

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**A European Statute for
Social and
Solidarity-Based
Enterprise**

STUDY FOR THE JURI COMMITTEE





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

A European Statute for Social and Solidarity-Based Enterprise

STUDY

Abstract

This study was requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

Social enterprises (SE) are subject to *ad hoc* legislation in an increasing number of EU jurisdictions and legislative initiatives in this field are under consideration by EU institutions. This paper explains why tailor-made legislation on SE is essential for the development of this unconventional form of business organization. It describes and compares existing models of SE regulation and discusses the core elements of an SE's legal identity, with the aim of providing recommendations on the potential forms and contents of an EU legal statute on this subject.

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LIST OF ABBREVIATIONS

- CIC** Community Interest Company
- CSR** Corporate Social Responsibility
- EC** European Commission
- EESC** European Economic and Social Committee
- EP** European Parliament
- ESE** European Social Enterprise
- EU** European Union
- MS** Member State
- SBI** Social Business Initiative
- SC** Social Cooperative
- SE** Social Enterprise
- SFS** *Société à Finalité Sociale*
- SUP** *Societas Unius Personae*
- TFEU** Treaty on the Functioning of the European Union
- WISE** Work Integration Social Enterprise

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EXECUTIVE SUMMARY

In recent decades, the term “social enterprise” (SE) 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.

An operational definition of SE is contained in the European Commission “Social Business Initiative” (SBI) of October 2011, and has already influenced EU legislation.

So far, the debate on SE has mainly focused on the reasons and conditions for their emergence and on their positive role in the economy and society. In contrast, the legal aspects of an SE have received insufficient attention, notwithstanding the fact that an adequate legal framework is considered one of the necessary conditions for the development of SEs.

A primary condition for an adequate legal framework pertaining to SEs is that it recognizes and specifically regulates them under organizational law. Indeed, *ad hoc* legislation on SE offers several advantages to social entrepreneurs and fosters the growth and development of this particular type of business organization. It permits the reservation of the use of the legal denomination of SE for real SEs, and allows social entrepreneurs to signal the terms and conditions that their organizations offer to stakeholders and to make credible their commitment not to change such terms and conditions.

A distinct legal identity of SEs is beneficial in several further respects: it allows SEs to be specifically considered for additional purposes, such as tax, public procurement, or competition law; the design of specific public policies in support of SEs, and, more particularly, the justification of these policies under EU competition and state aid law; the establishment of clearer boundaries between SE and different or more general concepts (such as those of “entities or enterprises of the social economy” and of “corporate social responsibility”); the protection of the stakeholders of the SE; the prevention of the establishment and operation of “false” SEs; and the collection of more reliable official statistics on SEs, also in order to improve their visibility.

More than 25 years since Italian Law no. 381/1991 on social cooperatives was approved, at least 18 EU Member States have specific organizational law on SE.

Different models of legislation may be identified across EU jurisdictions, and the legal nature of an SE depends on the model adopted in a given jurisdiction.

More precisely, there are laws according to which the SE is a legal form of incorporation (either a particular type of cooperative or a particular type of company) and laws according to which the SE is a legal qualification (or status). This latter model of legislation is increasingly gaining favour among European legislators, and it in fact offers several advantages over the former.

Another important criterion of classification of existing laws on SE is that between laws that recognize the SE only as a work integration social enterprise (WISE), and laws according to which the SE is identified by the performance of several activities of social utility, including, but not limited to, work integration of particular disadvantaged persons or workers. There is no apparent reason to limit by law the scope of SEs to work integration.

Whichever model of SE legislation is adopted, what legal identity legislators should assign to SEs remains a fundamental question.

The comparative analysis of existing *ad hoc* legislation on SE in the EU demonstrates that – regardless of the model of legislation and notwithstanding certain differences and particularities – a European common core in the regulation of SEs may be identified. This shared framework delineates a legal identity of SEs structured around several aspects.

The SE is a legal entity established under private law and independent of the state and other public administrations. It has an exclusive or at least a prevalent purpose of community or general interest. It is subject to a total or at least partial constraint on profit distribution, and more generally to specific rules on the allocation of profits and assets during its entire life, including at dissolution, and in case of loss of the SE qualification. It conducts a socially useful activity, including work integration of disadvantaged people or workers, as determined by law either *ex ante* or through a general clause. It is subject to specific governance requirements, including the obligation to issue a social report, to involve its various stakeholders in the management of the enterprise, and to provide fair and equitable treatment of its workers, notably the disadvantaged ones.

When it is established as a company, an SE is usually subject to additional governance requirements in order to resolve the potential contradictions between the company form and the SE status. On the other hand, the SE in the cooperative form, due to its democratic and participatory structure of governance, is an entity with a strong identity as SE.

The SE is subject to public control in order to ensure compliance with the legal requirements for its incorporation or qualification as an SE, which is necessary to protect the legal label of SE and preserve its intrinsic value.

This is the legislative background at the state level against which any potential EU initiative in the area of SE law should be evaluated.

EU legislative initiatives on SE could not take the form of harmonization directives. For several reasons, the obstacles to harmonization in this field via EU directives would be even bigger than in company law, regarding which the increasingly negative attitude of MSs towards top-down harmonization has emerged.

On the other hand, the introduction of an EU specific legal statute for SEs would be a desirable result. As regards its feasibility, however, the negative atmosphere that has characterized the debate over the introduction of new EU legal entities in the last few years demonstrates that MSs harbor the same negative attitude towards EU organizational law that they do towards harmonization directives in company law. Inevitably, this climate infuses pessimism about the introduction of an EU statute on SEs.

Nevertheless, the recent EC proposal of an EU directive on the *Societas Unius Personae* (SUP) applies a new strategy that may also be explored with regard to EU legislation on SE. An SUP-like EU directive on SEs would introduce a specific and (partially) harmonized law on SE in all the MSs. This law might concentrate on the essential elements of an SE identity, leaving the other aspects of regulation to the national law of each MS. This might provide for an EU social enterprise qualification (or status) – that of “European Social Enterprise” – and a related label or mark – that of “ESE” – common to, and reserved for, all SEs of the EU, regardless of the country of incorporation. The requirements of the ESE legal status could be identified on the basis of the existing common core of European SE law. This sort of EU statute could more easily find favor among MSs.

In any event, once recognized and regulated by EU organizational law, SEs should receive under EU public procurement, tax and competition law, among others, a treatment consistent with their particular legal nature. This is fundamental for their success.

1. INTRODUCTION

KEY FINDINGS

- In recent decades, the term “social enterprise” (SE) 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.
- An operational definition of SE is contained in the European Commission “Social Business Initiative” (SBI) of October 2011, and has already influenced EU legislation.
- So far, the debate on SE has mainly focused on the reasons and conditions for their emergence and growth and on their positive role in the economy and the society. In contrast, the legal aspects of an SE have received insufficient attention, notwithstanding the fact that an adequate legal framework is considered one of the necessary conditions for the development of SEs.
- Seeking to fill this gap, after having highlighted the fundamental role of the legal recognition and regulation of SEs, this paper provides an overview of the current state of SE legislation in the EU, with the aim of clarifying the legal nature of the SE; of comparing existing laws in EU Member States and assessing whether a common, European core regulation of SEs exists; and finally of discussing potential EU legislation on this subject.

In recent decades, the term “social enterprise” (SE) 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 governance¹.

Many attempts have been made to define an SE, that is, the piece of organizational reality that the term “SE” should isolate and evoke. One of the most influential, especially at the European level, 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 governance².

¹ It must be clarified from the beginning that notwithstanding the fact that in the title of this paper a slightly different denomination appears – that of “social and solidarity-based enterprise” – the substance of the subject matter under consideration is the same. From now on reference will be made to “social enterprises”. Indeed, in EU jurisdictions, “social enterprise” is the most commonly used denomination to refer to the type of organization analysed in this paper, while “solidarity-based enterprise” appears only in French Law no. 2014/856 of 31 July 2014 on the social and solidarity economy (see Table 1 annexed). From this comes the choice to simply refer to “social enterprises” in the main text.

² These subsets and indicators are: 1) Economic and entrepreneurial dimensions of SEs, which comprises: 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 comprises: 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 comprises: 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.

Of greater importance for the purposes of this analysis is the operational definition of SE offered by the European Commission (EC) in the Communication “Social Business Initiative” (SBI) of October 2011. 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 activities”³.

This definition draws upon EMES’ previous work and has clearly influenced European Union (EU) legislation. Indeed, in Regulation no. 1296/2013 of the European Parliament (EP) and of the Council, 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”⁴.

In general, the debate over SEs is not confined to the definition, but comprises two additional aspects: the reasons and conditions for the emergence and growth of SEs and

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).

³ 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.).

⁴ See art. 2(1) of Regulation (EU) no. 1296/2013 of the European Parliament and of the Council, of 11 December 2013, *on a European Union Programme for Employment and Social Innovation (“EaSI”) and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion*. A similar notion of SE appears in art. 3(1)(d) of Regulation (EU) no. 346/2013 of the European Parliament and of the Council, of 17 April 2013, *on European social entrepreneurship funds*, 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”.

the role of the SE in the economy and the society⁵. In this last regard, the virtues of the SE, within the more general category of the entities of the social economy⁶, have been frequently celebrated by EU institutions, which have recognized their fundamental contribution to several key socio-economic objectives of the Union – including the achievement of smart, sustainable and inclusive growth, high-quality employment, job creation and preservation, social cohesion, social innovation, local and regional development and environmental protection – and to people's well-being. It may suffice here to mention, in addition to the EC Communication on SBI of 2011, the EP resolution of 10 September 2015 on Social Entrepreneurship and Social Innovation in combating unemployment, and the Council conclusions on the promotion of the social economy as a key driver of economic and social development in Europe, adopted on 7 December 2015⁷.

The positive impact attributed to SEs has led EU institutions to express the need for their promotion and to take concrete actions in this regard⁸. An adequate 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). Not incidentally, improving the legal environment is one item of the EC Communication on SBI of 2011, in relation to which a key action is envisaged⁹.

Nevertheless, the legal aspects of the SE have received, thus far, less attention than they deserve. Seeking to fill this gap, after having highlighted the fundamental role of the legal recognition and regulation of the SE for the promotion of this organizational form, this analysis provides an overview of the current state of SE legislation in the EU, with the aim:

- of clarifying the legal nature of the SE through a description of its main features and particularities, which distinguish it from other types of legal entities, as well as from other phenomena in which economic and social aspects are equally intertwined, but in a different way and for different purposes;

⁵ Literature on these two points is endless. A recent paper, which is worth consulting, is European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Social Enterprises and their eco-systems: developments in Europe* (Luxembourg, Publications Office of the European Union, 2016).

⁶ On the relationship between SE and social economy, see *infra* sect. 5.1.

