Models and Trends of Social Enterprise Regulation in the European Union

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1 Introduction

In the European Union (EU), social enterprise (SE) legislation continues to grow, [1] owing to both the introduction of new laws specifically dedicated to SEs and the recent changes to and replacements of preexisting laws. Moreover, in countries that still lack specific SE laws, their introduction has been discussed or specific legislative proposals already exist and are waiting to be passed. For example, Malta enacted

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[1] See Fici (2016, 2017), p. 12; Fici (2020).

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a new SE law in February 2022. [2] Furthermore, in 2017, Italy implemented SE regulations within the broader context of the great reform of the "third sector," [3] while the new Belgian Code of companies and associations in 2019 [4] brought about profound changes in SE identification and regulation. Regarding countries without dedicated SE laws, in an October 2021 study promoted by the Irish government as a follow-up to research conducted when implementing the National Social Enterprise Policy of 2019, 51% of respondents declared they would prefer that a new legal form specific to SEs be introduced. [5]

The issue of social enterprise and its legal forms continues to generate great interest at both the national and EU levels. However, at the EU level, the current perspective appears to be slightly modified compared to previously (as emerging from the Commission's "Social Business Initiative" of 2011, the "SBI" Communication). The Commission's "Action Plan for the Social Economy" [6] in December 2021 shifted the discourse on social enterprise to incorporate it into the broader context of the social economy. Accordingly, at the national level, the topic of social enterprise is sometimes framed and addressed within broader contexts, such as the social economy's third sector. For example, in Italy, SEs are considered a component of the third sector, [7] and in France, SEs (which in this jurisdiction present the slightly different denomination of "solidarity enterprises of social utility") are included by law among social and solidarity economy enterprises. [8]

Important nonlegal research has also directed attention toward the legal framework of SEs. The impressive ICSEM project [9] and the extensive and relevant research on social enterprises and their ecosystems promoted by the European Commission [10] have elucidated the determinants and features of existing social enterprises in Europe and globally, piquing legal scholars' curiosity regarding how

[2] Act no. IX of 2022, to regulate social enterprise organizations and their administration, published in the Government Gazette of Malta on February 22, 2022.

[3] Legislative decree no. 112/2017 on social enterprises replaced Legislative decree no. 155/2006 on the same subject. Legislative decree no. 112/2017 is connected to Legislative decree no. 117/2017, the Code of the third sector, since social enterprises are a particular type of third sector organization Cf. Fici (2021).

[4] In Belgium, "cooperatives accredited as social enterprises" replaced "social purpose companies": cf. art. 8:5 of the Code of companies and associations of 2019 and art. 6 ff. of Royal Decree June 28, 2019.

[5] Cf. Lalor and Doyle (2021).

[6] Cf. Cf. COM (2021) 778 final of December 9, 2021 on "Building an economy that works for people: an action plan for the social economy," according to which "social enterprises are now generally understood as part of the social economy" (p. 3).

[7] Cf. art. 4, para. 1, Legislative decree no. 117/2017.

[8] Cf. art. 11 of Law no. 2014/856 of 31 July 2014, which modified art. L3332-17-1 of the Labor Code. Among other countries, something similar occurs in Slovakia due to Law no. 112/2018: cf. Polačková (2021), p. 190.

[9] Cf. Defourny et al. (2021) and Defourny and Nyssens (2021a, b).

[10] Cf. European Commission (2020).

these findings fit within the existing legal framework of SEs and vice versa. [11] For the jurist, empirical research on the third sector and the social economy, [12] and the consideration thereof in statistical surveys and methodologies, [13] has brought about similar interests.

Consequently, the situation relating to social enterprise has changed significantly since the passage of the first law specifically dedicated to this phenomenon (i.e., Italian law November 8, 1991, no. 381, on social cooperatives). In the three decades since, the picture has become clearer in terms of both legislation and legal culture related to SEs, while broader organizational categories, such as the third sector and the social economy, have also emerged.

Therefore, the current general climate might allow another step forward, in the sign of both the further completion of the legal framework on SEs at the national level (six EU countries still have no ad hoc SE legislation) [14] and the introduction at the EU level of specific legislation thereon, even if on the latter front EU institutions making apparent strategy changes have increased the complexity of the situation. [15]

2 The Essential Role of Social Enterprise Law

A considerable number of specific laws on SEs exist in various EU (and non-EU) countries, thus demonstrating the essential role of legislation in SE development. In fact, 21 out of 27 EU countries have dedicated laws on SEs, and some even have more than one. [16] Furthermore, in those countries where such laws do not yet exist, their possible introduction is under discussion or precise legislative proposals have been put forward. [17]

Continuing to use real-world examination to support our thesis, it is worth noting that in countries where there had previously been no specific SE laws, their adoption led to notable SE growth. In Italy, although social cooperatives were established even before Law no. 381/1991 was introduced, their number has increased considerably since then. According to the National Institute of Statistics (ISTAT), there were a little over 2000 social cooperatives before 1991, almost 3500 in the

[11] See, for example, Adam and Douvitsa (2021) regarding Greek legislation.

