted another different approach. In Belgium, following the reform of 2019, the SE is a legal status. However, it may be obtained only by cooperatives (upon approval by the Minister of the Economy). The Latvian Law of 2017 also establishes the SE as a status, but it may be acquired only by limited liability companies (see sect. 2 of said Law). A new trend therefore seems to be emerging: there are jurisdictions in which the two general models of legislation are combined so that, on the one hand, the SE is a legal status, whilst on the other hand, only entities with a specific legal form (either a cooperative or a company) may qualify as SE. This results in the convergence of the two alternative models of legislation presented and described in this paper.

SE as a legal status is a model of legislation increasingly praised by legal scholars⁴² and ever more diffuse in the EU. It is also the model adopted and promoted by EU Institutions: indeed, no reference to a specific legal form of incorporation is present in the definition of SE in the SBI Communication of 2011 and “EaSI” Regulation no. 1296/2013 specifies that the legal form is not relevant for the definition of an SE, which is considered “an undertaking, regardless of its legal form, ...”. More recently, in its Resolution of 5 July

2018, the European Parliament proposes the adoption of a European Social Enterprise Label which is not based on the legal form of incorporation.

In fact, the most recent national laws on SE are laws providing for the SE as a legal qualification, certification or status. The SE is a legal qualification in the Romanian Law of 23 July 2015 and Luxembourg Law of 12 December 2016, as well as in the more recent Latvian Law of 2017 and Bulgarian Law of 2018. Draft laws on SE in Cyprus and Malta have also been inspired by this model. Even in some countries, such as France, Italy and Slovakia, which already had a law on social cooperatives (first model), laws of this kind have been introduced (see Table 1 above)⁴³.

In effect, there are some advantages that may be ascribed to this model of legislation in comparison to the preceding model. It allows an existing organization to become an SE without having to re-incorporate as an SE, and an existing SE to lose its status as SE without having to dissolve, convert, or re-incorporate in another legal form, thereby reducing costs and facilitating access to (and exit from) the SE legal qualification⁴⁴. This holds particularly true for an organization established in a legal form (for example, association or foundation) different to that usually chosen by legislatures, following the first model of SE legislation, to accommodate the SE, i.e., of company or cooperative. Imposing sanctions may be simpler for the authority enforcing the SE status (and less onerous for the same organization), because it may suffice to revoke the qualification of SE (or threaten to revoke it if irregularities are not removed), instead of dissolving or converting a legal entity⁴⁵.

However, the most significant advantage offered by this model of legislation is that it allows an SE to choose the legal form under which it prefers to conduct its business, without imposing the cooperative form or the company form (or another specific legal form), as happens when a jurisdiction decides to adopt the first model of legislation on SE. The plurality of the available legal forms enables an SE to shape its structure in the most suitable manner, according to the circumstances (e.g., the nature of the founders or members: workers, investors, first-degree SEs, etc.), the (cultural, historical, etc.) tradition where it has its roots (e.g., of associations or cooper-

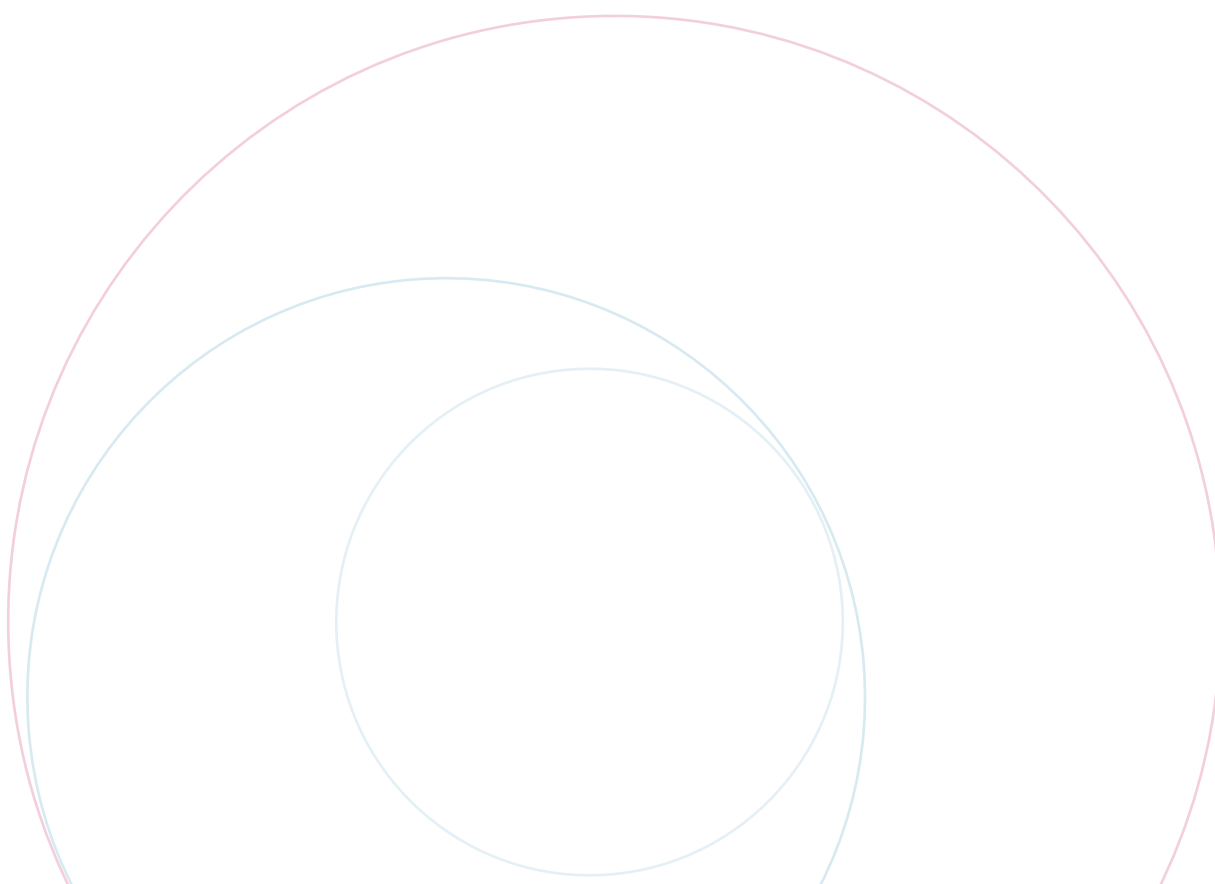
atives), or the type of business (e.g., labour-intensive or capital-intensive). This favours the development of SEs, since the plurality of the available legal forms should determine an increase in their total number.

On the other hand, although the law imposes certain requirements on all SEs (or rather, on all organizations that wish to qualify as SEs and maintain this qualification over time), independently from their legal form of incorporation, this model of legislation ensures, in any event, that all SEs have a common identity as SEs⁴⁶. Moreover, with regard to an entity's identity as an SE, there is no evidence that the laws attributable to this second model of SE legislation are, in general, less strict than those attributable to the previous one. At the same time, this model of legislation allows legislators to organize and combine the legal requirements for SE qualification in different manners depending on the legal form of the SE, thus avoiding rigidity of the SE status⁴⁷.

This model of legislation resolves the dilemma between the company form and the cooperative form, which the previous model of SE legislation inevitably poses⁴⁸.