⁷ This list of acts must also include, at least, in chronological order:

- the opinion of the Economic and Social Committee (EESC) on 'The Social Economy and the Single Market' of 2 March 2000;
- the opinion of the EESC on the 'Ability of SMEs and social economy enterprises to adapt to changes imposed by economic growth' of 27 October 2004;
- the EP resolution of 19 February 2009 on Social Economy;
- the opinion of the EESC on the 'Diverse forms of enterprise' of 1 October 2009;
- the opinion of the EESC on 'Social entrepreneurship and social enterprise' of 26 October 2011;
- the opinion of the EESC on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Social Business Initiative - Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation' of 23 May 2012;
- the opinion of the Committee of the Regions on the 'Responsible Businesses Package' of 19 July 2012;
- the EP resolution on Social Business Initiative of 20 November 2012;
- the opinion of the European Economic and Social Committee on 'For a social dimension of European Economic and Monetary Union' of 22 May 2013;
- the EP resolution of 10 September 2015 on Social Entrepreneurship and Social Innovation in combating unemployment;
- the opinion of the European Committee of the Regions on 'The role of the social economy in restoring economic growth and combating unemployment' of 3 December 2015.

⁸ Cf. all the acts already cited in the preceding footnote. Concrete actions have been taken by the EC following the SBI Communication of 2011. Facilitate 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.

⁹ Cf. COM(2011) 682 final, cit., 9 f.

- of comparing existing laws in the EU Member States and assessing whether a common, European legal concept and core regulation of SE exists, which might be employed for EU legislative initiatives in this area;
- of discussing potential EU regulation of the SE, and in particular the possibility, forms and contents of a European legislative harmonisation in this field, taking into account, among other things, the state of, and the debates over harmonisation of company law and the EU legal types of organization;
- and finally, of making practical proposals and recommendations for EU action, based on the analysis' key findings.

2. THE FUNDAMENTAL ROLE OF THE LAW ON SOCIAL ENTERPRISE

KEY FINDINGS

- A primary condition for a legal framework to be adequate for SEs is that it recognizes and specifically regulates them under organizational law.
- *Ad hoc* legislation on SE offers several advantages to social entrepreneurs and fosters the growth and development of this particular type of business organization. It permits the reservation of the use of the legal denomination of SE for real SEs, and allows social entrepreneurs to signal the terms and conditions that their organizations offer to stakeholders and to make credible their commitment not to change such terms and conditions.
- A distinct legal identity of SEs is beneficial in several further respects, since it allows SEs to be specifically considered for additional purposes, such as tax, public procurement, or competition law; the design of specific public policies in support of SEs, and, more particularly, the justification of these policies under EU competition and state aid law; the establishment of clearer boundaries between SE and different or more general concepts (such as those of “entities or enterprises of the social economy” and of “corporate social responsibility”); the protection of the stakeholders of the SE; the prevention of the establishment and operation of “false” SEs; and the collection of more reliable official statistics on SEs, also in order to improve their visibility.

EU institutions have frequently emphasized the importance of an adequate legal framework for SEs (and other entities of the social economy). Yet, they have not expressed a clear opinion about what “adequate” means, and more precisely if “adequate” means “specific”. Whether SEs need a specific, tailor-made organizational law, or may be established and proliferate even in the absence of *ad hoc* legislation is a rather controversial issue. The answer, of course, may depend on the characteristics of the national legal system. On the one hand, there may be jurisdictions that provide for legal forms that may be employed to create and operate organizations of various nature, including an organization with the essential features of an SE. On the other hand, there may be other jurisdictions which do not offer a general or neutral legal structure that might adequately house an SE.

There are, however, several strong arguments, both theoretical and practical, in favour of specific laws on SE. Namely, laws that (at least) recognize the SE as a particular type (or

particular category) of organization, distinct from all the others, by virtue of specific characteristics which are defined by those same laws.

Firstly, even assuming that in a given jurisdiction existing legal forms (association, foundation, cooperative, company, etc.) are neutral as regards to the entity's purpose, activity and internal governance¹⁰, thereby permitting an organization to shape itself and act as an SE¹¹, in the absence of specific law, SEs would lack a precise, distinct, reserved and protected legal identity. As a result, an organization's elected nature as an SE would not be secured over time, because it would be exposed to the will of those who control the organization (who could modify, during the entity's life, its statutes or by-laws). In addition, SEs could not enjoy exclusive rights over the denomination of "social enterprise", and thus prevent organizations that are not SEs from using it. In conclusion, SEs would be deprived of all the advantages that a legal identity is able to confer on those that it identifies.

Secondly, the proliferation of specialized laws for SEs provides *per se* sufficient evidence that *ad hoc* legislation is in line with the interests of social entrepreneurs, and not the reverse.

Indeed, it is indisputable that "social enterprise lawmaking is a growth industry"¹². In Europe, this legislative process commenced even earlier than in other parts of the world. *Ad hoc* legal forms for the SE began to be adopted by European legislatures in the 1990s. The social cooperative (SC) of Italian Law no. 381/91 was the precursor. Today, at least 18 EU Member States (MS) have laws specifically designed for the SE (and some of them have more than one)¹³, while in several EU Member States legislative initiatives on this topic are under discussion¹⁴.

Moreover, the approval of specific laws on the SE has determined an increase in the existing number of SEs, which demonstrates the importance of *ad hoc* legislation for the promotion and development of SEs, especially when substantive rules are coupled with policy measures, notably of a fiscal nature.

In Italy, for example, social cooperation has experienced substantial growth since the founding law of 1991. According to the Italian National Institute of Statistics (ISTAT), the

¹⁰ Admittedly, however, this is a questionable assumption, since in many jurisdictions all the legal forms mentioned in the main text present at least one element incompatible with the nature of the SE as emerges from the relevant studies and EU documents (cf. sect. 1 in the main text). In general, companies are profit-distributing (or shareholder value-maximizing) and investor-driven entities ("one share, one vote"), which conflicts with the social dimension of an SE's purpose and with the participatory dimension that should characterize its governance. Cooperatives, albeit democratic ("one member, one vote"), are mutual entities acting in the economic interest of their members as consumers, providers or workers of the cooperative enterprise, which conflicts with the social dimension of an SE's purpose. Associations and foundations may face limits on the entrepreneurial activity that they are permitted to perform, and in any event they may not have equity and distribute profits to the members and founders, which significantly reduces their capacity as business enterprises. In addition, especially in some jurisdictions, the law of associations and foundations does not offer a comprehensive legal framework consistent with the performance of economic activities, since these legal forms were originally conceived by legislatures for the development of donative or redistributive activities, rather than for business activities. In conclusion, even when general legal forms permit the establishment and operation of SEs, they might however be ineffective in several respects. In any event, for the purposes of this analysis, it would be useless to present and study these hypotheses, since the focus is on a possible European statute for SEs; hence, on a specific, tailor-made statute, which, moreover, this analysis considers the most convenient strategy for the development of SEs.

¹¹ That is, they permit the organization to provide for in its statutes (or by-laws) a purpose, an activity and an internal governance of the same type as those that characterize an SE.

¹² In these terms, Galle, *Social Enterprise: Who Needs It?*, in 54 Boston College Law Review 205 (2013), with regard to the United States, where, over the last few years, several state laws, establishing specific legal forms for SEs, such as the low-profit limited liability company, the benefit or public benefit corporations, and the social purpose corporation, to mention only the most common.

¹³ Cf. *infra* sect. 3 and Table 1 annexed.

¹⁴ This group of Member States includes Latvia, Malta, Poland. For further references, cf. the study *A Map of Social Enterprises and Their Eco-Systems in Europe*, conducted 31 October 2014 by ICF Consulting Services for the European Commission.

number of SCs increased from just over 2,000 prior to 1991, the year of approval of Law no. 381/91, to nearly 3,500 in the mid-90s and just over 6,000 in late 2003¹⁵. Today, according to the last ISTAT census at the end of 2011, there are more than 11,000 SCs¹⁶.

Far less, at least to date, has been the impact of Italian Legislative Decree no. 155/2006 on the establishment of SEs. In fact, at the end of 2013, only 774 SEs were registered in the pertinent special section of the register of enterprises¹⁷. This small number is certainly the result of the absence of a consistent and adequate tax treatment of SEs (whose introduction is now under discussion within the systematic reform of the Italian third sector¹⁸) and of the predominance in this jurisdiction of SCs incorporated under Law no. 381/91, which, at present, have no interest in complying with Legislative Decree no. 155/2006 to qualify as SEs¹⁹.

Finally, there is a more fundamental reason for the introduction of tailored legal forms for SEs, which involves matters of policy related to the role of organizational law in promoting a certain type of organization.

In fact, the issue of whether and how a legislature should recognize a new type of entity recurs every time a new form of organization emerges in practice or is theorized by sociologists or economists, especially when the potential impact of the law on the development of the new organizational model is under discussion.

The solution depends on the answer to the following question: In the type of organization under consideration, can a function be identified that cannot be effectively fulfilled by other branches of law, like contract law or property law, such that organizational law becomes essential for the existence and development of the organizational model?

Two prominent legal scholars claim – with specific regard to the law of non-profit organizations – that the constraint on the distribution of profits to members, which characterizes this category of entities, is an attribute that these entities might not exhibit without the existence of a well-devised organizational law to bind them to it. They conclude, hence, that the profit non-distribution constraint constitutes an essential function of the law of non-profit organizations²⁰. This contention is definitely valid, and can be extended beyond the field of non-profit organizations²¹.

Indeed, when a type of entity or category of entities has a distinctive feature related to the purpose pursued – be it merely negative, as in the non-profit purpose, or, even more so, positive, as the general or community interest purpose that distinguishes SEs – organizational law plays an irreplaceable role in defining the specific identity of the organizations, which is determined (first of all) by their particular goals. Therefore, the primary and essential role of SE law is (and should be) to establish a precise identity of SEs and to preserve their essential features. This justifies, *per se*, the existence of specific legislation on SE and helps to identify its minimum and essential content.

¹⁵ Precisely, 6,159: cf. ISTAT, *Le cooperative sociali in Italia. Anno 2003* (Roma, 2006).

¹⁶ Precisely, 11,264: cf. ISTAT, *9° Censimento dell'industria e dei servizi* (Roma, 2011). Many more (namely, 13,938) were instead recorded by Euricse and his researchers in 2008: cf. *La cooperazione in Italia. 1° rapporto Euricse*, November 2011.

¹⁷ Cf. Venturi & Zandonai, *L'impresa sociale alle soglie della riforma*, in Venturi & Zandonai (eds.), *L'impresa sociale in Italia. Identità e sviluppo in un quadro di riforma. Rapporto Iris Network*, 65 f. (Trento, 2014), which however notes that the term "social enterprise" appears in the names of 574 other companies, which could therefore be additional SEs that escaped enrolment in the pertinent special section of the register of enterprises.

¹⁸ Cf. *infra* sect. 5.1.

¹⁹ Italian SCs of Law no. 381/91, in fact, enjoy very favourable tax treatment, regardless of their status as SEs – which, as already stated, is (for the moment) irrelevant under tax law.

²⁰ Cf. Hansmann & Kraakman, *The Essential Role of Organizational Law*, in 110 *Yale Law Journal* 386 ff. (2000), 435 ff., and fn. 77 for the explanation.

²¹ Cf. already, but with reference to cooperatives and their mutual purpose, Fici, *The Essential Role of Cooperative Law*, in *The Dovenschmidt Quarterly* 147 ff. (2014).

On the other hand, very concretely, it is exactly this – namely, having a specific identity, operating with an identity distinct from those of other organizations and appearing different under a legal designation that conveys objectives and modes of action – that meets the interests of SEs' founders and members and is, consequently, a precondition for the existence and development of this particular type of business organization.

All this requires is a very precise legal definition of an SE in order to enhance its distinctive features.