[12] Cf. Enjolras et al. (2018).

[13] Cf. United Nations (2018).

[14] They are Austria, Estonia, Germany, Ireland, the Netherlands, and Sweden.

[15] Cf. *infra* Sect. 4.

[16] This occurs when, in a given jurisdiction, a law on social cooperatives (or another specific legal form of social enterprise) and a more general law on social enterprises coexist, as happens in France, Greece, and Italy, among other countries.

[17] For example, in Ireland, see the preliminary study of Lalor and Doyle (2021); in 2020, in the Netherlands, the government planned to introduce the social private limited liability company as a specific legal form for SEs.

mid-1990s, and just over 6000 by the end of 2003. [18] According to the latest available ISTAT census data on nonprofit institutions, almost 15,500 social cooperatives were active as of December 31, 2019. [19] Other EU countries have also reported significant increases in the number of registered SEs after introducing such laws. In Latvia, for example, this number has increased sixfold since SE laws were introduced in 2017. [20] Outside the EU, UK regulations implemented in 2004 demonstrated an enormous impact on the development of "community interest companies," [21] the number of which had reached 23,887 as of March 31, 2021. [22]

However, arguments in favor of introducing ad hoc legislation on SEs are not only based on practical examples. Precise theoretical justifications for the legal recognition and regulation of SEs have also been provided. In most jurisdictions, the existing general legal forms (e.g., association, foundation, cooperative, company) can be used to establish an organization with the concrete characteristics of an SE; however, in the absence of specific organizational law recognizing them, SEs do not have a precise, distinct, reserved, and protected legal identity. When organizations possess distinctive features related to their pursued purpose—be it negative, such as the nonprofit purpose, or, moreover, positive, such as the social purpose that characterizes SEs—organizational law has a vital role in defining each organization's specific identity, which is primarily determined by its particular goals.

Therefore, SE law's primary and essential role is (and should be) to establish a defined identity of SEs and preserve their essential features. This per se justifies the existence of specific SE legislation and helps identify its minimum and essential contents. [23] Having and operating under a specific identity different from that of other organizations, and under a legal designation that conveys particular objectives and actions, is what satisfies the interests of SE founders and members and, consequently, is a precondition for this particular form of business organization's existence and development. [24] If "the diversity and openness of the concept [of SE] are probably some of the reasons for its success," [25] however, 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." [26]

[18] Precisely, 6159: cf. ISTAT, Le cooperative sociali in Italia. Anno 2003 (Roma, 2006).

[19] Cf. ISTAT, Censimenti permanenti. Istituzioni non profit, October 15, 2021.

[20] Cf. Gintere and Licite-Kurbe (2021).

[21] Sections 26 ff. of the Companies (Audit, Investigations and Community Enterprise) Act of 2004, and the Community Interest Company Regulations of 2005.

[22] Cf. Community Interest Companies Annual Report 2020/2021. On this subject, cf. Liptrap (2021b).

[23] See Fici (2017), p. 13; more recently, along the same lines, Bohinc and Schwartz (2021), p. 4: "A primary contribution of social enterprise law is to enable companies with a true social mission to distinguish themselves."

[24] Cf. Bohinc and Schwartz (2021), p. 6.

[25] In these terms, Defourny and Nyssens (2012), p. 20.

[26] In these terms, Kraakman et al. (2009), p. 22.

Therefore, dedicated SE laws are advantageous to the extent that they allow social entrepreneurs to distinguish their initiatives for stakeholders (e.g., customers, employees, investors, volunteers, donors, public administrations). By imposing specific legal identities on SEs, legislators are not unnecessarily restricting their private autonomy but rather allowing them to display their distinctive traits and profit from them. The list of potential benefits includes, among others, these aspects:

1. SEs may be taken into specific consideration in tax, public procurement, insolvency, or competition laws, among others, and thus receive rules that are in line with their legal nature, which is a prerequisite for SEs to prosper; [27] SEs need a comprehensive legal framework that favors their establishment because organizational law alone (especially in the absence of a consistent tax regime) is insufficient. [28]
2. Specific public policies may be designed in support of SEs, [29] and these policies may be justified under EU competition and state aid laws. [30]
3. Clearer boundaries may be drawn between SEs and other concepts, such as corporate social responsibility, sustainable businesses, and socially responsible

[27] Several times, EU institutions have emphasized the need for SEs to receive specific treatment under competition law and public procurement law: cf., for example, the EP resolution of September 10, 2015, on Social Entrepreneurship and Social Innovation in combating unemployment, at paragraphs 21, 22 and 33; and the EP resolution of February 19, 2009, on Social Economy, at paragraph 4. The aspect is also highlighted, with regard to social economy entities in general, in the Commission's Action Plan of December 2021: "Developing coherent frameworks for the social economy entails considering its specific nature and needs with regard to numerous horizontal and sectoral policies and provisions such as those relating to taxation, public procurement, competition, social and labour market, education, skills and training, healthcare and care services, Small and Medium-sized Enterprise (SME) support, circular economy, etc."