On the other hand, **the virtues of the cooperative form – already highlighted in this paper – should and may be recognized even within this model of legislation.** In Italy, for example, although SEs may assume any legal form, social cooperatives are *ope legis* social enterprises and recipients of a more favourable tax regime than SEs incorporated in other legal forms. This better regime is linked to the underlying virtues of the cooperative form, which makes it reasonable and justifiable also under competition and state-aid law.

Regardless of the model of SE legislation and the legal form of incorporation of an SE, how legislators should shape the legal identity of SEs remains a fundamental issue, which the next section of this report intends to explore.





3. The Legal Identity of Social Enterprises and its Essential Requirements

The comparative analysis of existing *ad hoc* legislation on SE in 20 EU Member States demonstrates that – regardless of the model of legislation and notwithstanding certain differences and particularities (which are, however, worth underlining) – a European common core in the regulation of SEs may be identified. This shared framework delineates a legal identity of SEs structured around the aspects examined below. This legal identity is consistent with the general concept of an SE adopted by EU Institutions and the EC in the SBI Communication.

3.1. The Private Nature

First of all, SEs are legal entities (or legal persons) almost everywhere. Natural persons may not, *per se*, qualify as SEs. This is the implied result of the law providing for legal entities as the legitimate applicants for qualification or the effect of explicit legal prohibition, as in the case of Danish Law no. 711/2014 (sect. 4(2)). However, exceptions may be found in Finland and in Slovakia, where an individual entrepreneur (or sole proprietor) may acquire the SE status⁴⁹. On the other hand, existing laws do not explicitly deny SE status to legal entities composed of only one person (even a natural person) in the event that their establishment is permitted by law, of course, as is the case for joint-stock and limited-liability companies. One explicit prohibition is, however, found in Italian Legislative Decree no. 112/2017, where a company held by a sole individual is considered to be one of the forms of company that may not acquire the qualification of SE.

To qualify as SEs, legal entities must be private, both in the sense that they must be entities regulated by private law and in the sense that they must not be controlled by public entities. For example, Italian Legislative Decree no. 112/2017 explicitly states that public administrations may not acquire SE status

(art. 1, para. 2). Whilst it allows public administrations to become members of an SE, at the same time it denies SE status to organizations directed and controlled by a public administration (art. 4, para. 3). Similar restrictions may be found, among others, in Slovenian Law no. 20/2011 (art. 9, para. 2), in Danish Law no. 711/2014 (sect. 5(1) no. 3), in Latvian Law of 2017 (sect. 2, para. 2), whereas laws allowing public entities to control an SE represent exceptions (e.g. Slovakia⁵⁰).

3.2. The Social Purpose

The pursuit of a purpose of general or community interest (or similar formulas, like social purpose) typifies SEs according to the existing legislation in the EU. This element is essential as it contributes to distinguishing SEs from other entities. First of all, from for-profit entities such as (ordinary) companies, which conduct entrepreneurial activity in order to make profits for subsequent distribution to their shareholders. Secondly, from mutual entities such as (ordinary) cooperatives, which conduct entrepreneurial activity with, and in, the final interest of their members who are the consumers, providers or workers of the cooperative enterprise⁵¹.

The institutional purpose affects directors' decisions and their discretionary power. Directors, in fact, are obligated to fulfil the entity's stated objectives. For this reason, it is important that the social nature of an SE's purpose be explicitly stipulated by law as the exclusive (or at least the principal) objective of an SE, as in fact happens in many EU laws. For example, Italian Law no. 381/91 stipulates that "social cooperatives aim to pursue the general interest of the community in the human promotion and social integration of citizens" (art. 1, para. 1). Another example is provided by Danish Law no. 711/2014 (sect. 5(1) no. 1), which requires an organization to have a social purpose in order to register as an SE. Furthermore, acting in the social or the general interest of the community is necessary for a Romanian entity to be granted the SE certificate (art. 8, para. 4, lit. a, of Law no. 219/2015). In the recent Belgian law on cooperatives accredited as social enterprises, there is the

requirement that the aim of the cooperative has to be “to generate a positive social impact on human beings, the environment or society” (art. 8, para. 1, Code of Companies and Associations of 2019, and art. 6, para. 1, Royal Decree 28 June 2019). The production of a “positive social impact” is also required by the Latvian law of 12 October 2017 for awarding the legal status of social enterprises to limited liability companies (sect. 2).

In some instances, although without substantial effects, the law connects the pursuit of the typical purpose directly to the activity performed. For example, with regard to British CICs, sect. 35(3) of the Companies Act of 2004 provides that “an object stated in the memorandum of a company is a community interest object of the company if a reasonable person might consider that the carrying on of activities by the company in furtherance of the object is for the benefit of the community”. French social initiative cooperatives “have as their object the production or supply of goods and services of collective interest, which are of socially useful character” (art. 19-*quinquies*, para. 2, Law no. 47-1775)⁵².

3.3. The Asset-Lock

According to existing legislation, SEs face specific limits on the distribution of profits generated by their businesses to shareholders, members, directors and other persons⁵³. More precisely, in several cases SEs are explicitly obligated by law to use possible profits either exclusively or prevalently for the pursuit of their social purpose⁵⁴. This “asset lock” entails the prohibition for an SE to use its profits for different goals – including wealth maximization of founders, members, shareholders, directors, employees, etc. – at any stage of its life, including dissolution, as well as in the case of loss of the SE qualification.

With this provision, existing legislation seeks to secure the institutional mission of an SE, so that the profit motive does not permeate the business and assets are used for the social or community benefit, rather than for the benefit of members, employees, directors, etc.⁵⁵. In this sense, the rules on profit allo-

cation complement and reinforce those on the social purpose. In addition, the rules on profit allocation make it clear that a socially useful activity is not *per se* considered by legislators capable of fulfilling the social mission of an SE. The activity needs to be conducted by the SE for no other reason than the benefit of the community.

It is also worth underlining that these constraints are provided for by law even with regard to SEs in the company form, which are different to those that, while pursuing a profit purpose, (also) choose to be socially responsible (i.e. social enterprises and socially responsible companies, as well as social enterprise and corporate social responsibility, are different concepts).

The restrictions on profit distribution allow the inclusion of SEs in the general area of non-profit organizations⁵⁶ and, most notably, in the more specific areas of the third sector and the social economy.

As already stated, the law explicitly prohibits the distribution of an SE’s profits to shareholders, members, directors, workers, etc.⁵⁷. In order to be effective, the non-distribution constraint should cover a number of potential circumstances, notably the payment of periodic dividends, the distribution of accumulated reserves, the devolution of residual assets upon the entity’s dissolution⁵⁸, the SE’s transformation into another type of organization, if permitted by law, and the loss of the SE status⁵⁹. In effect, many laws appropriately specify the constraint in this manner.

The non-distribution constraint could also be indirectly circumvented by means of acts that are particularly and unreasonably favourable to those who cannot be (directly) rewarded by an SE, such as the payment of unjustifiable, above-market remunerations to employees or directors (so called “indirect distribution of profits” under Italian law). Indeed, there are some laws that explicitly prohibit such acts in order to protect the profit non-distribution constraint or reinforce the rules on profit allocation⁶⁰.