In other words, if, on one hand, it may be true that “the diversity and openness of the concept [of SE] are probably some of the reasons for its success”²²; on the other hand, a precise legal identity increases “a founder's or member's ability to signal, via her choice of form, the terms that the firm offers to other contracting parties, and to make credible [her] commitment not to change those forms”²³.

Therefore, as long as a specific legal form allows social entrepreneurs to distinguish their own initiatives in front of various stakeholders (e.g., customers, employees, investors, volunteers, donors, public institutions, etc.), a special regime of SEs is necessary. Moreover, by imposing specific identities on SEs, legislatures do not constraint their freedom uselessly; rather, they enable such enterprises to affirm and make their distinct identities visible, and to benefit from that.

A specific legal identity under organizational law is beneficial in several respects, since it permits, among other things:

- i) the specific consideration of SEs for additional purposes, such as tax, public procurement, or competition law. In fact, to be fully adequate, the overall legal framework of the SE should comprise rules that are consistent with its legal nature as emerging from its own organizational law²⁴;
- ii) the design of specific public policies in support of SEs²⁵, and, more in particular, the justification of these policies under EU competition and state aid law²⁶;
- iii) the establishment of clearer boundaries between SE and other concepts, such as, notably, corporate social responsibility (CSR), which may well deserve specific consideration by legislators and public institutions, but on different grounds and in different terms as compared to SEs²⁷;
- iv) the understanding of the relationship between SE and more general notions, in particular those of social economy and third sector, as legal categories of entities

²² In these terms, Defourny & Nyssens, ‘The EMES Approach of Social Enterprise in a Comparative Perspective’, cit., 20.

²³ In these terms, Kraakman *et al*, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 22 (2nd edn., New York, Oxford University Press, 2009).

²⁴ EU institutions have several times emphasized the need for specific treatment of SEs under competition law and public procurement law: cf., for example, the EP resolution of 10 September 2015 on Social Entrepreneurship and Social Innovation in combating unemployment, at paragraphs 21, 22 and 33; and the EP resolution of 19 February 2009 on Social Economy, at paragraph 4.

²⁵ This is one of the specific objectives envisaged by EU institutions: cf., for example, the Council conclusions on the promotion of the social economy as a key driver of economic and social development in Europe, cit., at paragraphs 28 and 29.

²⁶ Cf. EU Court of Justice, 8 September 2011 (C-78/08 a C-80/08), and, for commentary, Fici, *La sociedad cooperativa europea: cuestiones y perspectivas*, in 25 CIRIEC-España, *Revista Jurídica de Economía Social y Cooperativa*, 69 ff. and, in particular, 79 ff. (2014). The EU Court held that the specific (and more favourable) tax treatment of Italian cooperatives is (potentially) compatible with EU law, and, in particular, with the rules prohibiting state aid to enterprises, to the extent that cooperatives are business organizations different from all others (as they are person-centred and not capital-centred, democratic, etc.). Therefore, their particular tax treatment is not an unlawful privilege, but the reasonable consequence of their structural diversity from ordinary business organizations. The statement was made possible by the fact that cooperatives are also subject to EU law, having been provided for in a little-used, but highly symbolic EU statute (Regulation no. 1435/2003), as this ruling shows. Needless to say, an EU statute on SEs would have a similar effect with respect to SEs. In its absence, the 2011 EU Court judgement can certainly help (by way of analogy).

²⁷ See *infra* sect. 5.2.

including SEs but not limited to them; as well as of the relationship between SEs and other types (or categories) of entities of the social economy or the third sector, especially those of a non-entrepreneurial nature²⁸;

- v) the protection of the various stakeholders of the SE, such as customers, investors, and socially responsible suppliers, since the use of the term of “SE” without a legal standard to guarantee a corresponding substance would have a distorting effect on the market;
- vi) the prevention of the establishment and operation of “false” SEs, which would cause serious harm to the image of the social economy as a whole²⁹;
- vii) the collection of more reliable official statistics on SEs, also in order to improve the visibility of the entire sector³⁰.

Having ascertained the need and opportunity for legal recognition of SEs, the ensuing topic is the possible forms and contents of an SE’s *ad hoc* legislation³¹. The comparative analysis conducted in the next sections of this paper aims to shed light on this point.

3. MODELS OF SOCIAL ENTERPRISE REGULATION AND THE LEGAL NATURE OF A SOCIAL ENTERPRISE

KEY FINDINGS

- More than 25 years since Italian Law no. 381/1991 on social cooperatives was approved, at least 18 EU Member States have specific organizational law on SE.
- Different models of legislation may be identified across EU jurisdictions, and the legal nature of an SE depends on the model adopted in a given jurisdiction.
- More precisely, there are laws according to which the SE is a legal form of incorporation (either a particular type of cooperative or a particular type of company) and laws according to which the SE is a legal qualification (or status). This latter model of legislation is increasingly gaining favour among European legislators, and in effect it presents several advantages as compared to the former.
- Another important criterion of classification of existing laws on SE is that between laws that recognize the SE only as a work integration social enterprise (WISE), and laws according to which the SE is identified by the performance of several activities of social utility, including, but not limited to, work integration of particular disadvantaged persons or workers. There is no apparent reason to limit by law the scope of SEs to work integration.
- Whichever model of SE legislation is adopted, what legal identity legislators should assign to SEs remains a fundamental question.

²⁸ See *infra* sect. 5.1.

²⁹ Cf. Yunus, *Creating a World Without Poverty. Social Business and the Future of Capitalism*, 178 (New York, PublicAffairs, 2007); as well as Yunus, *Building Social Business*, XXV and 117 (New York, PublicAffairs, 2010).

³⁰ Improving statistics on SEs, to increase their visibility, is another objective often highlighted by EU institutions: cf., for example, the opinion of the EESC on ‘Social entrepreneurship and social enterprise’ of 26 October 2011, at paragraphs 1.11 and 3.6.3.

³¹ Among the legal scholars that share this contention, cf. Lambooy & Argyrou, *Improving the Legal Environment for Social Entrepreneurship in Europe*, in 11(2) *European Company Law*, 72 (2014), maintaining that “introducing legal structures that are tailor-made for social entrepreneurs seems a step that is consistent with EC’s policy to improve the enabling legal environment for social entrepreneurs”.

Specific laws on SEs began to appear in Europe in the 1990s. Indeed, Italian Law no. 381 of 1991 on SCs is often considered the cornerstone of this legislation³². More than 25 years since Italian Law no. 381/1991 on social cooperatives was approved, at least 18 EU Member States have specific organizational law on SE³³. Table 1, annexed to this paper, lists and presents these laws by EU country³⁴. The panorama is varied: Different models of SE regulation may be identified, and the legislation on SEs may be classified in several ways. The legal nature of an SE depends on the model of legislation adopted in a given jurisdiction.

The most relevant criterion of classification of the existing laws on SE is that between

- (i) laws that recognize and establish the SE as a particular type (or sub-type) of legal entity, i.e., as a specific legal form of incorporation, and
- (ii) laws that recognize and establish the SE as a particular category (or qualification/status) of various entity types meeting some common requirements.

Laws belonging to the first typology provide a specific legal form of incorporation for SEs, which is distinct from all the other legal forms and constitutes a special sub-type (or modified type) of either a 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 SC, and similar legal denominations, such as collective interest cooperatives and social solidarity cooperatives, which are provided for in many jurisdictions (France, Italy, Poland, Portugal, Spain, etc.), and the UK community interest company (CIC) are the most prominent examples of this sort of legislation (see Table 1 annexed).

Laws belonging to the second typology, instead, identify a particular category of entities – that of “SEs” – by some common requirements. Under these laws, an organization qualifies (and disqualifies) as an SE, and the term “SE” is, therefore, a legal qualification (or legal status). Hence, in principle, in each jurisdiction, this category may comprise entities incorporated under various legal forms (of a company, a cooperative, an association, a foundation, etc., depending on the jurisdiction), provided they meet the relevant legal

³² 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 economic 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).

³³ Admittedly, the study *A Map of Social Enterprises and Their Eco-Systems in Europe*, conducted 31 October 2014 by ICF Consulting Services for the European Commission, enumerates 20 Member States with specific legislation for SEs (including SCs). However, we have preferred to indicate in the text the lower number of 18 as a precaution, since, in some of the 20 countries mentioned in the ICF’s report, the legislation on SE results, in fact, “under development”.

³⁴ In this paper, attention is focused on the organizational law of SEs, and therefore the list of laws in Table 1 is limited to such laws. This is not to disregard the importance of tax law for understanding SEs. It is not uncommon, in fact, for tax law in European jurisdictions to institute categories of entities that are directly connected in some way with the figure of the SE. Examples include, among others, the “*organizzazioni non lucrative di utilità sociale*” (non-profit organizations of social utility, or ONLUS) of Italian Legislative Decree no. 460/97, and the “*instituições particulares de solidariedade social*” (private institutions of social solidarity, or IPSS) provided for by Portuguese Law-Decree no. 119/83 and Regulation no. 139/2007. Another *caveat* regards the fact that in some countries, like Croatia (cf. Vidović & Baturina, ‘Social Enterprise in Croatia: Charting New Territories’ (2016), ICSEM Working Papers, no. 32, 7 f.), although a specific law on SE does not exist, a pure (and, usually, broad) operational definition of SE may be found under sectorial measures or measures aiming at funding SEs. Indeed, this is also the case of Regulation (EU) no. 1296/2013. Yet another *caveat* regards some countries, like Spain, where, due to the competence of the autonomies in the field of cooperatives, there are also various regional laws and regulations on SCs that may not be taken into consideration in this analysis.

requirements. This sort of legislation may be found in many Member States, such as Denmark, Finland, Italy, Romania (see Table 1 annexed).

Another important criterion of classification of existing laws on SE is that between

- (i) laws that recognize the SE only as a work integration social enterprise (WISE), and
- (ii) laws according to which the SE is identified by the performance of several activities of social utility, including, but not limited to, work integration of particular disadvantaged persons or workers.

This distinction regards the scope of an SE's activity and applies to both the typologies of laws previously differentiated on the basis of the legal nature assigned to an SE. Thus, depending on the characteristics of the national legislation, one may find laws that provide only for the establishment of work integration SCs and laws under which work integration is the only activity that an organization can perform to be qualified as an SE (see Table 1 annexed).

Indeed, there is no apparent reason to limit by law the scope of SEs to work integration. Work integration of disadvantaged persons and workers is just one social utility (or general interest) activity among many others. An adequate legal framework for SEs, therefore, identifies an SE by the performance of one or more activities of general interest, considering work integration (only) one of them.

3.1. The Social Enterprise as a Legal Form of Incorporation

The laws that provide a specific legal form of incorporation for SEs represent the first wave or generation of laws on SE. 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 company. Italian SCs and British CICs are the most well-known and successful of these legal forms. While seeking to identify the most suitable legal framework for SEs, one should therefore ask which legal form suits SE best, whether the cooperative form or the company form.

3.1.1. The Social Enterprise as a Particular Type of Cooperative

Beginning with Italy in 1991, many EU jurisdictions have provided for the establishment of SEs in the cooperative form, in which case they assume the legal denomination of "social cooperatives" or similar (e.g., "social initiative cooperatives": see Table 1 annexed).

Why is the SE conceived of by legislatures as a modified form of cooperative? Why is the cooperative form considered to be the appropriate "legal dress" for the phenomenon of the SE?