[28] This is demonstrated by the failure of Italian Legislative Decree no. 155/2006. It led to the establishment of a very limited number of SEs, which resulted from the lack of consistent and adequate tax consideration for SEs. In the 2017 reform, the Italian legislature introduced specific tax rules for SEs into Legislative Decree no. 112/2017 specific tax rules; they are still not effective (because they are conditioned on the European Commission's approval, which has yet not arrived), but they are expected to re-launch this legal instrument.

[29] This is one specific objective envisaged by EU institutions: cf., for example, the Council's 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. See the Commission's Action Plan for the Social Economy of 2021.

[30] Cf. EU Court of Justice, 8 September 2011 (C-78/08 a C-80/08), and, for commentary, Fici (2014). The Court held that the specific (and more favorable) 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-centered and not capital-centered, 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. Thus, 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).

enterprises; [31] these concepts may deserve specific consideration from legislators and public institutions but on different grounds and in different terms than SEs.
4. The relationship between SEs and more general concepts, notably those of the social economy and third sector, as legal categories of entities that include but are not limited to SEs may be better understood.
5. The interests of an SE's various stakeholders, such as customers, investors, and socially responsible suppliers, may be more effectively protected because the use of the denomination "SE" without a legal standard to guarantee a corresponding substance may have a distorting effect on the market.
6. The establishment and operation of "pseudo-SEs" may be prevented, thereby reducing the risk of serious harm to the image of the third sector or the social economy as a whole. [32]
7. More reliable statistical data on SEs may be collected, thereby improving the visibility of the entire sector. [33]

Hence, SEs should have their own organizational laws for numerous theoretical and practical reasons. In addition, on a more philosophical level, it arouses curiosity why laws on SEs, or on the third sector and the social economy overall, should require justification. In fact, there is no apparent reason why the state should provide a specific legal framework for collective actions motivated by profit but not for collective actions aimed toward the common good. Both structures of action, those for the "homo oeconomicus" and the "homo donator" or "reciprocans," should be recognized and carefully regulated by law. Organizations with a higher degree of constitutional salience, such as SEs, which perform important social and economic functions by helping the state to provide general interest services and the community to self-organize to satisfy needs unmet by the state (the first sector) and traditional for-profit producers (the second sector), in principle, deserve more attention than organizations in other categories.

Thus, in countries where SEs and third-sector (or social economy) organizations in general are not regulated, the question should not be whether to legally recognize these subjects but should be why this has not already occurred.

[31] Cf. recently Bohinc and Schwartz (2021), p. 5: "A company that strives to be a good citizen is not the same as one that is committed to a certain social goal. Social enterprises are good corporate citizens, but good corporate citizens are not necessarily social enterprises."

[32] Cf. Yunus (2007), p. 178; Yunus (2010), pp. XXV and 117.

[33] Improving statistics on SEs to increase their visibility is another objective EU institutions often highlight: cf., for example, the opinion of the EESC on "Social entrepreneurship and social enterprise" of October 26, 2011, at paragraphs 1.11 and 3.6.3. On data and statistics for the sector, the Commission's Action Plan for the Social Economy of December 2021 has a dedicated section.

3 Models and Trends of National Social Enterprise Legislation in the EU

Beginning with Italian Law no. 381/1991 on social cooperatives, [34] social enterprise legislation has spread throughout Europe; today, 21 out of 27 EU Member States have at least one law on this subject. The current national legislation on SEs is certainly more varied and complex than at the time of its emergence. Laws on social cooperatives are still in force and continue to be adopted; however, the legal landscape is now more articulated, and different forms of legislation also exist.

More precisely, two general models of SE legislation can be identified, which can also coexist within the same national jurisdiction. [35] In the first model of legislation to emerge, SEs are a particular legal type (or subtype) of entity: either a (social purpose) cooperative or company. In the second model, which has been increasingly used, "SE" is a legal qualification (the terms "certification" and "accreditation" are also used for the same purpose) that may be acquired by private organizations that, regardless of the legal form of incorporation (a company, a cooperative, or, even in certain cases, an association or a foundation), satisfy the requirements assumed by the law as indicators (or "criteria") of their "sociality."

Another possible classification of SE laws is as follows:

- Laws that recognize only work integration social enterprises (WISEs) as SEs, and
- Laws according to which an SE is identified by the performance of one or more social utility or general interest activities, including work integration of disadvantaged persons or workers

This distinction regards the scope of an SE's activity and may apply to both law typologies previously described. Therefore, depending on the characteristics of national legislation, laws may provide only for the establishment of work integration social cooperatives (e.g., Poland), [36] or there may be laws under which work integration is the only activity that an organization can perform to qualify as an SE (e.g., Lithuania). [37]

[34] The fact that Italian Law no. 381/1991 is the cornerstone of this type of legislation corresponds to an opinion commonly shared by the most prominent scholars in this field, such as Galera and Borzaga (2009) and Defourny and Nyssens (2012). However, although it is undeniable that this Italian 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).