More precisely, among existing SE laws, there are laws that fully prohibit profit distribution (total non-distribution constraint)⁶¹, and laws that author-

ize a limited distribution of profits (partial non-distribution constraint). The second group is the most numerous and comprises the most recent laws⁶². The change recently introduced into Italian social enterprise legislation is significant in this regard. Legislative Decree no. 112/2017, replacing the previous Legislative Decree no. 155/2006, now permits profit distribution in Italian social enterprises, but with a number of limits: first, only social enterprises incorporated as companies or cooperatives may distribute dividends to their shareholders/members; second, the share of annual profits that may be distributed to shareholders/members must be lower than 50% of total annual profits (minus the losses of the previous years); third, each shareholder/member may not receive more than the maximum interest of the postal bonds increased by 2.5 points on the paid-up capital⁶³. A similar cap on the distribution of dividends is provided for by art. 6, para. 7, Royal Decree 28 June 2019 on Belgian cooperatives accredited as SEs. There are also laws that – rather than prohibiting profit distribution or allowing a limited distribution of profits – require an SE to use all the profits or a share of them for its social activity or for its social objectives⁶⁴.

Whether SEs should be subject to a total or a partial constraint on profit distribution is a controversial issue. It is clear that, in principle, a total constraint would maximize the general or community interest and prevent purely selfish individuals from “abusing” the SE form or status to satisfy their private interests⁶⁵. On the other hand, there is the usual, reasonable explanation for the partial constraint: namely that it promotes investment in SEs⁶⁶.

However, it seems that there are unrealistic hopes about the ability of this specific aspect of an SE’s regulation to actually solve the problems which, as appropriate, justify the one or the other alternative. On the one hand, a total constraint may be inadequate to prevent possible abuses of the SE form or status if the system of enforcement of the social purpose is not effective. On the other hand, it is uncertain that a partial constraint might really attract investors, especially if investors are not granted a correspondingly proportional power of control of the SE⁶⁷.

3.4. The Activity of Community/General Interest

Another essential element of the SE legal identity is the carrying out of a socially useful entrepreneurial activity (or similar formulas, such as the recent “a social activity that produces social added value determined according to a methodology issued by the Minister of Labour and Social Policy” found in art. 7, no. 1, of Bulgarian Law no. 240/2018). The entrepreneurial character of the activity conducted distinguishes SEs from more traditional non-profit organizations, which pursue the same objectives as the SE, but do so through activities of a distributive and non-commercial nature and are therefore also known as donative non-profits⁶⁸. Indeed, existing laws explicitly require an SE to perform its activities in an entrepreneurial form and in certain cases also emphasise the characteristics that an activity must possess to be considered entrepreneurial⁶⁹.

Secondly, the business activity of SEs must be beneficial to society or the community. In this regard, two general approaches exist.

First, as previously observed, there are laws that only recognize WISEs (see Table 1 above). In this case, it is not the type of business, but work integration of certain people that makes the activity performed socially useful. The law therefore prescribes that, regardless of the nature of the business, WISEs must employ a certain minimum percentage of disadvantaged people or workers⁷⁰.

In contrast, there are laws that afford a twofold possibility: the SE is identified either by the performance of an activity considered socially useful by law (health care, social assistance, social housing, etc.), or by work integration of disadvantaged people or workers in any possible activity (even not socially useful *per se*). Following the Italian example, it is very common in Europe to use the expression “social en-

terprise of type A” to refer to an SE that produces socially useful goods or services and “social enterprise of type B” to refer to a WISE⁷¹.

Laws that provide only for SEs of type A are rarer⁷².

With regard to SEs of type A, it is also worth distinguishing between laws that define and enumerate the socially useful or general interest activities (welfare services, health care, etc.) that an entity must carry out to qualify as SE⁷³, and laws, such as the UK law on CICs, that provide a general clause for the identification of the eligible activities⁷⁴. A CIC must satisfy a “community interest test”, i.e., it must demonstrate to the CIC Regulator that “a reasonable person might consider that its activities are being carried on for the benefit of the community” (including a section of the community, which could also be constituted by a group of individuals with common characteristics)⁷⁵. It is also interesting to observe that in the UK law on CICs (as well as in some other laws), the allocation of profits (whatever the business that generates them) to social or community purposes (*e.g.*, to support a charity) is an activity that passes the “community interest test”⁷⁶.

With regard to SEs of type B or WISEs, one must distinguish between laws, such as the Italian ones on social cooperatives and SEs and the Finnish one on SEs, that do not require (but only permit) disadvantaged people or workers (who are employed by the SE) to be (also) members of the SE⁷⁷, and laws that, instead, conceive of WISEs strictly as worker cooperatives, so that the disadvantaged people or workers (employed by the SE) must also be members of the SE (although other categories of members are admissible, given that only minimum percentages of disadvantaged worker-members are prescribed by law)⁷⁸. There is no apparent reason for requiring the disadvantaged people or workers to be members of the organization for it to qualify as a WISE. In fact, in some instances the status of being disadvantaged might prevent a person from being a member of the entity and exercising the powers thereof. This does not mean, however, one should overlook the additional positive impact of participation in an SE when it is not impeded by the status of being disadvan-

taged or other reasonable circumstances. In the latter event, the legal form of the worker cooperative acquires a specific meaning and value.

3.5. The Democratic/Participatory/ Inclusive Governance

The governance of an SE is influenced by the model of SE legislation in force in a given jurisdiction. For cases in which the SE is a particular type of company (*e.g.*, a CIC) or a particular type of cooperative (*e.g.*, a social cooperative), its governance features are in general those of a company and of a cooperative, respectively⁷⁹. In contrast, for cases in which the SE is a particular legal qualification or status, its governance features vary according to the legal form in which the organization has been established (*association, foundation, company, cooperative, etc.*)⁸⁰.

However, independent of the model of SE legislation and the legal form of the SE, there are certain governance requirements that SE laws usually impose on all SEs and these are consistent with the latter’s role and ultimate objectives.

One of most notable of these governance requirements is the obligation to issue a report on the activities carried out and the benefit delivered to the community, as well as on other related aspects, such as the involvement of stakeholders and the use of profits and assets. This report may have different denominations (social report, community interest report, special report, etc.) and contents across jurisdictions, but it performs the same function everywhere, namely for the SE to showcase the excellent and diverse work that it does and for the authority in charge of the control to oversee the social impact of the SE in an ongoing manner⁸¹. This legal requirement is in line with the open, accountable and transparent management that EU institutions, and the SBI Communication in particular, demand of SEs.