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

The SC is, in fact, a cooperative with a non-mutual purpose, because – as, for example, Italian Law no. 381/91 literally states – it has the "aim 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 SCs of type A) or through

the conduct of any entrepreneurial activity through the employment of disadvantaged people (so called SCs of type B)³⁵.

If, then, an SC's "soul" is that typical of an SE, its "body" remains that of a cooperative. Consequently, beyond the distinctive traits common to all SEs (including, in particular, the total or partial profit non-distribution constraint and the disinterested devolution of remaining assets upon dissolution)³⁶, the SE in the cooperative form manifests itself as:

- 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, the organization being person-centred rather than capital-centred);
- potentially open to new members, whose joining 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);
- jointly owned and controlled by its members (given that, usually, all or a majority of the directors must be members of the cooperative, and the external control of a cooperative or control by a single member are not permitted);
- and, by its very nature, supportive of other cooperatives (cooperative system), its employees and the community at large³⁷.

Not accidentally, therefore, the cooperative is considered in specific constitutional provisions that recognize its social function and provide for state support³⁸. The social function of cooperatives can be considered to be even more intense when a cooperative aims to pursue (rather than the economic interest of its members) the general interest of the community by acting as an SE. Essentially, the combination of a cooperative structure and objectives of general interest results in increased social relevance of the organization, given that the social relevance of the cooperative structure is added to the social relevance of the enterprise's objectives.

Undoubtedly, the SE in the cooperative form is an entity with a strong identity as SE, because its governance has the participatory (and human) dimension that characterizes the "ideal-model" of SE. 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 growing common in Europe and in the laws on the social economy approved thus far in Europe. Under these laws, indeed, democratic governance is a key identifier of the entities of the social economy³⁹.

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

³⁵ An SC's members, therefore, cooperate not to serve themselves (as is the case in ordinary, mutual cooperatives), but to serve. Cf. Fici, *Italy*, in Cracogna, Fici & Henry (eds.), *International Handbook of Cooperative Law*, 479 ff. (Berlin-Heidelberg, Springer, 2013).

³⁶ See *infra* sect. 4.3.

³⁷ 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) (forthcoming).

³⁸ Cf. Fici, *La función social de las cooperativas: notas de derecho comparado*, in 117 *Revesco* 77 ff. (2015).

³⁹ Cf. art. 4, lit. a), of Spanish Law no. 5/2011; art. 5, lit. c), of Portuguese Law no. 30/2013; art. 1, par. 1, no. 2, of French Law no. 2014-856; art. 4, lit. d), of Romanian Law no. 219/2015.

of its statutory and institutional objectives, to the gain of the ultimate beneficiaries of the organization⁴⁰.

3.1.2. The Social Enterprise as a Particular Type of Company

Among the EU jurisdictions, only the UK's provides a specific company form, namely, the CIC, for the establishment of SEs⁴¹.

An SE in the company form is a particular type of company intended not to maximize shareholder value, but to pursue the interest of the community. In itself, the company form does not raise particular concerns for the pursuit of an SE's purpose, to the extent that the law is clear in assigning a social or general interest objective (and in restricting the distribution of profits) to 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, as the cooperative, in which equity is irrelevant to governance ("one member, one vote"). Indeed, what particularly 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 shareholder⁴².

The SE in the company form could also be, in fact, a manager-run enterprise, since the members' control and active participation are not required 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 enterprise 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 curry favour with company ownership in order to satisfy the interests of shareholders as their principals and retain their offices⁴³.

To be consistent with its institutional objectives, therefore, an SE in the company form should have:

⁴⁰ We draw this conclusion, whose basic arguments cannot be developed here, from a wide 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 exactly, 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.

⁴¹ 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 category or qualification, open to entities incorporated under various legal forms, including that of a company.

⁴² 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.

⁴³ 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).

- either a governance structure that directly involves the shareholders in the management of the enterprise, if they are actually motivated by a sense of altruism;
- 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.

In conclusion, an SE in the company form is a type of organization whose identity as an SE is weaker and at risk if limits are not set on the control by a single member or if precise rules on the ownership and control are not adopted⁴⁴. This is the case, for example, in Italian Legislative Decree no. 155/2006, which stipulates that an SE may be joined, but not controlled or directed, by a for-profit entity⁴⁵. This approach resolves the issue almost completely, making the SE in the company form a very interesting 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, 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 to the SE the enterprise or its assets)⁴⁶. Yet another interesting measure is that regarding the Belgian *société à finalité sociale* (SFS), in which no shareholder may have more than one-tenth of the votes in the shareholders' general meeting⁴⁷.

3.2. The Social Enterprise as a Legal Qualification (or Status)

The laws that provide a specific legal qualification (or status, certification, etc.) for SEs represent the second wave or generation of laws on the SE. As already observed, these laws do not consider the SE as a particular legal form of incorporation, but as a legal qualification that may be acquired by entities complying with certain requirements, regardless of the legal form in which they have been incorporated. More precisely, in some jurisdictions, like Finland and Italy, the law stipulates that all the available legal forms are eligible by an organization in order to qualify as an SE, while in other jurisdictions, like Belgium and Luxembourg, the law restricts the SE qualification to entities incorporated as companies or as cooperatives⁴⁸.

⁴⁴ In addition to the risk of abuse of the SE legal form for profit purposes, the risk 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 CSR. If this is the case, the autonomy of the social economy sector from the for-profit capitalistic sector could be seriously compromised.

⁴⁵ Cf. art. 4, par. 3, Legislative Decree no. 155/2006, as well as art. 8, par. 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).

⁴⁶ 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.

⁴⁷ Cf. art. 661, par. 1, no. 4, of the Belgian Company Code. This maximum percentage is 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.

⁴⁸ In Belgium, the *société à finalité sociale* (social purpose society, or SFS) is a legal denomination that all the types of companies provided for by art. 2, par. 2, of the Belgian Company Code of 1999 – namely, the *société en nom collectif*, the *société en commandite simple*, the *société privée à responsabilité limitée*, the *société coopérative, à responsabilité limitée, ou à responsabilité illimitée*, the *société anonyme*, the *société en commandite par actions*, the *groupement d'intérêt économique* – may acquire if they meet the relevant

This model of legislation is increasingly being praised by legal scholars⁴⁹ and appears as the new frontier of SE regulation. In fact, the most recent national laws (or rules) on SE are laws (or rules) providing for the SE as a legal qualification, certification or status. The SE is a legal qualification in Romanian Law of 23 July 2015 and Luxembourgian Law of 12 December 2016 (see Table 1 annexed). Moreover, some countries, like France and Italy, which already had a law on SCs, subsequently decided to introduce laws (or rules) of this second type (see Table 1 annexed)⁵⁰.

In effect, there are some advantages that may be ascribed to this model of legislation in comparison to the preceding one. It permits an existing organization to become an SE without having to re-incorporate as an SE, and an existing SE to lose its status as an SE without having to dissolve, convert into, or re-incorporate in another legal form, thereby reducing costs and facilitating access to (and exit from) the SE legal denomination⁵¹. This holds particularly true for an organization established in a legal form (for example, association or foundation) different from 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 entity⁵².

However, the most considerable advantage that this model of legislation carries with it 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 permits 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 cooperatives), or the type of business to conduct (e.g., labour-intensive or capital-intensive). This favours the development of the SE, for the plurality of the available legal forms should determine an increase in the total number of SEs.

On the other hand, inasmuch as 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 SEs⁵³. Moreover, with regard to an

requirements (see art. 661, Company Code). 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, par. 1). Also in the recent Luxembourgian 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). 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, par. 1, of Law no. 5/2004, makes reference, in defining an SE, to both legal and physical persons.

⁴⁹ 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).

⁵⁰ None of these countries, however, has repealed the existing laws on SCs. In Italy, Legislative Decree no. 155/2006 on SE permits SCs of Law no. 381/91 to acquire the qualification as SEs. In the Italian delegation law of 2016 on the reform of the Third Sector, SCs are considered SEs *ope legis*.

⁵¹ Cf. Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, cit., 284.

⁵² Cf. Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, cit., 284 f.

⁵³ Moreover, nothing prevents legislators from providing different treatment for SEs established in different forms; for example, to favor, 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.

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 status⁵⁴.

This model of legislation resolves the dilemma between the company form and the cooperative form, which the previous model of SE legislation inevitably poses⁵⁵. In addition, in some jurisdictions (e.g. Finland and Italy), it also permits SEs to assume the form of an association or a foundation, thereby taking advantage of the benefits that each of these legal forms is capable of conferring⁵⁶.

In conclusion, treating an SE as a specific legal qualification (rather than as a specific legal form of incorporation) seems to be the best available strategy. Nevertheless, whichever model of SE legislation is adopted, what legal identity legislators should assign to SEs remains a fundamental question. The next section of this paper is dedicated to exploring this issue, by making recourse to a comparative analysis of the existing legislation on SE in the EU.

4. THE LEGAL IDENTITY OF A SOCIAL ENTERPRISE AND THE MAIN RELATED ISSUES OF REGULATION

KEY FINDINGS

- The comparative analysis of existing *ad hoc* legislation on SE in the EU demonstrates that – regardless of the model of legislation and notwithstanding certain differences and particularities – a European common core in the regulation of SEs may be identified. This shared framework delineates a legal identity of SEs structured around the following aspects.
- The SE is a legal entity established under private law and independent of the state and other public administrations.
- It has an exclusive or at least a prevalent purpose of community or general interest.
- It is subject to a total or at least partial constraint on profit distribution, and more generally to specific rules on the allocation of profits and assets during its entire life, including at dissolution, and in case of loss of the SE qualification.
- It conducts a socially useful activity, including work integration of disadvantaged people or workers, as determined by law either *ex ante* or through a general clause.
- It is subject to specific governance requirements, including the obligations to issue a social report, to involve its various stakeholders in the management of the

⁵⁴ For example, the democratic and participatory character of an SE in the cooperative form permits 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.

⁵⁵ 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 will clarify *infra* in the main text.

⁵⁶ In particular, further legal research on SE should evaluate the use of the foundation form for SEs, also in light of the positive effects on business performance that recent, influential research has ascribed to foundations: cf. Hansmann & Thomsen, 'Managerial Distance and Virtual Ownership: The Governance of Industrial Foundations' (2013), ECGI Working Paper Series in Finance, no. 372/2013.

enterprise, and to provide fair and equitable treatment to its workers, notably the disadvantaged ones.

- When it is established as a company, an SE is usually subject to additional governance requirements, in order to resolve the potential contradictions between the company form and the SE status. On the other hand, the SE in the cooperative form, due to its democratic and participatory structure of governance, is an entity with a strong identity as SE.
- The SE is subject to public control in order to ensure compliance with the legal requirements for its incorporation or qualification as an SE, which is necessary to protect the legal label of SE and preserve its intrinsic value.

The comparative analysis of existing *ad hoc* legislation on SE in 18 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 following aspects.

4.1. The Social Enterprise as a Private Legal Entity

First of all, SEs are almost everywhere legal entities (or legal persons). 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)). Yet, exceptions may be found in Finland and in Slovakia, where an individual entrepreneur (or sole proprietor) may acquire the SE status⁵⁷. On the other hand, existing laws do not explicitly deny the SE status to legal entities composed of only one person (even a natural person), when, of course, their establishment is permitted by law, as is usually the case for public and private limited-liability companies.