[35] The two models in this chapter do not coincide with the two models identified by Vargas Vasserot (2021), p. 70.

[36] Cf. Law 27 April 2006 on social cooperatives.

[37] Cf. Law no. IX-2251 of June 1, 2004, on social enterprise. See also Lithuanian Law no. XIII-2427 of September 19, 2019, on the same subject.

Work integration of disadvantaged persons and workers is only one possible social utility (or general interest) activity that SEs may, in principle, conduct; thus, no apparent reason exists to reduce by law the scope of SEs to work integration. Accordingly, the legislative trend toward enlarging the scope of institutionalized social enterprises beyond work integration must be appreciated. One example of this is Slovakia, where a new law passed in 2018 on social economy and social enterprises freed the concept of SE from work integration and overcame the limits of the preceding legislation, which, by supporting only WISEs, was unable to capture *de facto* SEs not focused on work integration. [38]

3.1 Social Enterprise as a Legal Form of Incorporation

Following the first model of legislation described above, in some EU countries, the law provides a specific legal form for SE incorporation, which is distinct from the ordinary legal forms and usually constitutes a special subtype (or modified type) of either a cooperative or shareholder company. The most common legal form for an SE is social cooperative, which in some countries has different names, such as collective interest cooperative in France, social solidarity cooperative in Portugal, or social initiative cooperative in Spain. It is present in many EU national jurisdictions, namely, Croatia, [39] the Czech Republic, [40] France, [41] Greece, [42] Hungary, [43] Italy, [44] Poland, [45] Portugal, [46] and Spain [47] (as well as Belgium after reforms in 2019, although in a partially different manner, which is described later in this chapter).

In the EU28, the UK community interest company was the most prominent example of a social purpose company. After Brexit and changes to the Belgian legal framework on SEs (in which the provisions on the social purpose company were repealed), Latvia is now the only EU Member State that adopts this model of legislation (although in a partially different manner, as highlighted later in this

[38] Cf. Law no. 112/2018 of March 13, 2018 on social economy and social enterprises and art. 50b of Law no. 5/2004 on employment services, as amended in 2008. See also European Commission (2020), p. 29.

[39] Cf. art. 66 of Law no. 764 of March 11, 2011, on cooperatives.

[40] Cf. art. 758 ff. of Law no. 90/2012 on commercial companies and cooperatives.

[41] Cf. art. 19-*quinquies* ff. of Law no. 47-1775 of September 10, 1947, on cooperatives, as introduced by Law no. 2001/624 of July 17, 2001, and amended by Law no. 2014/856 of July 13, 2014, on the social and solidarity economy.

[42] Cf. Laws no. 2716/1999 and 4019/2001.

[43] Cf. articles 8, 10(4), 51(4), 59(3), 60(1), and 68(2)(e) of Law no. X-2006 on cooperatives.

[44] Cf. Law of November 8, 1991, no. 381.

[45] Cf. Law of April 27, 2006.

[46] Cf. Law-Decree no. 7/98 of January 15, 1998, on social solidarity cooperatives.

[47] Cf. art. 106 of Law no. 27/1999 on cooperatives.

chapter). [48] However, in both Germany and the Netherlands, the national government has put forth proposals regarding the introduction of social purpose limited liability companies.

3.1.1 Social Enterprise in the Cooperative Form

The existing framework demonstrates that national legislators appreciate social cooperatives, thus raising questions as to why. A possible explanation is that, notwithstanding its particular aims, the social cooperative remains, at its core, a cooperative, of which it shares the general structure of internal governance and other particular qualities national legislators deem to be consistent with an SE's nature and objectives.

The social cooperative is, in fact, a cooperative with a nonmutual purpose, [49] given that—as for example Italian Law no. 381/91 states—its "aim [is] to pursue the general interest of the community in the human promotion and social integration of citizens," either through the management of socio-health or educational services (social cooperatives of type A) or any entrepreneurial activity in which disadvantaged people are employed ("social cooperatives of type B," which belong to the WISE category). [50] Of great interest in this regard is the recent Belgian legal provision, according to which cooperatives may be accredited as social enterprises if their "main objective is not to provide their shareholders with an economic or social advantage, in order to satisfy their professional or private needs," but "to generate a positive societal impact for the human being, the environment or the society" (art. 8, para. 5, Code of Companies and Associations of 2019). [51]

However, if a social cooperative's "soul" (i.e., main purpose) is that typical of an SE (and not of an "ordinary" cooperative pursuing a mutual purpose), then its "body" (i.e., organizational structure) remains that of a cooperative. Consequently, in addition to the distinctive traits all SEs share (including, in particular, the total or partial profit nondistribution constraint and disinterested devolution of residual assets in case of dissolution), the SE in the cooperative form is as follows:

[48] Cf. Law of October 12, 2017, on social enterprise.