Another legal requirement that is particularly worth mentioning is the obligation of SEs to involve their various stakeholders in the management of the enterprise. Normally, existing SE laws are not very precise in defining this requirement⁸². This is not

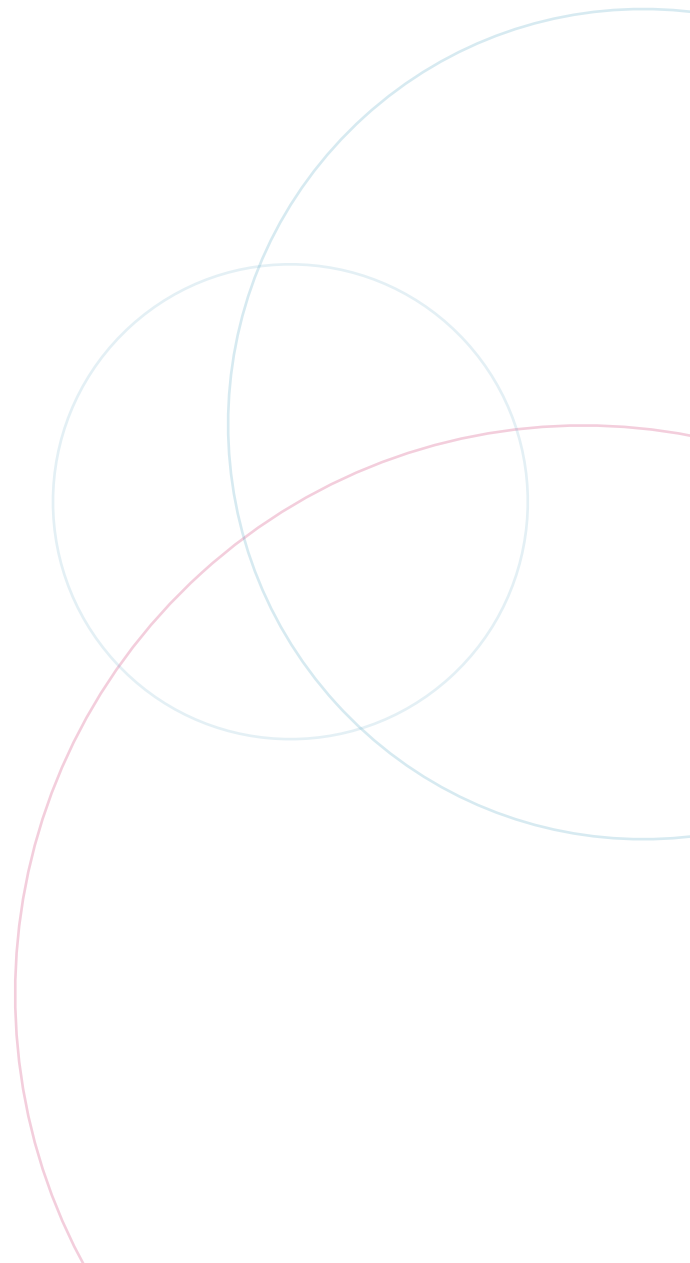
surprising, since the possible forms and modalities of stakeholder involvement depend on several circumstances, such as the type of SE (whether type A or type B), the nature of the business conducted, the size of the SE, etc. This is the reason why SE laws resort to general provisions which are, however, of paramount importance for SEs to comply with the vision that EU institutions have of them⁸³. Admittedly, more precise obligations may also be found in the existing legislation, such as that of involving representatives of the beneficiaries of the SE's activity of general interest on the boards of the SE⁸⁴ or at least of some SEs⁸⁵.

Yet another significant legal requirement concerns the legal and economic treatment of an SE's employees. There are SE laws that simply insist, with particular regard to the disadvantaged people or workers employed by a WISE⁸⁶, on a treatment that must not be less favourable than that of the employees of ordinary business enterprises⁸⁷. There are other laws that, for understandable equity and fairness reasons within an SE, lay down a limit on the variance of the salaries, such that it does not exceed a determined ratio⁸⁸.

In the EMES' definition of the ideal-type of SE, a high degree of autonomy and a decision-making power not based on capital ownership are – together with the stakeholder involvement – essential elements of the governance of SEs. According to the EC, in the SBI Communication a social enterprise “is managed in an open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities”. Analogous provisions are present in the EaSI and EuSEF Regulations of 2013.

One cannot affirm that these aspects are taken into consideration by all the existing laws on SE. This depends on the model of legislation adopted and in particular on whether an SE can take the legal form of a company. Indeed, where an SE may be established as a company, it may be managed according to the capitalistic principle of “one share, one vote”, and it may be directed and controlled even by a single shareholder or function as a pure subsidiary. If legislators wish to preserve the autonomy and democracy of SEs – and moreover, to make them compatible with the concept of social economy that is emerging

in the EU, of which, as already pointed out, organizational democracy is an essential element – they should either exclude the legitimacy of an SE in the company form or regulate the use of the company form so that its potential contradictions with an SE's autonomy and democracy are eliminated or at least reduced. A previous section of this paper has provided some guidance in this respect.







4. Conclusions

THE ANALYSIS CONDUCTED IN THIS PAPER HAS SHOWN THAT:

- the SBI Communication of 2011 has strongly influenced Member States' legislation, inducing at least 12 MSs either to adopt *ad hoc* laws on SE or to adapt the existing legislation to the concept of SE embraced by the EC (see Table 1 above); in at least four other Members States there are pending proposals of law which go in the same direction (see Table 1 above);
- as a consequence, after a first generation of SE laws based exclusively on the cooperative legal form (the season of "social cooperatives"), a new wave of laws on SE began to appear in the EU. In these latter laws, SE is a legal qualification/status/label that entities which meet with certain legal requirements may acquire, regardless of the legal form of incorporation (company or cooperative, and even association or foundation). This model of legislation represents the current trend among EU Member States, as well as the one recommended by the European Parliament for introduction into EU law (the "European Social Enterprise" label);
- this legal framework has determined the legal recognition as SEs of organizations other than social cooperatives, including shareholder companies meeting the necessary legal requirements;
- although social cooperatives continue to exist in the legislation (and, moreover, are increasingly provided for by law around the world) and to proliferate in the real world, the category of SEs has become wider; the interest in the company form has increased, to the point that in some jurisdictions either the SE is given only the form of a company or the SE in the company form (notably, limited liability company) takes precedence over the others;
- nevertheless – although the existence of common requirements for qualification as SE reduces the differences between SEs established in different legal forms – there are several reasons why **the cooperative should continue to be considered the most adequate legal form for SEs, and the SE incorporated as a cooperative should be seen as the most virtuous form of social enterprise**; in this paper, we have sought to highlight this point while comparing the SE in the company form with the SE in the cooperative form;
- consistently, there are jurisdictions that, although admitting SEs in the company form, give social cooperatives (or SEs established as cooperatives) better treatment than SE incorporated in other legal forms, both because social cooperatives are considered *ope legis* SEs and because they are recipients of a more favourable tax regime;
- of great significance in this regard, is the shift from the company form to the cooperative form that took place in Belgian law in 2019, when the social purpose company was replaced by the cooperative accredited as a social enterprise;
- the SBI Communication of 2011 has influenced not only the models of national legislation on SE, but also the contents of the laws, since the legal identity of an SE stemming from national legislation strongly resembles that envisaged by the EC in said communication;
- the private and not public nature of the SE, the objective of a social nature and the asset-lock, the general interest character of the entrepreneurial activity and the participatory and inclusive governance, are the elements of the common core of an SE's legal identity across Europe;
- even within this new framework, **the SE in the cooperative form deserves specific attention and treatment by legislators**, as the cooperative SE adds the values of the cooperative organizational model (as they have developed across the centuries and are recognized and guarded by the International Cooperative Alliance) to those of all the other social enterprises: to convince legislators of this fact represents a new challenge for the cooperative movement.



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Endnotes

1 See European Parliament Resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

2 Cf. Fici A., A European Statute for Social and Solidarity-Based Enterprise, Study for the Committee on Legal Affairs of the European Parliament, Brussels, February 2017, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583123/IPOL_STU\(2017\)583123_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583123/IPOL_STU(2017)583123_EN.pdf). The Study of November 2017 by Elodie Thirion, European Added Value Assessment of a statute for social and solidarity-based enterprises, accompanying the European Parliament's legislative own-initiative report (Rapporteur: Jiří Maštálka), substantially shares the recommendations concluding our Study.