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 Law no. 155/2006 explicitly states that public administrations may not acquire the SE status (art. 1, par. 2). It permits public administrations to become members of an SE, but at the same time refuses the SE status to organizations directed and controlled by a public administration (art. 4, par. 3). Similar restrictions may be found in Slovenian Law no. 20/2011 (art. 9, par. 2) and in Danish Law no. 711/2014 (sect. 5(1) no. 3), among others.

4.2. The Purpose of General or Community Interest

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, from for-profit entities like (ordinary) companies, which conduct entrepreneurial activity in order to make profits for subsequent distribution to their shareholders. Second, from mutual entities like

⁵⁷ 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, par. 1, Slovak Law no. 5/2004.

(ordinary) cooperatives, which conduct entrepreneurial activity with and in the final interest of their members which are consumers, providers or workers of the cooperative enterprise⁵⁸.

The institutional purpose affects directors' decisions and 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, par. 1). Another example is that Danish Law no. 711/2014 (sect. 5(1) no. 1) 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 certificate of SE (art. 8, par. 4, lit. a, of Law no. 219/2015).

In some instances, although without substantial effects, the law connects the pursuit of the typical purpose directly to the activity performed. For example, a Belgian SFS's by-laws "define precisely the social purpose to which the activities referred to in the stated social object are devoted" (art. 661, par. 1, no. 2, Company Code). As regards 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*, par. 2, Law no. 47-1775)⁵⁹.

4.3. Non-Distribution Constraint and Profit Allocation

According to existing legislation, SEs face specific limits on the distribution of profits generated by their businesses to shareholders, members, and other persons⁶⁰. 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 purpose⁶¹. This "asset lock" entails the prohibition of an SE from using profits for different goals – including wealth maximization of founders, members, shareholders, directors, employees, etc. – at any stage of its life, including dissolution, and in 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 benefit of the community rather than for the benefit of members, employees, directors, etc.⁶². In this sense, the rules on profit allocation complement those on social purpose, the former aiming at reinforcing the latter. 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 to benefit the community.

⁵⁸ "Ordinary" in brackets is intended to distinguish these companies and cooperatives from CICs and SCs or, more in general, companies and cooperatives with the status of SEs.

⁵⁹ See also art. 2, par. 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.

⁶⁰ It must be clear that an SE is not barred from making profits, but only from freely distributing and using them. Sometimes, confusion on this point still exists.

⁶¹ Cf., among others, art. 3, Italian Legislative Decree no. 155/2006; at least 90 % in art. 8, par. 4, lit., b), Romanian Law no. 219/2015.

⁶² As the British CICs' Regulator finely underlines: cf. Office of the Regulator of Community Interest Companies: Information and Guidance Notes, *Chapter 6: The Asset Lock*, 3 f. (October 2014).

It is also worth underlining that these constraints are provided for by law even with regard to SEs in the company form. Legislation on SE, therefore, allows for the establishment of companies without a profit purpose, i.e., remuneration of share capital or shareholder value maximization. Hence, these SE companies are different from those that, while pursuing a profit purpose, choose to be (also) socially responsible⁶³.

The restrictions on profit distribution allow attribution of SEs to the general area of non-profit organizations⁶⁴ and, most notably, to the more particular areas of the third sector and the social economy⁶⁵.

As already stated, the law explicitly prohibits the distribution of an SE's profits to shareholders, members, workers, etc.⁶⁶. 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 at the entity's dissolution⁶⁷, the SE's transformation into another type of organization, if permitted by law, and the loss of the SE status⁶⁸. In effect, many laws opportunely specify the constraint in this manner.

The non-distribution constraint could also be indirectly violated by means of acts that are particularly favourable, without reason, to those who cannot be advantaged by an SE, such as the payment of unjustifiable, above-market remunerations to employees or directors (so called "indirect distribution of profits"). 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 allocation⁶⁹.

More precisely, among existing SE laws, there are laws that fully prohibit profit distribution⁷⁰, and laws that authorize a limited distribution of profits (these are the majority and the most recent laws)⁷¹.

⁶³ Cf. *infra* sect. 5.2.

⁶⁴ Unless, of course, one limits this area to organizations subject to a total non-distribution constraint, because, as we shall see, SEs are usually subject only to a partial non-distribution constraint.

⁶⁵ Cf. *infra* sect. 5.1.

⁶⁶ 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.

⁶⁷ In this last respect, cf. art. 13, par. 3, Italian Legislative Decree no. 155/2006; art. 661, par. 1, no. 9, Belgian Company Code; 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 SCs (cf. art. 19, Law 27 April 2006).

⁶⁸ In this last regard, cf., for example, art. 663, Belgian Company Code; art. 16, par. 4, which refers to art. 13, par. 3, Italian Legislative Decree no. 155/2006.

⁶⁹ Cf. art. 3, Italian Legislative Decree no. 155/2006; art. 11, paragraphs 2 and 3, Slovenian Law no. 20/2011; chap. 3, sect. 9, Danish Law no. 711/2014; Art. L3332-17-1, 1, 3°, of the French Labour Code. To "indirect financial benefits" refers, yet more broadly, the Belgian Company Code in regulating SFSs (art. 661, par. 1, no. 2). Art. 5, par. 1, Luxembourgian Law of 12 December 2016, prohibits worker remuneration higher than six times the amount of the minimum social wage.

⁷⁰ Cf. art. 3, Italian Legislative Decree no. 155/2006. The prohibition is total also for Portuguese SCs (cf. articles 2, par. 1, and 7, Law-Decree no. 7/98), for Spanish SCs (cf. art. 106, par. 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), for Polish SCs (art. 10, par. 2, Law 27 April 2006); for Hungarian SCs registered as public utility organizations (sect. 59(3), Law no. X-2006).

⁷¹ 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). 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 destinations 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), Belgian SFSs (see art. 661, par. 1, no. 5, Company Code), Italian

Whether SEs should be subject to a total constraint 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” of the SE form or status to satisfy their private interests⁷². On the other hand, there is the usual, reasonable explanation for the partial constraint: namely that it promotes investment in SEs⁷³. Yet, it seems that on this specific aspect of an SE’s regulation, there are unrealistic hopes about its ability 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 SE⁷⁴.

4.4. The Entrepreneurial Activity of Social Utility

Another essential element of the SE legal identity is the performance of a socially useful enterprise. The entrepreneurial character of the activity conducted distinguishes SEs from more traditional non-profit organizations, which pursue the same objectives as the SE but through activities of a distributive and non-commercial nature, and are therefore also known as donative non-profits⁷⁵. Indeed, existing laws explicitly require an SE to perform its activities in an entrepreneurial form and in certain cases dwell upon the characteristics that an activity must possess to be considered entrepreneurial⁷⁶.

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

First, as previously observed, there are laws that recognize SEs only as WISEs (see Table 1 annexed). In this case, it is not the type of business but work integration of people with difficulty accessing the labour market that makes the enterprise socially useful. The law

SCs (see art. 3, Law no. 381/91, to be read in conjunction with art. 2514 of the Civil Code), Slovenian SEs (see art. 11, par. 2, Law no. 20/2011), and Spanish integration enterprises (Law no. 44/2007); among many others. In Luxembourgian 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).

⁷² 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”.

⁷³ 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 SCs, the remarkable number of existing ones has been already highlighted in this paper (see *supra* fn. 16).

⁷⁴ 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 her/his investment in the CIC’s share capital. But it may not explain the success of Italian SCs, in which each member has a vote regardless of the amount of capital held.

⁷⁵ 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”.

⁷⁶ 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, par. 1, no. 2, Law no. 1351/2003); Italian SEs of Legislative Decree no. 155/2006 must carry on a stable economy activity of production of goods or services of social utility.

therefore prescribes that, regardless of the nature of the business, WISEs must employ a certain minimum percentage of disadvantaged people or workers⁷⁷.

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 the work integration of disadvantaged people or workers in any activity (even not socially useful *per se*). Following the Italian example, it is very common in Europe to use the expression “social enterprise 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 WISE⁷⁸.

Laws that provide only for SEs of type A are rarer⁷⁹.

With regard to SEs of type A, it is also worth distinguishing between laws that define and enumerate the socially useful activities (welfare services, health care, etc.) that an SE must carry out⁸⁰, and laws, such as the UK law on CICs, that provide a general clause for the identification of the admissible activities⁸¹. An 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)⁸². It is also interesting to observe that in the UK law on CICs (as well as in some other laws) the destination 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”⁸³.

⁷⁷ 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. Admittedly, 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 is varied depending on the jurisdiction. For example, Finnish Law no. 1351/2003 (sect. 1) provides for the work integration of the disabled – understood as “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. Also Lithuanian Law no. IX-2251 (sect. 4) assumes the disabled (which it divides into various groups, depending on the measure 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, par. 1, lit. f), i), ix) e x), EU regulation no. 2204/2002, or disabled persons, identified by reference to art. 2, par. 1, lit. g), of the same regulation (this regulation has been replaced by EU regulation no. 651/2014 of 17 June 2014).

⁷⁸ In Italian law this model of legislation addresses both SCs (cf. art. 1, par. 1, lit. a) and lit. b), Law no. 381/91) and SEs (cf. art. 2, Legislative Decree no. 155/2006); along the same lines, among many others, Spanish SCs (cf. art. 106, par. 1, Law no. 27/1999), Portuguese SCs (with less clarity, however: cf. art. 2, par. 1, Law-Decree no. 7/98), Slovenian SEs (cf. arts. 5, 6, and 8, par. 2, Law no. 20/2011) and Romanian SEs (chapters II and III, Romanian Law no. 219/2015).

⁷⁹ 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*, par. 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 held applicable to SCICs, regardless of their specific legal regime, would allow them to take on the role of WISEs.

⁸⁰ Art. 2, par. 1, Italian Legislative Decree no. 155/2006, which contains a very long list of activities, could be even further expanded through the inclusion of additional activities, such as fair trade, employment services aimed at integrating disadvantaged workers, social housing and micro-credit, when the reform of the third sector is approved. Cf. also art. 5, Slovenian Law no. 20/2011.

⁸¹ 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, par. 2).

⁸² 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 also art. 661, par. 1, no. 2, Belgian Company Code; along the same lines, art. 2, French Law no. 2014-856.

⁸³ 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

With regard to SEs of type B or WISEs, one must distinguish between laws, such as the Italian ones on SCs and SEs and the Finnish one on SEs, that do not require (though they permit) disadvantaged people or workers to be (in addition to workers) members of the SE⁸⁴, and laws that, instead, conceive of WISEs strictly as worker cooperatives, so that the disadvantaged people or workers 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)⁸⁵. There is no apparent reason for requiring that the disadvantaged people or workers be members of the organization for it to qualify as a WISE. In fact, in some instances the state of disadvantage would 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 state of disadvantage or other reasonable circumstances.

4.5. Governance Requirements

The governance of an SE is influenced by the model of SE legislation that is in force in a given jurisdiction⁸⁶. For cases in which the SE is a particular type of company (e.g., a CIC) or a particular type of cooperative (e.g., an SC), its governance features are in general those of a company and of a cooperative, respectively⁸⁷. 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.)⁸⁸.

Yet, whichever the model of SE legislation and whatever the legal form of the SE, there are certain governance requirements that SE laws usually impose on all SEs, consistent with the latter's role and ultimate objectives.