[49] The mutual purpose that, in general, characterizes ordinary cooperatives is to act in the interest of their members as users, consumers, or workers of the cooperative enterprise. Therefore, "nonmutual" here refers to cooperatives not acting exclusively in the interest of their members but primarily in the general interest. This does not imply, of course, denying the societal role or social function of ordinary cooperatives, which is even recognized at the constitutional level in many countries (as highlighted in the main text and footnotes). Cf. also Meira (2020).

[50] A social cooperative's members, therefore, cooperate not to serve themselves (as in ordinary mutual cooperatives), but to serve others: cf. Fici (2013b).

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

- A democratic SE (cooperatives are, in principle, managed according to the "one member, one vote" rule, regardless of the share capital held by each member; therefore, they are person-centered rather than capital-centered organizations)
- Open to new members, whose admission is favored by the variability of capital (the "open door" principle in cooperatives is a manifestation of present members' concern for the future generations of members)
- Jointly owned and controlled by its members (in cooperatives, usually, all, or at least most, of the directors must be members, and the external or nonmember control of a cooperative is not permitted by law); and
- By its very nature, supportive of other cooperatives, its employees, and the community at large [52]

Therefore, the cooperative legal form is considered in specific constitutional provisions that recognize its social function and provide for state support. [53]

The social function of cooperatives is even more intense when a cooperative aims to pursue the general interest of the community rather than its members' economic interests. Essentially, the combination of cooperative structure and social objectives may determine an organization's increased social relevance, given that the sociality of the cooperative structure is added to the sociality of the entity's objectives.

Undoubtedly, SEs in the cooperative form are entities that have a very strong identity as SEs because their governance has the participatory (and human) dimension that characterizes the SE "ideal-model," as adopted, for example, by the European Commission in the SBI Communication of 2011, which was based on previous work by the EMES research network. In the SBI Communication, an SE is described as follows: "It is managed in an open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities." In addition, the democratic nature of SE in the cooperative form makes it perfectly compatible with the notion of a social economy entity that is increasingly common in Europe and the laws on the social economy approved there thus far. In these laws, democratic governance is indeed a key identifier of social economy entities. [54]

If the above holds true, two examples in the most recent legislation may be appreciated for the prominence given to the cooperative form in SE regulation. The first, and most relevant, is the case of Belgium, which completely modified its legislative approach to SEs in 2019 by repealing its law on the "social purpose company" (SFS) and replacing it with legislation on the "cooperative accredited as social enterprise." The second is the case of Italy, where the "social cooperative," as

[52] It is impossible to discuss here these general characteristics of the cooperative legal form of business organizations: cf. Fici (2013a) and Fajardo et al. (2017).

[53] The list of countries whose constitutions deal with cooperatives is very long and includes, among many others, Italy, Spain, and Portugal. For further reference, see Fici (2015) and Douvitsa (2018).

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

provided for by Law no. 381/1991, is now recognized as an *ope legis* social enterprise in Legislative Decree no. 112/2017 and receives more favorable treatment (not only under tax law) than SEs established in another legal form.

These recent legislative changes are in line with the idea that the cooperative form is the "most natural" for a social enterprise.

3.1.2 Social Enterprise in the Company Form

Under the first model of legislation, cases in which national legislators provide for SEs in the company form are, as previously noted, exceptional. [55] An SE in the company form is a particular type of company intended not to distribute profits to shareholders or maximize shareholder value but to pursue a social purpose, the general interest, or the interest of the community or maximize "social value." [56] The company form does not, in itself, raise particular concerns regarding the pursuit of an SE's typical purpose if and to what extent the law clearly assigns a social objective to these companies and restricts profit distribution [57] (and, of course, if enforcement is reliable and effective). [58] Furthermore, SEs in the company form might be more effective in fulfilling their objectives, given their greater financial capacity compared with SEs established in other legal forms. Being their structure based on the capital individually held (one share, one vote), these companies should potentially attract more investors than other types of organizations, such as cooperatives, in which capital held is irrelevant to governance (one member, one vote).

However, these strengths of the company form are also risky aspects for a social enterprise's identity. Being a capital-driven organization, an SE incorporated as a company could potentially be controlled by a single shareholder, thereby losing its democratic or participatory character. [59] An SE in the company form could also become a manager-run enterprise since members' control and active participation are not required the way that they are in the cooperative form. This arrangement can even be risky for a social enterprise's identity, considering certain findings in the fields of behavioral law and economics. These findings indicate that, under certain

[55] Of course, as is clarified in the main text, an SE in the company form may also be found in those jurisdictions that adopt the second model of legislation, in which SE is a legal qualification, open to entities incorporated in various legal forms, including that of a company.

[56] Liptrap (2020), p. 15.

[57] The fact that the company SE has a share capital per se does not imply, of course, that shareholders are entitled to receive profits. In addition, it must be noted that SE legislation, rather than prohibiting the distribution of profits, usually more opportunely mandates a certain use of the profits, thereby impeding their full distribution to shareholders: cf. Fici (2017); Fici (2020); Liptrap (2020), pp. 19 f.