3 See sect. 1.1.

4 See sect. 1.2.

5 See sect. 2.1.

6 See sect. 2.2.

7 See sect. 3.1.

8 See sects. 3.2. and 3.3.

9 See sect. 3.4.

10 See sect. 3.5.

11 See sect. 4.

12 These subsets and indicators are: 1) Economic and entrepreneurial dimensions of SEs, which comprise: a) a continuous activity producing goods and/or selling services; b) a significant level of economic risk; c) a minimum amount of paid work; 2) Social dimensions of SEs, which comprise: d) an explicit aim to benefit the community; e) an initiative launched by a group of citizens or civil society organisations; f) a limited profit distribution; 3) Participatory governance of SEs, which comprise: g) a high degree of autonomy; h) a decision-making power not based on capital ownership; i) a participatory nature, which involves various parties affected by the activity. See Defourny & Nyssens, 'The EMES Approach of Social Enterprise in a Comparative Perspective' (2012), EMES Working Papers Series no. 12/03. EMES is a formal, non-profit association incorporated under Belgian law, composed of research centres and individual researchers. Its conception of an SE has been reshaped over time. Cf., initially, Defourny, From Third Sector to Social Enterprise, in Borzaga & Defourny (eds.), *The Emergence of Social Enterprise*, 1 ff. (London and New York, Routledge, 2001).

13 Cf. COM(2011) 682 final, of 25 October 2011, Social Business Initiative. Creating a favourable climate for social enterprises,

key stakeholders in the social economy and innovation, 2. The EC goes on to specify the types of business covered by the term "social enterprise", namely:

- those for which the social or societal objective of the common good is the reason for the commercial activity, often in the form of a high level of social innovation,

- those where profits are mainly reinvested with a view to achieving this social objective,

- and where the method of organisation or ownership system reflects their mission, using democratic or participatory principles or focusing on social justice.

Thus:

- businesses providing social services and/or goods and services to vulnerable persons (access to housing, health care, assistance for elderly or disabled persons, inclusion of vulnerable groups, child-care, access to employment and training, dependency management, etc.); and/or

- *businesses with a method of production of goods or services with a social objective (social and professional integration via access to employment for people disadvantaged in particular by insufficient qualifications or social or professional problems leading to exclusion and marginalisation) but whose activity may be outside the realm of the provision of social goods or services (ivi at 2 f.).*

14 EaSI stands for "European Union Programme for Employment and Social Innovation". The programme runs from 1 January 2014 to 31 December 2020, with the aim "to contribute to the implementation of Europe 2020, including its headline targets, Integrated Guidelines and flagship initiatives, by providing financial support for the Union's objectives in terms of promoting a high level of quality and sustainable employment, guaranteeing adequate and decent social protection, combating social exclusion and poverty and improving working conditions" (art. 1, Reg. no. 1296/2013).

15 EuSEF stands for "European social entrepreneurship funds". The Regulation "lays down uniform requirements and conditions for managers of collective investment undertakings that wish to use the designation 'EuSEF' in relation to the marketing of qualifying social entrepreneurship funds in the Union, thereby contributing to the smooth functioning of the internal market. It also lays down uniform rules for the marketing of qualifying social entrepreneurship funds to eligible investors across the Union, for the portfolio composition of qualifying social entrepreneurship funds, for the eligible investment instruments and techniques to be used by qualifying social entrepreneurship funds as well as for the organisation, conduct and transparency of managers that market qualifying social entrepreneurship funds across the Union" (art. 1, Reg. no. 346/2013).

16 Cf. European Commission (2020), *Social enterprises and their ecosystems in Europe. Comparative synthesis report*. Authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini. Luxembourg: Publications Office of the European Union, 108 f. Available at <https://europa.eu/!Qq64ny>, at page 28 ff, and appendix 2 at page 158 ff.

17 This report, therefore, will not consider the hypothesis of social enterprises using general legal forms (association, foundation, etc.) adapted to their specific needs, nor that of general status (like that of public benefit organizations in Germany) in which social enterprises may also be included: for this distinction and classification, see also European Commission (2020), *Social enterprises and their ecosystems in Europe. Comparative synthesis report*, cit., 108 f.

18 The list of acts highlighting this aspect is endless. Concrete actions have been taken by the EC following the SBI Communication of 2011. Facilitating access to finance for SEs and, more in general, to the entities of the social economy, is, in this regard, a major concern: cf. COM(2013) 83 final, of 20 February 2013, *Towards Social Investment for Growth and Cohesion* – including implementing the European Social Fund 2014–2020, and the opinions of the EESC on 'Social Impact Investment' of 11 September 2014 and on 'Building a financial ecosystem for social enterprises' of 16 September 2015.

19 Cf. COM(2011) 682 final, cit., 9 f.

20 Such as, for example, the Social Enterprise Mark in Finland. For further reference, see European Commission (2020), *Social enterprises and their ecosystems in Europe. Comparative synthesis report*, cit.

21 Such as, for example, the 2019 National Social Enterprise Policy in Ireland. For further reference, see European Commission (2020), *Social enterprises and their ecosystems in Europe. Comparative synthesis report*, cit.

22 In this sense, cf., among others, Defourny & Nyssens, 'The EMES Approach of Social Enterprise in a Comparative Perspective', cit., 3; Crama, *Entreprises sociales. Comparaison des formes juridiques européennes, asiatiques et américaines* (2014), *Think Tank européen Pour la Solidarité* – PLS, 17; Galera & Borzaga, *Social Enterprise. An International Overview of Its Conceptual Evolution and Legal Implementation*, in 5 *Social Enterprise Journal* 210 ff. (2009). However, although it cannot be denied that this law initiated a process that involved several EU Member States and, therefore, had a strong cultural impact even outside the borders of its application, it must be acknowledged that the UK's Industrial and Provident Societies Act (IPSA) of 1965 already provided for the establishment of a Community Benefit Society, that is, a company whose econom-

ic activity “is being, or is intended to be, conducted for the benefit of the community” (see sect. 1(2)(b) IPSA 1965, and now sect. 2(2)(a)(ii) of the Co-operative and Community Benefit Societies Act of 2014).

23 Cf. European Commission (2020) Social enterprises and their ecosystems in Europe. Updated country report: Slovakia. Author: Zuzana Polačková. Luxembourg: Publications Office of the European Union, 29. Available at <https://europa.eu/!Oq64ny>.

24 The mutual purpose that in general characterizes ordinary cooperatives is to act in the interest of their members as users, consumers or workers of the cooperative enterprise. Therefore, by “non-mutual” I refer here to cooperatives not acting exclusively in the interest of their members, but primarily in the general interest. This does not imply, of course, denying the societal role or social function of ordinary cooperatives, which is even recognized at the constitutional level in many countries (as we shall highlight below in the main text and footnotes).

25 A social cooperative’s members, therefore, cooperate not to serve themselves (as is the case in ordinary, mutual cooperatives), but to serve others. Cf. Fici, Italy, in Cracogna, Fici & Henry (eds.), *International Handbook of Cooperative Law*, 479 ff. (Berlin-Heidelberg, Springer, 2013).

26 Translation by Author. The original French text is as follows: their “but principal ne consiste pas à procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels ou privés”, but “de générer un impact sociétal positif pour l’homme, l’environnement ou la société”.