Among these governance requirements is, notably, 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, 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 to oversee the social impact of the SE in an ongoing manner⁸⁹. This legal requirement is in line with the open, accountable and transparent management that EU institutions demand of SEs⁹⁰.

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.

⁸⁴ Cf., for example, art. 4, par. 2, Italian Law no. 381/91; art. 2, par. 4, Italian Legislative Decree no. 155/2006; articles 1, 4, par. 3, and 5, Finnish Law no. 1351/2003.

⁸⁵ Among the possible examples, Polish SCs, in light of the provisions in articles 2 and 5 of their instituting law, and Hungarian SCs, by reason of the provisions in sect. 8 of the Hungarian Law on cooperatives.

⁸⁶ On the models of SE legislation, cf. *supra* sect. 3.

⁸⁷ This is sometimes explicitly stated by the applicable law. Cf. for example, as regards SCs, art. 1, par. 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".

⁸⁸ 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 wider.

⁸⁹ 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, par. 2, Luxembourgian Law of 12 December 2016; art. 9, par. 1, lit. c), Romanian Law no. 219/2015; chap. 2, sect. 8, Danish Law no. 711/2014; art. 10, par. 2, Italian Legislative Decree no. 155/2006.

⁹⁰ Precisely in the SBI communication and in Regulation no. 1296/2013.

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 requirement⁹¹. 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 in order for SEs to comply with the vision that EU institutions have of them⁹².

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 WISE⁹³, on a treatment that must not be less favorable than that of the employees of ordinary business enterprises⁹⁴. 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 ratio⁹⁵.

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 SEs⁹⁶. One cannot affirm that these aspects are taken into consideration by all 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 "one share, one vote", and it may be directed and controlled by even a single shareholder or as a pure subsidiary. If legislators want 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, democracy is an essential element – they should either exclude the legitimacy of an SE in the company form or – what is recommended – 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 provides some guidance in this respect⁹⁷.

4.6. Systems of Public Enforcement

No SE legislation would be adequate without an effective system of enforcement and, in particular, of protection of the SE legal form or qualification. This is considering that existing laws protect, in the interest of SEs, the legal denomination of SE, by reserving the

⁹¹ 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. 12, Italian Legislative Decree no. 155/2006, according to which an SE must involve workers and beneficiaries of the activity, and involvement is understood as "any mechanism, including information, consultation and participation, through which workers and beneficiaries of 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".

⁹² 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.

⁹³ Cf. sect. 4, par. 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, par. 2, Spanish Law no. 44/2007; art. 43, par. 1 and 2, Spanish Royal Legislative Decree no. 1/2013.

⁹⁴ Cf., for example, art. 14, par. 1, Italian Legislative Decree no. 155/2016.

⁹⁵ Cf. art. 8, par. 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.

⁹⁶ Cf. *supra* sect. 1 and fn. 1.

⁹⁷ Cf. *supra* sect. 3.1.2.

exclusive right to use the name “social enterprise” for entities that are established and operate in accordance with the relevant regulations⁹⁸.

Yet, how to make this system effective depends on several factors which are also country-related. For example, the structure and efficiency of national public administrations and their competence in the field of SEs or, more generally, of the third sector or the social economy.

Public external control of SEs may be exercised *ex ante*, before registering SEs or before issuing a certificate that declares the possession of the status⁹⁹, and/or *in itinere*, during the existence of an SE, as well as upon dissolution. Existing laws provide for all these types of control and define times, forms and procedures thereof.

The public institution in charge of the enforcement and control of the SE form or status varies across jurisdictions¹⁰⁰. In some countries, the control of SEs may be delegated by the state to secondary organizations composed of SEs¹⁰¹. Indeed, self-control via secondary organizations is an interesting vehicle for increased responsibility within the SE sector.

Sanctions also differ depending on the model of SE legislation. When the SE is a qualification or status, the ordinary sanctions are removal from the register of SEs or revocation of the SE certification, upon prior injunction to regularize irregularities¹⁰². When the SE is a legal form of incorporation, the ordinary final sanction is dissolution by order of the authority. In any event, the law prescribes the disinterested devolution of an SE's residual assets at the loss of the SE status or at the entity's dissolution, as the case may be¹⁰³. Fines for improper use of the SE legal denomination and other violations are also found in some jurisdictions¹⁰⁴.

5. DEFINING THE BOUNDARIES BETWEEN SOCIAL ENTERPRISE AND OTHER CONCEPTS

KEY FINDINGS

- *Ad hoc* legislation on SE may also serve the function of drawing clearer boundaries between SE and different or more general concepts, such as social economy and third sector on one hand, and corporate social responsibility (CSR) and socially responsible business organization, on the other.

⁹⁸ Cf., e.g., art. 9, par. 1, Luxembourgian Law of 12 December 2016; chap. 1, sections 1 and 3, Danish Law no. 711/2014; art. 7, par. 3, Italian Legislative Decree no. 155/2006; art. 667, Belgian Company Code; sect. 2, par. 2, Finnish Law no. 1351/2003; art. 18, par. 3, Slovenian Law no. 20/2011; art. 759, Czech Law no. 90/2012. SE laws, on the other hand, typically obligate SEs to include this formula in their actual denominations: cf., e.g., art. 1, par. 3, Italian Law no. 381/91; art. 7, par. 1, Italian Legislative Decree no. 155/2006; art. 106, par. 4, Spanish Law no. 27/1999; art. 662, Belgian Company Code; art. 18, par. 1 and 2, Slovenian Law no. 20/2011; sections 32(1) and 33, English Companies Act of 2004; art. 3, Polish Law of 2006 on SCs.

⁹⁹ Existing laws, in fact, provide for registers or certificates specifically dedicated to SEs. Cf., e.g., sect. 4, Finnish Law no. 1351/2003; art. 3, par. 2, Italian Law no. 381/91; art. 5, par. 2, Italian Legislative Decree no. 155/2006; art. 2, par. 1, Finnish Law no. 1351/2003; articles 10 and 12, Lithuanian Law no. IX-2251; sections 33 and 36(8), English Companies Act of 2004; art. 42, Slovenian Law no. 20/2011; chap. 2, sect. 6, Danish Law no. 711/2014.

¹⁰⁰ The Ministry of Labor in Finland; the Ministry of Labor and Social Policy in Italy; the Business Authority in Denmark; the Ministry of Labor, Family and Social Protection in Romania; the Ministry in charge of the social and solidarity economy in Luxembourg; etc.

¹⁰¹ This is the case, for example, of Italian SCs.

¹⁰² Cf., for example, art. 8, Spanish Law no. 44/2007; art. 5, par. 1, Luxembourgian Law of 12 December 2016; sect. 7, Finnish Law no. 1351/2003; art. 11, Lithuanian Law no. IX-2251; art. 16, par. 4, Italian Legislative Decree no. 155/2006.

¹⁰³ Cf., among others, art. 11, Luxembourgian Law of 12 December 2016; art. 8, par. 4, lit. c), Romanian Law no. 219/2015. In Polish Law of 27 April 2006 (art. 19), 20% of the assets can be divided among members.

¹⁰⁴ Cf. chap. 7, Danish Law no. 711/2014; art. 29 ff., Romanian Law no. 219/2015.

- The concept of SE does not coincide with that of “entities or enterprises of the social economy”, as emerging from the legislation on the social economy in force in some EU jurisdictions, because the SE is a particular type of entity of the social economy, but is not the only one. A similar relation exists between SE and “third sector”, as this concept is delineated, for example, in Italian Law no. 106/2016. The third sector is a category of organizations that includes, but is not limited to SEs.
- SEs must not be confused with conventional enterprises that, on a voluntary basis, choose to take CSR actions, namely to integrate social and environmental concerns in their business operations and in their interaction with stakeholders. SEs must also be distinguished from organizations established under a particular legal statute that allows them to pursue a dual purpose without, however, giving priority to the social purpose over the profit purpose, and without imposing on them the other requirements that shape the identity of an SE. A recent example of such organizations is the Italian “benefit society” of art. 1, par. 376, Law 208/2015.

For several reasons, confusion between SE and other, different or more general, concepts would hinder the development of SEs and should be avoided. *Ad hoc* legislation on SE may also serve this specific function. Indeed, the analysis conducted in this paper already permits drawing clearer boundaries between SE and these other concepts.

5.1. Social enterprise, Social Economy, Third Sector

The concept of SE does not coincide with the one of “entities of the social economy” (or “social and solidarity-based enterprises”, as the EP prefers to refer to them¹⁰⁵), which is emerging from the legislation on the social economy increasingly adopted by EU jurisdictions during the last few years¹⁰⁶. Undoubtedly, the SE is and should be considered a particular type of entity of the social economy, but is not the only one. For example, cooperatives (namely ordinary cooperatives pursuing a mutual purpose and not only SCs) are included by the relevant laws in the category of the entities of the social economy. Moreover, in some jurisdictions, the definition of entities of the social economy may also embrace entities that are not business organizations. Therefore, regardless of its usefulness, “entities of the social economy” is a more general category which encompasses, but is not limited to, SEs as delineated in this paper according to the existing legislation.

A similar relation exists between SE and the concept of “third sector” as delineated in Italian Law no. 106/2016 on the reform of the third sector. In this delegation law – which has not yet been implemented by the Italian government – the third sector is defined as “the whole of private entities established for the pursuit, without a profit aim, of civic, solidarity-based and social utility purposes, and that [...] promote and carry out activities of general interest by means of forms of voluntary and donative action, of mutuality or of

¹⁰⁵ Cf. EP resolution of 10 September 2015 on Social Entrepreneurship and Social Innovation in combating unemployment, par. 1.

¹⁰⁶ The Spanish Law of 2011 was the forerunner (*Ley 5/2011, de 29 de marzo, de Economía Social*). This was followed by the Portuguese Law of 2013 (*Lei 30/2013, de 8 de maio, Lei de Bases da Economia Social*) and by the French Law of 2014 (*Loi 2014-856, du 31 juillet 2014, relative à l'économie sociale et solidaire*). On the other hand, notwithstanding its title (“Law on Social Economy and Social Entrepreneurship”), Greek Law no. 4019/2011 cannot be considered a real law on the social economy (at least, taking the above-mentioned laws as reference models), as it is, in fact, a law on SCs (see, in this sense, Nasioulas, ‘Greek Social Economy at the Crossroads. Law 4019/2011 and the Institutionalization Challenge’ (2011), CIRIEC Working Paper no. 2011/10). Other, more recent laws on the social economy, which appear more as laws on SE or which however deal prevalently with SEs, are Romanian Law of 23 July 2015 and Luxembourgian Law of 12 December 2016.

production and exchange of goods and services". The Italian third sector is therefore a category of organizations that includes, but is not limited to SEs. Unlike the social economy, the third sector, as identified by Italian law, does not encompass ordinary cooperatives (but only SCs). On the other hand, like the former, the latter embraces both commercial and non-commercial non-profits.