[58] On the importance of enforcement in SE regulation, see Brakman Reiser (2013); Brakman Reiser and Dean (2014).

[59] Cf. Lloyd (2010), which explains that the CIC—as compared to a charity—finds its justification in that it offers its founders the possibility of controlling the organization.

conditions, managers are less inclined to transfer resources to third-party beneficiaries compared to not only their shareholders but also themselves, were they not acting as agents. A likely reason for this is that managers tend to adopt principles to curry favor with company ownership and satisfy shareholders' interests to retain their positions. [60]

Therefore, compared to SEs in the cooperative form, SEs in the company form need rules imposing specific restrictions to avoid potential deviations from their social mission. In fact, an SE in the company form has, in principle, a weaker identity as an SE, which is at risk if, among other things, legislators do not set limits on the control of certain shareholders or precise rules on the ownership and control of the company. [61] For example, Italian Legislative Decree no. 112/2017 stipulates that a single individual or for-profit entity may participate in, but not control or direct, an SE. [62] This approach resolves the issue almost entirely, making the company SE a useful structure, notably for second-degree aggregation among primary SEs or operating as a subsidiary of other SEs, third-sector entities, or nonprofit organizations.

Another interesting provision to this effect is found in art. 9, paragraph 1, of Slovenian Law no. 20/2011, which limits for-profit companies' potential to establish SEs by providing that they may do so only to create new jobs for redundant workers (and explicitly providing that they may not do so to transfer the enterprise or its assets to the SE). [63] Notable as well is a rule set by the (no longer existing) Belgian *société à finalité sociale* (SFS), according to which no shareholder could have more than one-tenth of the votes in the shareholders' general meeting. [64]

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[60] Cf. Fischer et al. (2015). It is generally agreed that agents tend to behave less generously than their principals in both the ultimatum and dictator games: cf. Hamman et al. (2010).

In our opinion, to be consistent with its institutional objectives, an SE in the company form should have a governance structure that either (a) directly involves the shareholders in the management of the enterprise, if they are actually motivated by a sense of altruism; (b) 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 © 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 organization's social mission.

[61] See the preceding footnote about our recommendations on how this might be accomplished.

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

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

[63] 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 qualification if it is subject to the dominant influence of one or more for-profit companies.

[64] Cf. repealed art. 661, para. 1, no. 4, of the Belgian Company Code. This maximum percentage was even lower (i.e., equal to one-twentieth), if the holder of equity (i.e., the shareholder) was a

3.2 Social Enterprise as a Legal Qualification

The laws ascribed to the second model of legislation aim to establish a particular legal category of entities—that of social enterprises—that have some common characteristics relative to their pursued purpose (a social purpose), the activity conducted to pursue that purpose (an activity of general or collective interest), profit use, and some aspects of governance. These laws assume these characteristics to be requirements for the qualification or accreditation of an organization as a social enterprise. In contrast, the legal form of an entity's incorporation is not relevant for its qualification or accreditation as an SE; thus, under this legislation, SEs may, in principle, have different legal forms. There may be cooperative or company SEs and, in some jurisdictions, even association or foundation SEs.

The plurality of the available legal forms for SEs is the element that most differentiates these laws from those in the group previously examined in this chapter. The other major distinction is that, applying this model of legislation, an organization receives the qualification to be an SE rather than incorporates as an SE, unlike what occurs when an SE is a legal form. In contrast, an SE's identity is not subject to variation, depending on the model of legislation adopted. Comparative analysis shows that in both models, SEs have substantially the same legal identity (apart from the profile of the legal form, as already noted). [65] This type of legislation is found in most national jurisdictions in the EU (and in two-thirds of those with specific SE laws), namely, Bulgaria, [66] Cyprus, [67] Denmark, [68] Finland, [69] France, [70] Greece, [71] Italy, [72] Lithuania, [73] Luxembourg, [74] Malta, [75] Romania, [76] Slovakia, [77]

"*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 law of the entity's incorporation.

[65] Cf. Fici (2016, 2017, 2020).

[66] Law no. 240/2018 on social and solidarity enterprises.

[67] Law on social enterprise of 2020.

[68] Law no. 711 of June 25, 2014, on registered social enterprises.

[69] Law no. 1351/2003 of December 30, 2013, on social enterprises.

[70] Art. L3332-17-1 of the Labor Code on the solidarity enterprise of social utility.

[71] Law no. 4430/2016 on the social and solidarity economy. However, on the questions posed by this legislation, cf. Adam (2019).

[72] Legislative decree no. 112/2017 of July 3, 2017.

[73] Law no. IX-2251 of June 1, 2004.

[74] Law of December 12, 2016, on social impact societies, as amended by Law of August 31, 2018.

[75] Social Enterprise Act no. IX of 2022.

[76] Art. 8 ff. on social enterprise of Law no. 219/2015 of July 23, 2015, on the social economy.

[77] Law no. 112/2018 of March 13, 2018, on social economy and social enterprises.