27 See Sect. 3.

28 It is not possible to discuss here these general characteristics of the cooperative legal form of business organization; cf. Fici, *Cooperative Identity and the Law*, in 24 *European Business Law Review* 37 ff. (2013); Fici, *An Introduction to Cooperative Law*, in Cracogna, Fici & Henry (eds.), *International Handbook of Cooperative Law*, cit., 3 ff.; Fajardo, Fici et al., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017.

29 The list of countries is very long: it includes Italy, Spain, Portugal and many others. See, also for further reference, Fici, *La función social de las cooperativas: notas de derecho comparado*, in 117 *Revesco* 77 ff. (2015); Douvitsa, *National constitutions and cooperatives: an overview*, in *Int’l Journal of Cooperative Law*, no. 1, 128 ff. (2018).

30 Cf., for example, art. 4, lit. a), of Spanish Law no. 5/2011; art. 5, lit. c), of Portuguese Law no. 30/2013; art. 1, para. 1, no. 2, of French Law no. 2014-856; art. 4, lit. d), of Romanian Law no. 219/2015.

31 We draw this conclusion, whose basic arguments cannot be developed here, from a wide body of literature, including, in particular, Akerlof & Kranton, *Identity and the Economics of Organizations*, in

19 *Journal of Economic Perspectives* 9 ff. (2005); Rodrigues, *Entity and Identity*, in 60 *Emory Law Journal* 1257 ff. (2011); Davis, *Identity*, in Bruni & Zamagni (eds.), *Handbook on the Economics of Reciprocity and Social Enterprise*, 201 ff. (Cheltenham-Northampton, Edward Elgar, 2013). More specifically, the entity’s identity is not likely to motivate only the workers of the enterprise, but also its other stakeholders, such as suppliers, lenders and consumers, as well as donors and volunteers.

32 Of course, as we will clarify in the main text, an SE in the company form may also be found in those jurisdictions that adopt a model of legislation in which the SE is a legal status or label or qualification, open to entities incorporated under various legal forms, including that of a company.

33 See sections 3 and 7 of the Maltese Draft Law of 2015.

34 A British lawyer (Lloyd, Transcript: *Creating the CIC*, in 35 *Vermont Law Review* 31 ff. (2010)), who celebrates himself as one of the inventors of the English law on CIC, explains that the idea of the CIC as a particular form of company first came to his mind as he thought about all the times when, while suggesting the foundation of a charity to clients interested in establishing a business organization with social purposes, he faced their dismay at discovering the possibility of losing control of their own creatures due to the regulations on English charities. Hence, the lawyer conceived that, if such an organization instead had the legal form of a company, his clients would not have had this reaction, for they would not have been afraid to “give their babies away”. On the legal aspects of CICs, cf. also Cabrelli, *‘A Distinct “Social Enterprise Law” in the UK? The Case of the “CIC” (2016), University of Edinburgh – School of Law – Research Paper Series no. 2016/27*.

35 Cf. Fischer, Goerg & Hamann, *Cui Bono, Benefit Corporation? An Experiment Inspired by Social Enterprise Legislation in Germany and the US*, in 11 *Review of Law and Economics* 79 ff. (2015). Indeed, it is generally agreed that agents tend to behave less generously than their principals in both the ultimatum game and the dictator game: cf. Hamman, Loewenstein, & Weber, *Self-Interest through Delegation: An Additional Rationale for the Principal-Agent Relationship*, in 100(4) *American Economic Review* 1826 ff. (2010).

According to the Author of this Report, to be consistent with its institutional objectives, an SE in the company form should have:

- a governance structure that directly involves the shareholders in the management of the enterprise, if they are actually motivated by a sense of altruism; or
- a governance structure that completely frees the managers from the competitive pressures of shareholders, so that they do not have any incentive to align themselves with the latter’s interests; or

- a governance structure that awards rights and powers (also) to an SE’s beneficiaries who are not shareholders (or to their representatives), so that they might push managers to efficiently and effectively achieve the social mission of the organization.

36 See the preceding footnote about the Author’s recommendations on how this might be done.

In addition to the risk of abuse of the SE legal form for profit purposes, the risk also exists that – if the use of the company form of SE is not carefully regulated through limits on who may hold and/or control its capital – the SE might be used purely for purposes of corporate social responsibility. If this is the case, the autonomy of the social economy sector from the for-profit capitalistic sector could be seriously compromised.

37 Cf. art. 4, para. 3, Legislative Decree no. 112/2017, as well as art. 7, para. 2, of the same act. Even stricter is the solution found in Spanish Law no. 44/2007, given that only not-for-profit entities, associations and foundations may promote the establishment of integration enterprises (see articles 5, lit. a) and 6).

38 In addition, it is worth mentioning that the second paragraph of the same article of this Law suggests that an entity may not acquire the SE status if it is subject to the dominant influence of one or more for-profit companies.

39 Cf. repealed art. 661, para. 1, no. 4, of the Belgian Company Code. This maximum percentage was even lower (i.e., equal to one-twentieth), if the holder of equity (i.e., the shareholder) is a “membre du personnel engagé par la société” (staff member employed by the company). Cf. also art. 23 of Slovenian Law no. 20/2011, which imposes on SEs the obligation to treat members equally in decision-making processes and, in particular, prescribes a single vote for all members, regardless of the particular regime applicable to the SE entity.

40 According to art. 1, para. 1, of Italian Legislative Decree 112/2017, “All private entities, including those established in the forms of the fifth Book of the Civil Code, may acquire the qualification of social enterprise”. The legal forms of the fifth Book are companies and cooperatives.

41 According to Luxembourg Law of 12 December 2016, only the société anonyme, the société à responsabilité limitée and the société coopérative may obtain the qualification as social impact societies (SISs). Along the same lines, the qualification as an integration enterprise under Spanish Law no. 44/2007 is limited to those enterprises with the legal form of a sociedad mercantil or a sociedad cooperativa (art. 4, para. 1). In contrast, the possibility exists that legislators permit even an individual entrepreneur to acquire the status of an SE, as happens in Finland, where Law no. 1351/2003 allows the registration as SEs of all traders, including individuals, registered under sect. 3 of Law no. 129/1979, and in Slovakia, where art. 50b, para. 1, of Law no. 5/2004, makes reference, in defining an SE, to both legal and physical

persons (the same occurs in Slovakian Law no. 112/2018, with regard to the definition of the subjects of the social economy, among which are social enterprises).

42 Cf., in particular, Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, in 15 *European Business Organization Law Review*, 267 ff. (2014).

43 However, none of these countries has repealed the existing laws on social cooperatives.

44 Cf. Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, cit., 284.

45 Cf. Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, cit., 284 f.

46 Moreover, nothing prevents legislators from providing different treatment for SEs established in different forms; for example, to favour, under tax law or policy measures, an SE in the cooperative form, in consideration of its democratic nature as compared to an SE in the company form.

47 For example, the democratic and participatory character of an SE in the cooperative form allows for the relaxation of the profit distribution constraint requirement, while the non-democratic character of an SE in the company form imposes rigidity as regards profit distribution, as well as specific measures to ensure stakeholders' involvement.

48 This does not mean, however, that the SE in the company form does not require specific rules also under this model of legislation, in order to make it (more) consistent with an SE's identity, as we have clarified supra in the main text.