5.2. Social Enterprise, Corporate Social Responsibility, Socially Responsible Business Organizations

SEs are a particular type of business organization. They should not be confused with conventional enterprises that, over and above their legal obligations, choose to assume responsibility for their impact on society. This is the concept of CSR as defined by the EC in these precise terms: "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis"¹⁰⁷. It may suffice to highlight the verb "integrate" and the formula "on a voluntary basis" to draw the distinction between SE and CSR. SEs pursue, mainly or exclusively, a social purpose, and do so not on a voluntary basis but because they must in order to incorporate as SEs or acquire the SE qualification. As the EP has correctly pointed out, "the notion of CSR should be viewed separately from that of the social economy and social enterprises, even though commercial enterprises with significant CSR activities can have a strong interconnection with social business"¹⁰⁸ (EP 2012, par. 15). Therefore, while the EP "warmly welcomes the increase in the number of conventional enterprises which apply corporate social responsibility strategies as part of their business plans; [it] stresses, however, that applying such strategies is not in itself a sufficient condition for being considered a social and solidarity-based economy enterprise"¹⁰⁹. Nonetheless, this does not mean that stable forms of collaboration between SEs and conventional enterprises applying CSR strategies would not benefit the community or should be discouraged by legislators.

Whereas CSR actions are voluntarily taken by conventional enterprises, there may be legal statutes providing for the establishment of entities with a dual purpose, one that both serves the members' economic interests and benefits the community. As long as these statutes do not clearly designate the main purpose of the established entity to be the benefit of the community, as well as the other attributes that shape an SE's legal identity according to the common core of SE law in Europe, the entity cannot be considered an SE, from which it must be clearly separated. At most, this type of entity could be considered a "socially responsible business organization", which would distinguish it from a conventional enterprise that voluntarily decides to perform CSR activities.

In Italy, for example, art. 1, par. 376, of Law 28 December 2015, no. 208, instituted a new legal status, that of the "benefit society", defined as a society (which may be either a company or a cooperative) that performs an economic activity not only for profit distribution, but (also) for one or more common benefit purposes, and that acts in a responsible, sustainable and transparent manner towards people, communities, territories and environment, cultural and social goods and activities, entities and associations and other stakeholders. A benefit society must be managed in a way that balances the interests of the members and the other stakeholders. As one may easily observe, the benefit society status has nothing to do with the SE status, for reasons that are apparent. Rather, the

¹⁰⁷ COM(2011) 681 final, of 25 October 2011, on *A renewed EU strategy 2011-14 for Corporate Social Responsibility*.

¹⁰⁸ EP resolution on Social Business Initiative of 20 November 2012, par. 15.

¹⁰⁹ EP resolution of 10 September 2015 on Social Entrepreneurship and Social Innovation in combating unemployment, par. 8.

benefit society may be ascribed to the category of “socially responsible business organizations”.

6. RECOMMENDATIONS ABOUT POSSIBLE EU LEGISLATIVE INITIATIVES ON SOCIAL ENTERPRISE

KEY FINDINGS

- This comparative analysis has shown that the SE is subject to specific legislation in most EU jurisdictions; that the SE as a legal qualification (or status) is becoming the prevalent model of legislation in the EU; and that existing MS’s laws on SE reveal a significant degree of convergence in the identification of the aspects of the legal identity of an SE, although differences in the regulation still remain considerable. This is the legislative background at the state level against which any potential EU initiative in the area of SE law should be evaluated.
- EU legislative initiatives on SE could not take the form of harmonization directives. For several reasons, the obstacles to harmonization in this field via EU directives would be even bigger than in company law, regarding which the increasingly negative attitude of MSs towards top-down harmonization has emerged.
- On the other hand, the introduction of an EU specific legal statute for SEs would be a desirable result. As regards its feasibility, however, the negative atmosphere that has characterized the debate over the introduction of new EU legal entities in the last few years demonstrates that MSs harbor the same negative attitude towards EU organizational law that they do towards harmonization directives in company law. Inevitably, this climate infuses pessimism about the introduction of an EU statute on SEs.
- Nevertheless, the recent EC proposal of an EU directive on the *Societas Unius Personae* (SUP) applies a new strategy that may be explored also with regard to EU legislation on SE. An SUP-like EU directive on SEs would introduce a specific and (partially) harmonized law on SE in all the MSs. This law might concentrate on the essential elements of an SE identity, leaving the other aspects of regulation to the national law of each MS. This might provide for an EU social enterprise qualification (or status) – that of “European Social Enterprise” – and a related label or mark – that of “ESE” – common to, and reserved for, all SEs of the EU, regardless of the country of incorporation. The requirements of the ESE legal status could be identified on the basis of the existing common core of European SE law. This sort of EU statute could more easily find favor among MSs.
- In any event, once recognized and regulated by EU organizational law, SEs should receive under EU public procurement, tax and competition law, among others, a treatment consistent with their particular legal nature. This is fundamental for their success.

This comparative analysis has shown that the SE is subject to specific legislation in most EU jurisdictions; that the SE as a legal qualification or status is becoming the prevailing model of legislation in the EU; and that existing MS’s laws on SE reveal a significant degree of convergence in the identification of the aspects of the legal identity of SEs, although differences in the regulation still remain considerable.

This is the legislative background at the state level against which any potential EU initiative in the area of SE law should be evaluated, particularly if harmonization of national laws is desired.

On the other hand, when discussing potential EU legislative initiatives in the area of private organizations like SEs, one must also take into account the current state of the two paths thus far followed by EU law in this regard. These are harmonization through EU directives and establishment of supranational legal entities through EU regulations.

6.1. On the Harmonization of Social Enterprise Law through EU Directives

In the area of private organizations, the process of harmonization via EU directives has so far regarded company law. It has experienced different phases. After a difficult start in the 1960s, where only one directive was issued¹¹⁰, the two following decades were marked by strong legislative activism, in which the majority of the existing harmonization directives were adopted. Thereafter the process stalled. The main roadblocks were the proposed fifth directive on corporate governance, the ninth directive on groups of companies, and the 14th directive on the cross-border transfer of the registered office. The 1990s were years of amendments to the existing directives and reflection on the purposes and scope of the harmonization process. In the new millennium the process has restarted, but apparently on new bases. In particular, the EU strategy regarding company law has changed following the Action Plan of 2003, which was in turn based on the 2002 Report from the High Level Group of Company Law Experts¹¹¹. Harmonization started to be considered not an end in itself, but an instrumental good valued for its capacity to improve the efficiency of business functioning¹¹².

All this has led to a minimalist approach to EU company law: Harmonization directives should be adopted only as far as they are useful for firms, and they should mainly concentrate on cross-border issues in the name of subsidiarity. Furthermore, the new approach should involve increased use of default rules and options, so that EU law might enable rather than constrain national legislatures¹¹³. Similarly, EU legislation should concentrate on parties' freedom to select the applicable law in order to foster competition among MSs to improve their national laws, avoid national business migration (passive competition) and attract foreign businesses (active competition)¹¹⁴. The expectation is that this strategy will lead to greater cohesion of national company laws, although following a different route, which is bottom-up rather than top-down as in the case of directives.

This new strategy – proposed by the EC¹¹⁵ – certainly reflects a less optimistic view of European integration. One in which MSs are reluctant to undergo top-down harmonization and EU institutions have thus to explore indirect ways of harmonizing or approximating national laws, with uncertain success and results.

¹¹⁰ Namely, the First Council Directive no. 68/151/EEC of 9 March 1968, now repealed and substituted by Directive no. 2009/101/EC of 16 September 2009.

¹¹¹ Cf. COM(2003) 284 final.

¹¹² Cf. Armour & Ringe, *European company law 1999–2010: Renaissance and crisis*, in 48 Common Market Law Review 125 ff. (2011).

¹¹³ As examples of this new approach, cf. Directive no. 2007/36/EC of 11 July 2007, on certain shareholder rights in listed companies, and Directive no. 2012/17/EU of 13 June 2012, on the interconnection of central, commercial and companies registers.

¹¹⁴ Competition favored by the EUCJ case law on freedom of establishment (beginning with *Centros* in 1999).

¹¹⁵ Cf. EC, *Summary of responses to the public consultation on the future of European company law*, July 2012, and COM(2012) 740 final.

Returning to SEs, the obstacles to harmonization of SE law via EU directives are even bigger if one considers that:

- i) not all MSs have specific laws on SE, and therefore there is a lack in material to be harmonized;
- ii) where SE is a matter specifically regulated by law, two different models of SE legislation exist (SE as a legal form of incorporation and SE as a legal qualification or status);
- iii) regardless of the model of SE legislation, differences in the national regulation of SEs remain significant, for example regarding the scope of an SE's activity, since there are some laws that only recognize WISEs;
- iv) the national movements representing SEs might not be in favor of harmonization, given the different cultural approaches to SE that are reflected in the existing legislation;
- v) EU institutions might not wish to harmonize SE law if harmonization is opposed by SEs or their representatives.

In conclusion, harmonization of SE law via EU directives is not a recommended strategy, primarily because it appears unfeasible.

6.2. On an EU Legal Statute for Social Enterprises

In the SBI communication of 2011, the EC considered “the need for ... a possible common European statute for social enterprises” an issue that would require further consideration¹¹⁶.

Indeed, following the results of the analysis conducted in this paper, specific EU legislation on SE would be welcome for the same reasons that it is beneficial at the state level¹¹⁷, in addition to the fact that the existing EU legal entities – namely, European Company, European Cooperative Society and European Economic Interest Grouping¹¹⁸ – cannot easily be adapted to suit SEs¹¹⁹.

¹¹⁶ Cf. COM(2011) 682 final, cit., p. 12.

¹¹⁷ Cf. *supra* sect. 2, as well as Möslein, *Building Social Business in Europe*, in 12(6) European Company Law 269 (2015), holding that “the introduction of a new legal form – a ‘European Social Company’ – would concurrently constitute an important competitive advantage for [social entrepreneurs] ... [It] would represent not just another step, but indeed a crucial centerpiece of a suitable legal framework for social entrepreneurship in Europe”.

¹¹⁸ Subject, respectively, to Regulations no. 2157/2001 of 8 October 2001, no. 1435/2003 of 22 July 2003, and no. 2137/1985 of 25 July 1985.

¹¹⁹ The European Economic Interest Grouping is a useful though limited form of economic coordination among firms. On the one hand, it has “the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued” (art. 1, par. 2, reg. no. 2137/1985). On the other hand, its purpose is “to facilitate or develop the economic activities of its members and to improve or increase the results of those activities”, but not to make profits for itself (art. 3, par. 1; art. 21, par. 1). Furthermore, its activity must be ancillary to the economic activities of the members (art. 3, par. 1), which gives rise to a number of operational restrictions (art. 3, par. 2). In addition, a European Economic Interest Grouping’s members have unlimited joint liability for the debts of the grouping (art. 24, par. 1). The European Cooperative Society – which in theory, having the structure of a cooperative, could be an adequate instrument of incorporation for SEs – “shall have as its principal object the satisfaction of its members’ needs and/or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions” (art. 1, par. 3, reg. no. 1435/2003). This provision highlights the mutual character of this EU legal form, which would be difficult to adapt to the needs of social entrepreneurs. The European Company is the EU equivalent of national public companies. Therefore, its basically capitalistic structure would create numerous problems in the functioning on an SE. In addition, its minimum legal capital of 120,000 euros (art. 4, par. 2, reg. no. 2157/2001) is a requirement that social entrepreneurs would have serious difficulty satisfying.

An EU legal form of SE could offer further benefits, which are usually expected from supranational statutes on business organizations, namely providing EU citizens and organizations with an alternative legal form for conducting business (relative to national legal forms), facilitating the cross-border activity and grouping of SEs, promoting the understanding and visibility of SEs, and favouring *de facto* approximation of national SE laws.