Slovenia, [78] and Spain. [79] More precisely, in some countries, such as Bulgaria, Finland, Italy, Slovakia, and Slovenia, the law permits entities incorporated in any legal form (company, cooperative, association, or foundation) to qualify as SEs. [80] In other countries, such as Luxembourg, the law restricts SE qualification to entities incorporated as companies (or only certain types of companies) or cooperatives. [81] In the Maltese SE law passed in 2022, one qualification requirement is that the entity be established in the legal form of a company, partnership, or cooperative; [82] however, the same law foresees the potential expansion of the admissible legal forms to include foundations. [83]

Two recent laws adopted yet another approach. In Belgium, after the 2019 reforms, SE became a legal accreditation; however, it can only be obtained by cooperatives (upon the concession of the Minister of the Economy). In the Latvian Law of 2017, SE is a legal qualification but may be acquired only by limited liability companies. This suggests a new trend emerging in which jurisdictions combine both general models of legislation, so that SE is a legal qualification, but only entities with a specific legal form (either a cooperative or company) may qualify. This results in the convergence of the two models of legislation identified and described in this chapter.

SE as a legal qualification is a model of legislation increasingly praised by legal scholars [84] and increasingly diffused across the EU. Thus far, it has also been a reference model for EU Institutions. In the European Commission's "SBI" Communication of 2011, which provoked a new wave of laws on SEs in the EU, [85] no reference is made to a specific legal form of incorporation defining an SE. Similarly, "EaSI" Regulation no. 1296/2013 specifies that legal form is irrelevant for the

[78] Law no. 20 of 2011 on social entrepreneurship.

[79] With particular regard to integration enterprises and special employment centers: cf., respectively, Law no. 44/2007 of December 13, 2007, and art. 43 ff. of Royal Legislative decree no. 1/2013 of November 29, 2013. Cf. Vargas Vasserot (2021), pp. 80 f.

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

[81] More precisely, according to Luxembourgian Law of 1December12, 2016, only the *société anonyme*, *société à responsabilité limitée*, and *société coopérative* may qualify as social impact societies (SISs). Along the same lines, 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 *sociedad cooperativa* (art. 4, para. 1). In contrast, the possibility exists that legislators permit even an individual entrepreneur to qualify as an SE, as happens in Finland, where Law no. 1351/2003 allows the registration as SEs of all traders, including individuals, registered under sect. 3 of Law no. 129/1979, and in Slovakia, where art. 50b, para. 1, of Law no. 5/2004, refers, in defining an SE, to both legal and physical persons (the same occurs in Slovakian Law no. 112/2018, with regard to the definition of the subjects of the social economy, among which are social enterprises).

[82] See sect. 3(1)(a), Act no. IX of 2022.

[83] See sect. 3(3), Act no. IX of 2022.

[84] Cf., in particular, Sørensen and Neville (2014); more recently Lavišius et al. (2020).

[85] Cf. Fici (2020).

definition of an SE, which is "an undertaking, regardless of its legal form . . ." [86] Furthermore, in its Resolution of July 5, 2018, the European Parliament proposed the adoption of a "European Social Enterprise Label" to be awarded to enterprises complying with certain criteria but "established in whichever form available in Member States and under EU law." [87]

National-level legislators also seem to appreciate the opportunities this model of SE legislation brings. The most recent national SE laws, such as those passed in Malta in 2022 and Cyprus in 2020, provide for SE as a legal qualification. In some countries that already had a specific law on social cooperatives, such as France, Italy, and Slovakia, laws of this type have been subsequently approved. [88]

In effect, there are certain advantages that may be attributed to this model of legislation in comparison to the preceding one. It permits an existing organization to become an SE without having to reincorporate and an existing SE to lose its qualification without having to dissolve or convert into or reincorporate as another legal form, thereby reducing costs and facilitating access to (and exit from) the SE legal qualification. [89] This holds particularly true for organizations already established in a legal form different from that usually chosen by legislatures (e.g., associations or foundations), following the first model of legislation, to accommodate an SE (i.e., company or cooperative). Imposing sanctions may be simpler for the public authority in charge of enforcing SE qualification laws (and less onerous for the organization) because it may suffice to revoke the qualification (or threaten to revoke it if problems are not resolved) rather than dissolve or convert a legal entity. [90]

However, the most considerable advantage of this model is that it allows an SE to choose the legal form under which it prefers to conduct business, without imposing either the cooperative or company form (or another specific legal form), which differs from what occurs when a jurisdiction adopts the first model. The plurality of the available legal forms permits an SE to shape its structure in the most suitable manner, according to its circumstances (e.g., the nature of the founders or members: workers, investors, first-degree SEs, etc.), the tradition (e.g., cultural, historical) where it has its roots (e.g., of associations or cooperatives), or the nature of the business it conducts (e.g., labor- or capital-intensive).