49 See sect. 4(1), Finnish Law no. 1351/2003, allowing the registration as SEs of all traders, including individuals, registered under sect. 3, Law no. 129/1979, and art. 50b, para. 1, Slovak Law no. 5/2004 (the same occurs in Slovakian Law no. 112/2018).

50 Cf. European Commission (2020) *Social enterprises and their ecosystems in Europe*. Updated country report: Slovakia, cit., 32.

51 "Ordinary" in brackets is intended to distinguish these companies and cooperatives from CICs and social cooperatives or, more in general, companies and cooperatives with the status of SEs.

52 See also art. 2, para. 3, Polish Law of 27 April 2006; articles 3 and 4, Slovenian Law no. 20/2011; and art. 762, Czech Law no. 90/2012, among others.

53 It must be clear that an SE is not barred from making profits, but only from freely distributing them. Sometimes, confusion on this point still exists.

54 Cf., among others, art. 3, Italian Legislative Decree no. 112/2017, which, however, admits a limited distribution of dividends to members; at least 90 % in art. 8, para. 4, lit., b), Romanian Law no. 219/2015; articles 7-9 of Bulgarian Law no. 240/2018.

55 As the British CICs' Regulator explicitly underlines: cf. Office of the Regulator of Community Interest Companies: *Information and Guidance Notes*, Chapter 6: *The Asset Lock*, 3 f. (October 2014).

56 Unless, of course, one limits this area to organizations subject to a total profit non-distribution constraint, because, as we shall see, SEs are usually subject only to a partial non-distribution constraint.

57 Apparently, the only exceptions are represented by Finnish Law no. 1351/2003 and Lithuanian Law no. IX-2251, with respect to which one must ask whether the stated purposes of SEs are in these jurisdictions per se sufficient for preventing an unlimited distribution of profits in an SE.

58 In this last respect, cf. art. 12, para. 5, Italian Legislative Decree no. 112/2017; sect. 31, English Companies Act of 2004 and sect. 23, Community Interest Company Regulations of 2005; art. 8, Portuguese Law-Decree no. 7/98; art. 28, Slovenian Law no. 20/2011. A limited percentage (not more than 20% of residual assets) may be distributed to the members of Polish social cooperatives (cf. art. 19, Law 27 April 2006).

59 In this last regard, cf., for example, art. 14, para. 5, which refers to art. 15, para. 8, Italian Legislative Decree no. 112/2017. Latvian Law of 2017 (sect. 12) requires SEs to lose their status to refund taxes accrued whilst they maintained the status.

60 Cf. art. 3, para. 2, Italian Legislative Decree no. 112/2017; art. 11, paragraphs 2 and 3, Slovenian Law no. 20/2011; chap. 3, sect. 9, Danish Law no. 711/2014; Art. L3332-17-1, I, 3°, of the French Labour Code. Art. 5, para. 1, Luxembourgian Law of 12 December 2016, prohibits worker remuneration higher than six times the amount of the minimum social wage.

61 The prohibition is total for Portuguese social cooperatives (cf. articles 2, para. 1, and 7, Law-Decree no. 7/98), Spanish social cooperatives (cf. art. 106, para. 1, Law no. 27/1999, to be read in conjunction with the *Disposición adicional primera* of the same Law, on the qualification of cooperatives as entities without a profit purpose), Polish social cooperatives (art. 10, para. 2, Law 27 April 2006); Hungarian social cooperatives registered as public utility organizations (sect. 59(3), Law no. X-2006); Latvian Social Enterprises (sect. 9, para. 2, Law of 2017).

62 Sect. 30, English Companies Act of 2004, gives the CIC Regulator the power to set limits on the distribution of assets to a CIC's shareholders. Since 1 October 2014, the limit that the Regulator has imposed is 35% of annual net profits (the issue concerns only CICs that are companies limited by shares, since those limited by guarantee have no shareholders to pay dividends to). This limit is named "maximum aggregate dividend cap". On the other hand, the "dividend per share cap", previously provided for (and equal to 20% of a shareholder's paid-up capital), has been removed. Furthermore, it must be noted that this limit applies only to dividends paid to entities that are not asset-locked bodies, because dividends paid

to asset-locked bodies are not subject to any limits if approved by the Regulator: cf. Office of the Regulator of Community Interest Companies: *Information and Guidance Notes* (no. 51) 6 f. The prohibition is partial also for Danish SEs (see chap. 2, sect. 5(2), Danish Law no. 711/2014), French SCICs (see art. 19-nonies, Law no. 47-1775), Italian social cooperatives (see art. 3, Law no. 381/91, to be read in conjunction with art. 2514 of the Civil Code), Slovenian SEs (see art. 11, para. 2, Law no. 20/2011), and Spanish integration enterprises (Law no. 44/2007), among many others. In the Luxembourg Law of 12 December 2016, a distinction appears between "impact shares" and "investment shares": while no remuneration is admitted for the former, the latter may be remunerated under certain conditions (see articles 4 and 7).

63 Art. 3, para. 3, Italian Legislative Decree no. 112/2017.

64 Cf. articles 7-9 of Bulgarian Law no. 240/2018 which, furthermore, make a distinction, also in this respect, between class A social enterprises and class A+ social enterprises.

65 In criticizing the English regulation on CICs in this respect, Yunus, *Building Social Business*, cit., (fn. 37) at 129 f., affirms: "making selfishness and selflessness work through the same vehicle will serve neither master well. The equivocation between the profit motive and the social motive introduces a weakness that will make the L3C less effective in its pursuit of humanitarian goals than the pure social business".

66 Cf. Office of the Regulator of Community Interest Companies: *Information and Guidance Notes* (no. 51) at 6. Indeed, the considerable number of existing CICs (11,922 in the Annual Report 2015/2016 of the Regulator) may be taken as evidence of the comparative advantage of the partial constraint. A partial constraint applies also to Italian social cooperatives and the remarkable number of such cooperatives has already been highlighted in this paper (see supra fn. 16).

67 The partial constraint, among other factors, may explain the success of British CICs, in whose regulation no limits are fixed with regard to the powers that a single shareholder may be awarded in relation to their investment in the CIC's share capital. But it may not explain the success of Italian social cooperatives, in which each member has a vote, regardless of the amount of capital held.

68 North American scholarship speaks of donative non-profits, to be distinguished from commercial non-profits: cf. first Hansmann, *The Role of Nonprofit Enterprise*, in 89 *Yale Law Journal* 840 f. (1980), according to which, donative non-profits are those that "receive most or all of their income in the form of grants or donations", whereas commercial non-profits are those that "receive the bulk of their income from prices charged for their service".

69 For example, to produce goods and services on a commercial principle is one condition for the registration of Finnish

SEs in the respective register (see sect. 4, para. 1, no. 2, Law no. 1351/2003); Italian SEs of Legislative Decree no. 112/2017 must carry out a stable entrepreneurial activity of general interest.