Nevertheless, a potential EU statute on SEs, albeit desirable, raises two main issues. The first concerns its feasibility and the second its features and contents.

As regards feasibility, one cannot but underline the negative atmosphere that has characterized the debate over the introduction of additional EU legal entities in the last few years, specifically the European Association, the European Foundation, the European Mutual Society, and the European Private Company. Indeed, the process of their adoption has been officially suspended or interrupted, mainly due to MSs demonstrating the same negative attitude towards EU organizational law that they harbor towards harmonization directives in company law¹²⁰. This climate, of course, infuses pessimism about the introduction of an EU statute on SEs.

There is, however, a new path that the EC is exploring to overcome the difficulty it faces (both in harmonizing national company law and in providing for EU legal entities). The new frontier of EU company law is, in fact, the *Societas Unius Personae* (SUP). A proposal for a directive on the SUP was presented by the EC in April 2014, following the failure of the project regarding the European Private Company¹²¹. According to the proposed directive, the SUP would not be a new supranational legal entity proper (such as the European Company and the other entities previously mentioned), but a national company type (identified by the acronym "SUP", common to, and reserved for all SUPs of the EU) that all the MSs should provide for, part of which would be uniformly regulated in all the EU jurisdictions. This is the reason why the EC bases its proposal on art. 50, par. 2, f), of the Treaty on the Functioning of the European Union (TFEU) and not on art. 352 thereof, given the SUP's contribution "to the progressive abolition of restrictions on freedom of establishment as regards the conditions for setting up subsidiaries in the territories of Member States"¹²².

The identification of the legal basis of the SUP proposal, although it would undoubtedly facilitate the latter's adoption (making the unanimous decision of the Council unnecessary), has already raised doubts. Although art. 50, par. 2, f), TFEU, can hardly be invoked with regard to SEs, the reason why the SUP proposal is of interest to this analysis is that it offers a new perspective on how to achieve harmonization of organizational law. In fact, an SUP-like EU directive on SEs would introduce a specific and (partially) harmonized law on SE in all the MSs (including, therefore, those that still lack such legislation). This law might concentrate on the essential elements of an SE identity, leaving the other aspects of regulation to the national law of each MS. This might provide for an EU social enterprise qualification (or status) and a related label or mark common to, and reserved for, all SEs of the EU, regardless of the country of incorporation. This sort of EU statute could more easily find favor among MSs, which is very important in light of the previously described negative climate.

¹²⁰ This negative attitude has also prevented the revision of existing EU organizational law which needed revising, notably of the regulation no. 1435/2003 on the European Cooperative Society (as highlighted by the Author of this paper in the executive summary and in the synthesis and comparative report drafted for Cooperatives Europe, Euricse, Ekai (eds.), *Study on the implementation of the regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part I and part II, October 2010).

¹²¹ Cf. COM(2014) 212 final, of 9 April 2014.

¹²² Cf. COM(2014) 212 final, of 9 April 2014, at 5.

At this point, this analysis must return to the second previously raised issue, that of the features and contents of a possible EU statute on SE.

EU legislators would have the same two alternatives delineated in this paper: either introducing and regulating the SE as a specific legal entity or introducing and regulating the SE as a specific legal category (or status). In consideration of its increased use at the national level, of its intrinsic advantages as already highlighted in this paper, and last but not least, of its more probable acceptability by MSs, the second alternative is the recommended choice.

Hence, this EU statute should introduce an EU legal qualification (or status), that of the “European Social Enterprise”, and a related EU label or mark, which could be “ESE”. Both the EP and the EESC, as well as some legal scholars¹²³, have already stated their preference for this type of statute on SE¹²⁴. The ESE legal qualification and label could be introduced by way of an SUP-like directive if other, more direct, ways prove to be not practicable.

With regard to the requirements of the ESE legal status, reference can be made to existing SE legislation in EU jurisdictions, which provides solid foundations for delineating a common European regulation. In this last regard, it must be noted that the ESE legal status could be more or less rigid or flexible. Rigidity implies making some choices with respect, for example, to the scope of activity of an ESE and the alternative between total constraint and partial constraint on profit distribution. Flexibility allows of more relaxation in determining the essentials of an ESE, and may be the solution in the event of MSs’ reluctance toward such an EU statute.

6.3. Final Recommendations

Based on the analysis conducted thus far, the recommendations about possible EU legislative initiatives on SE are the following:

- 1) An EU legal statute for SEs should be adopted in order to enhance the development of SEs in the EU. This paper has strongly emphasized the fundamental role performed by specific legislation on SE and the numerous advantages of such legislation for SEs and consequently for the people and communities benefiting from their existence (see sect. 2).
- 2) This EU statute should introduce a new legal qualification (or status), that of the “European Social Enterprise”, to which the EU label of “ESE”, reserved for all European Social Enterprises, should be applied. This paper has offered a number of reasons why this model of legislation is preferable to one in which the SE is a legal form of incorporation, more precisely, either a particular type of cooperative or a particular type of company (see sect. 3).

¹²³ Although it also considers the possibility of a separate EU company form such as the British CIC, cf. Lambooy & Argyrou, *Improving the Legal Environment for Social Entrepreneurship in Europe*, cit., at 76.

¹²⁴ Cf. EP resolution on Social Business Initiative of 20 November 2012, par. 28: “[The EP] Calls on the Commission and the Member States to consider the feasibility and desirability of developing a ‘European social label’ to be awarded to social enterprises to ensure better access to public and socially innovative procurement without infringing any competition rules; suggests that enterprises bearing such a label should be monitored regularly regarding their compliance with the provisions set out in the label”; and the opinion of the EESC on ‘Social entrepreneurship and social enterprise’ of 26 October 2011, par. 3.6.1: “The Commission should consider a European social enterprise ‘label’ which would increase awareness and recognition, and build trust and demand. A first step should be a study, initiated by the Commission and carried out in cooperation with social enterprises, of existing labels and other certification systems already in place in many Member States”.

- 3) This EU statute should provide that the legal qualification of “European Social Enterprise” and the related label of “ESE” be available for organizations that satisfy a set of legal requirements, whatever the legal form of their incorporation (so as to have a “company ESE”, a “cooperative ESE”, a “foundation ESE”, etc.).
- 4) The legal requirements for acquiring (and maintaining) the ESE status should be identified by EU legislators in accordance with the common core of EU SE law (see sect. 4), and in particular:
 - a. An ESE should be an entity established under private law (in any of the available legal forms, including EU legal forms, such as the European Company and the European Cooperative) and independent of the state and other public administrations (see sect. 4.1).
 - b. It should have an exclusive or at least a prevalent purpose of community or general interest (see sect. 4.2);
 - c. It should be subject to a total or at least partial constraint on profit distribution and more generally to specific rules on the allocation of profits and assets during its entire life, including at dissolution (see sect. 4.3).
 - d. It should conduct a socially useful activity, as determined by law either *ex ante* or through a general clause; in particular, work integration of disadvantaged people or workers should be considered one of the possible activities of an ESE, but not the only admissible one (see sect. 4.4).
 - e. An ESE should be obligated to issue a social report, to involve its various stakeholders in the management of the enterprise, and to provide fair and equitable treatment to its workers, notably the disadvantaged ones (see sect. 4.5).
 - f. An ESE established as a company should be subject to specific governance requirements, in order to resolve the potential contradictions between the company form and the ESE status (see sections 4.5 and 3.1.2).
 - g. An ESE should be subject to an effective system of public control, which is necessary to protect the legal label of ESE and preserve its intrinsic value. Public control could be implemented by involving secondary organizations composed of ESEs (see sect. 4.6).
- 5) If other forms are not practicable, the ESE status might be introduced via an EU statute of the same type as the recently proposed EU directive on SUP. Such an EU statute would obligate each MS to adopt a law that offers national legal entities the possibility of qualifying as ESEs, but the ESE status, as defined by the EU statute, would be the same in all EU jurisdictions (see sect. 6.2).
- 6) Organizational law, including EU organizational law, is essential for the growth and development of SEs, but it does not, however, suffice for this purpose. Once recognized under organizational law, SEs should also be recognized and dealt with specifically by EU public procurement, tax and competition law, among others. Therefore, the ESE status should determine changes in these branches of law, so that SEs be awarded a treatment consistent with their particular nature as delineated by organizational law.

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ANNEX

Table 1: Laws on Social Enterprise in EU Member States

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)	Social Purpose Society
Croatia	Art. 66 on <i>socijalne zadruge</i> (social cooperatives), of Law of 11 March 2011, no. 764, on cooperatives	Social Cooperative
Czech Republic	Articles 758 ff., on <i>sociální družstvo</i> (social cooperative), of Law no. 90/2012 on commercial companies and cooperatives	Social Cooperative
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>sosiaalisista yrityksistä</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	Collective Interest Cooperative
	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	Solidarity-Based Enterprise of Social Utility
Greece	Laws no. 2716/1999 and no. 4019/2011 on <i>Κοινωνικοί Συνεταιρισμοί</i> (social	Social Cooperative

	cooperatives)	
Hungaria	Articles 8, 10(4), 51(4), 59(3), 60(1), 68(2)(e), on <i>szociális szövetkezetek</i> (social cooperatives), of Law no. X-2006 on cooperatives	Work Integration Social Cooperative
Italy	Law, 8 November 1991, no. 381, on <i>cooperative sociali</i> (social cooperatives)	Social Cooperative
	Legislative Decree of 24 March 2006, no. 155 on <i>impresa sociale</i> (social enterprise)	Social Enterprise
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)	Social Enterprise
Poland	Law of 27 April 2006 on <i>spółdzielni socjalne</i> (social cooperatives)	Work Integration Social Cooperative
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	Art. 50b, on <i>sociálny podnik</i> (social enterprise), of Law no. 5/2004 of 4 December 2003 on Employment Services	Work Integration Social Enterprise
Slovenia	Law no. 20 of 2011 on <i>socialnem podjetništvu</i> (social entrepreneurship)	Social Enterprise
Spain	Art. 106, on <i>cooperativas de iniciativa social</i> (social initiative cooperatives), of Law no. 27/1999 of 16 July 1999 on cooperatives	Social Initiative Cooperative
	Law no. 44/2007 of 13 December 2007 on <i>empresas de inserción</i> (integration enterprises)	Work Integration Social Enterprise

	Art. 43 ff., on <i>centros especiales de empleo</i> (special employment centres), of Royal Legislative Decree no. 1/2013 of 29 November 2013	Work Integration Social Enterprise
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

Source: The Author

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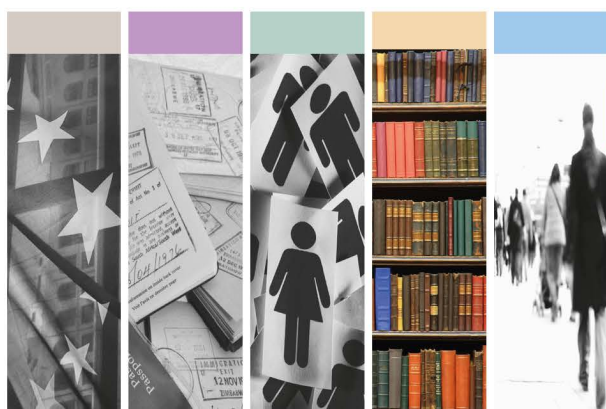
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