Furthermore, to the extent that 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), independent from their legal form of incorporation, this

[86] This regulation was replaced by Reg. no. 1057/2021 establishing the European Social Fund Plus (ESF+). In this regulation, the definition of social enterprise is found in art. 2(1) n. 13: see infra in the main text.

[87] See Vargas Vasserot (2021), pp. 68 f.; Liptrap (2021a) for comments on this proposal, which followed the final recommendations provided by the Author of this chapter in Fici (2017).

[88] None of these countries has repealed its existing laws on social cooperatives.

[89] Cf. Sørensen and Neville (2014), p. 284.

[90] Cf. Sørensen and Neville (2014), pp. 284 f.

model ensures that, in any event, all SEs have a common identity as SEs. [91] Therefore, there is no evidence that the laws in this second group are, in general, less strict than those in the first group. Of equal importance is the fact that this model allows legislators to organize and combine the legal qualification requirements in different ways, depending on the legal form of SE incorporation, thereby making the qualifications more flexible. [92] In addition, this model resolves the dilemma between the company and cooperative forms, which the previous model of SE legislation inevitably poses. [93]

Nevertheless, the benefits of the cooperative form—already highlighted in this chapter—might and should be recognized even within this model of legislation. For example, in Italy, although SEs may assume any possible legal form, social cooperatives are *ope legis* social enterprises and receive more favorable tax benefits than SEs incorporated in other legal forms. This preferential regime (as compared to other SEs) finds its rationale in the underlined virtues of the cooperative form, so that it also appears reasonable and justifiable under competition and state-aid laws.

4 Concluding Remarks

Social enterprise legislation is widespread in the EU, as three-quarters of Member States have specific laws on social enterprises. In this chapter, these laws have been classified according to two different models. In the first model, the law provides for an ad hoc legal form for social enterprises, which is usually that of the social cooperative. In the second model, the laws identify some legal requirements (usually regarding the purpose pursued, profit uses, activity conducted, and some aspects of governance), which allow an entity to obtain the qualification of a social enterprise (or the accreditation as a social enterprise), regardless of whether it is established as a cooperative or company or even as an association or a foundation. The second model is increasingly used by national legislators. Its main benefit lies in the fact that it recognizes social enterprises in various legal forms. Therefore, in this second model, social cooperatives are not the only social enterprises. [94] This model also presents

[91] Moreover, nothing prevents legislators from providing different treatment to 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.

[92] For example, the democratic and participatory character of an SE in the cooperative form permits the relaxation of the profit nondistribution requirement, while the nondemocratic character of an SE in the company form imposes rigidity with regard to profit distribution, as well as specific measures to ensure stakeholders' involvement.

[93] This does not mean, however, that SEs in the company form do not also require specific rules under this model of legislation to make it (more) consistent with an SE's identity, as clarified *supra* in the main text.

[94] Several reasons however remain as to why social cooperatives should deserve, even within this second model of legislation, special consideration relative to social enterprises in other legal forms,

certain practical advantages, for both private entities that aspire to qualify as SEs and public administrations that enforce the law.

The second model is inspired by the concept of social enterprise adopted by the European institutions, particularly the "SBI" Communication of 2011, which gave rise to a new wave of social enterprise laws. [95] In a 2018 resolution, the European Parliament referred to this model of legislation when calling on the Commission to introduce a European statute establishing the status or label of the "European social enterprise."

However, European institutions appear to be currently focusing their attention on other concepts. In the December 2021 "Action Plan for the Social Economy," the European Commission showed a preference for addressing the broader category of social economy entities, which includes not only social enterprises but also other subjects identified solely based on their legal form (e.g., associations, foundations, mutuals, cooperatives). [96] In addition, the European Parliament has recently proposed regulations introducing the European association and a directive of minimum harmonization on nonprofit organizations.

In this changed climate, where new strategies have been employed, [97] the hope is that forces will not be dispersed in attempts that are too ambitious and certainly more complex than the one to create a harmonious legislative framework for social enterprises in Europe, which, based on the existing national-level legislation, would be more feasible.

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by reasons of their intrinsic benefits derived from their cooperative structure, as explained in the main text. However, of great significance in this regard is the shift from the company form to the cooperative form that took place in Belgian law, where in 2019, the social purpose company was replaced by the cooperative accredited as social enterprise.

[95] If we are not mistaken, after the SBI Communication of 2011, 14 Member States either adopted new SE laws or changed the existing ones, while legislative proposals were put forward in the other Member States.

[96] In addressing social economy organization law, it may be useful to read Hiez (2021).

[97] As already testified, at the legislative level, by Regulation no. 1057/2021, replacing Regulation no. 1296/2013, which provided a new definition of social enterprise that includes social economy organizations. Cf. art. 2(1), n. 13, Reg. no. 1057/2021, which reads: "'social enterprise' means an undertaking, regardless of its legal form, including social economy enterprises, or a natural person which: '(a) in accordance with its articles of association, statutes or with any other legal document that may result in liability under the rules of the Member State where a social enterprise is located, has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes, and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives; (b) uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective; (c) is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact.'"

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