70 European laws on WISEs, indeed, fix a minimum percentage of disadvantaged people or workers (this percentage is, for example, 30% in Italian, Finnish and Romanian laws, as well as in Spanish Law no. 44/2007; 40% in Lithuanian law; 70% in Spanish Royal Legislative Decree no. 1/2013) and therefore do not require all employees of the SE to be disadvantaged people or workers. This makes sense because the idea of integration (especially if understood as social integration and not only as work integration) implies, in a way, that disadvantaged people and workers operate in a context in which the condition of disadvantage is just one of many conditions present. Another issue is the definition of the disadvantaged people or workers to be integrated by a WISE. Here, again, the situation varies depending on the jurisdiction. For example, Finnish Law no. 1351/2003 (sect. 1) provides for the work integration of the disabled – understood to be “employees whose potential for gaining suitable work, retaining their job or advancing in work have diminished significantly due to an appropriately diagnosed injury, illness or disability” – and the long-term unemployed, identified by reference to another national law. Lithuanian Law no. IX-2251 (sect. 4) also identifies the disabled (which it divides into various groups, depending on the degree of invalidity) and the long-term unemployed as target groups for SEs. Italian SEs must employ either disadvantaged workers, identified by reference to art. 2, para. 1, lit. f), i), ix) e x), EU regulation no. 2204/2002, or disabled persons, identified by reference to art. 2, para. 1, lit. g), of the same regulation (this regulation has been replaced by EU regulation no. 651/2014 of 17 June 2014).

71 In Italian law this model of legislation addresses both social cooperatives (cf. art. 1, para. 1, lit. a) and lit. b), Law no. 381/91) and SEs (cf. art. 2, para. 1 and 4, Legislative Decree no. 112/2017); along the same lines, among many others, Spanish social cooperatives (cf. art. 106, para. 1, Law no. 27/1999), Portuguese social cooperatives (with less clarity, however: cf. art. 2, para. 1, Law-Decree no. 7/98), Slovenian SEs (cf. arts. 5, 6, and 8, para. 2, Law no. 20/2011) and Romanian SEs (chapters II and III, Romanian Law no. 219/2015).

72 The French SCIC’s object may be “la production ou la fourniture de biens et de services d’intérêt collectif, qui présentent un caractère d’utilité sociale”; therefore, unless one considers the work integration of disadvantaged people or workers (art. 19-quinquies, para. 2, Law no. 47-1775) to follow this definition, the SCIC does not seem eligible for this last specific purpose. However, the recent French law on social and solidarity economy (Law no. 2014-856) contains a general provision in art. 2, no. 1, which, if deemed applicable to SCICs, regardless of their specific legal regime, would allow them to take on the role of WISEs.

73 Cf. art. 2, para. 1, Italian Legislative Decree no. 112/2017, which contains a very long list of activities. Cf. also art. 5, Slovenian Law no. 20/2011.

74 Two general clauses for the identification of the activity of the sociétés d’impact sociétal may also be found in the recent Luxembourgian Law of 12 December 2016 (see art. 1, para. 2).

75 Cf. sect. 35, Companies Act of 2004, sect. 3 ff., Community Interest Company Regulations of 2005, and sect. 4, Community Interest Company (Amendment) Regulations of 2009; see, along the same lines, art. 2, French Law no. 2014-856.

76 The English legislation on CICs, in fact, does not limit the distribution of an CIC’s profits to asset-locked bodies, like charities; thus, the community interest test may be satisfied by proving that the allocation of profit generated by the SE to a charity is, reasonably (albeit indirectly, as it must filter through the activity of the charity funded by the CIC), beneficial to the community. In this latter case, therefore, it is not the SE’s economic activity per se that is social, but the destination of the profits that the SE is able to produce through any economic activity. Cf., among others, also chap. 2, sect. 5(1)(c), Danish Law no. 711/2014, which permits donations to charitable organizations.

77 Cf., for example, art. 4, para. 2, Italian Law no. 381/91; art. 2, para. 5, Italian Legislative Decree no. 112/2017; articles 1, 4, para. 3, and 5, Finnish Law no. 1351/2003.

78 Among the possible examples, Polish social cooperatives, in light of the provisions in articles 2 and 5 of their instituting law, and Hungarian social cooperatives, by reason of the provisions in sect. 8 of the Hungarian Law on cooperatives.

79 This is sometimes explicitly stated by the applicable law. Cf. for example, as regards social cooperatives, art. 1, para. 2, Polish Law of 27 April 2006: “for any matter which is undefined by this law regulating social cooperatives, the cooperative law of 16 September 1982 shall apply”.

80 Of course, in jurisdictions that limit the available legal forms for an SE, for example to those of the company and the cooperative (see supra fn. 48), the spectrum of possibilities is less wide.

81 Cf., among others, art. 5, lit. e), Spanish Law no. 44/2007; sect. 34, English Companies Act of 2004 and sect. 26 ff., Community Interest Company Regulations of 2005; art. 6, para. 2, Luxembourg Law of 12 December 2016; art. 9, para. 1, lit. c), Romanian Law no. 219/2015; chap. 2, sect. 8, Danish Law no. 711/2014; art. 9, para. 2, Italian Legislative Decree no. 112/2017; art. 6, para. 2, Belgian Royal Decree 28 June 2019.

82 Cf., for example, chap. 2, sect. 5(4), Danish Law no. 711/2014, according to which an SE must be inclusive and responsible in the conduct of its activities; art. 11, Italian Legislative Decree no. 112/2017, according to which an SE must involve workers and beneficiaries (and other stakeholders) of the activity, and involvement is understood as

“a mechanism of consultation or participation, through which workers, beneficiaries and other stakeholders in the activity may exercise an influence on decisions to be taken within the enterprise, at least on topics that may directly affect the working conditions and the quality of the goods and services produced or exchanged”; art. 7, no. 2, Bulgarian Law no. 240/2018, according to which an SE “is managed in a transparent manner with the participation of the members, workers or employees in decision-making under a procedure established in the articles of association, the statutes or another statutory document”.

83 To be managed by involving workers, customers and stakeholders affected by its business activities, is one characteristic of the SE according to the SBI communication and to Regulation no. 1296/2013.

84 One requirement for acquiring the status of SE in the Latvian Law of 2017, is the involvement in the executive body or in the supervisory body of a representative of the “target group” (see sect. 5, para. 2).

85 According to art. 11, para. 4, lit. b), Italian Legislative Decree no. 112/2017, in large-size SEs one representative of the workers or the beneficiaries must have a seat on the board of directors and one on the board of internal control.

86 Cf. sect. 4, para. 1, no. 4, Finnish Law no. 1351/2003, according to which an SE “pays all its employees, irrespective of their productivity, the pay of an able-bodied person agreed in the collective agreement, and if no such agreement exists, customary and reasonable pay for the work done”; cf. also sect. 5, Lithuanian Law no. IX-2251. To be more precise, some laws, furthermore, explicitly obligate WISEs to provide personal and social services in favour of the disadvantaged people and workers that they employ: see, e.g., art. 4, para. 2, Spanish Law no. 44/2007; art. 43, para. 1 and 2, Spanish Royal Legislative Decree no. 1/2013.

87 Cf., for example, art. 13, para. 1, Italian Legislative Decree no. 112/2017.

88 Cf. art. 8, para. 4, lit. d), Romanian Law no. 219/2015, according to which differences among salaries cannot exceed the ratio of 1:8. See also art. L3332-17-1, I, 3°, of the French Labour Code and now art. 13, para. 1, of Italian Legislative Decree no. 112/2017.



About CECOP

CECOP is the European Confederation of Industrial and Service Cooperatives.

We represent the voices of worker cooperatives, social cooperatives and independent workers' cooperatives. CECOP works to create a supportive environment for cooperatives, so that they can operate to their full strength and fulfil their mission of providing sustainable jobs and high quality services to their communities. Our aim is to build a fairer Europe and contribute to sustainable economic growth, and to bring democracy and solidarity to the workplace.

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