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Recognition and legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective

Antonio Fici*

Abstract

Social enterprise lawmaking is a growth industry. In the United States alone, over the last few years, there has been a proliferation of state laws establishing specific legal forms for social enterprises. The situation is not different in Europe, where the process began much earlier than in the United States and today at least fifteen European Union member states have specific laws for social enterprise. This article will describe the current state of the legislation on social enterprise in Europe, inquiring into its fundamental role in the development of the social economy and its particular logics as distinct from those of the for-profit capitalistic economy. It will explore the models of social enterprise regulation that seem more consistent with the economic growth inspired by the paradigms of the social economy. It will finally explain why, in regulating and shaping social enterprise, the model of the social enterprise in the cooperative form is to be preferred to that of the social enterprise in the company form.

Keywords

Social enterprise; Social economy; Cooperatives; Comparative law; Non-profit corporate governance

JEL codes

K22; L31

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1. Introduction

“Social enterprise” is the term by which, almost universally (despite certain nuances that depend on the specific legislative and scholarly context), reference is made to an organization that pursues objectives of general interest, community interest or social benefit through the performance of an entrepreneurial activity involving the use of business logics and methods¹.

So defined and identified, social enterprises must be distinguished from both the more traditional not-for-profit organizations of a distributive nature, also known as donative non-profits (including, for example, in Italian law, volunteer organizations and social promotion associations), which pursue the same objectives as social enterprises but perform activities that are not (and may not be) entrepreneurial²; and the classical for-profit entities (*i.e.*, commercial companies or business corporations) and ordinary cooperatives, which equally conduct enterprise activity, but for different purposes than social enterprises, as the former is (primarily) oriented toward the distribution of profits to shareholders (*i.e.*, a lucrative purpose)³, while the latter is (predominantly) devoted to the provision of services to members (*i.e.*, a mutual purpose)⁴.

¹ Cf. BRAKMAN REISER, *Theorizing Forms for Social Enterprise*, in 62 *Emory Law Journal*, 2013, p. 681. Research conducted by the EMES group has significantly contributed to the nucleation of the concept of social enterprise, first in Europe and then elsewhere. The EMES formulated a definition of social enterprise—or more precisely, certain criteria (or indicators) for the identification of the social enterprise—which has been updated over time: cf. DEFOURNY & NYSENS, *The EMES Approach of Social Enterprise in a Comparative Perspective*, EMES Working Papers Series, no. 12/03, in http://emes.net/content/uploads/publications/EMES-WP-12-03_Defourny-Nyssens.pdf.

² North American scholarship speaks of donative non-profits, to be distinguished from commercial non-profits: cf. first, HANSMANN, *The Role of Nonprofit Enterprise*, 89 *Yale Law Journal*, 1980, p. 840 f., 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”. The same author also reports that the separation is not so clear: namely, these are ideal types that stand at opposite poles and admit hybrids (*i.e.*, non-profit organizations that are financed through both donations and prices).

The donative nature of Italian volunteer organizations is the result of several provisions of the law that identifies them (see Italian Law 11 August 1991, no. 266, and cf. FICI, *Imprese cooperative e sociali. Evoluzione normativa, profili sistematici e questioni applicative*, Torino, 2012, p. 163 ff.). The same is true for the social promotion associations of Italian Law 7 December 2000, no. 383.

³ Art. 2247 of the Italian Civil Code is clear in this respect when it includes the purpose of dividing profits among members in the definition of a company. So true is this that Italian legal scholarship enquires into the possibility of setting up a company without a profit purpose (cf. MARASÀ, *Le “società” senza scopo di lucro*, Milano, 1984). However, within the Italian “third sector”—or, more broadly, the “social economy” sector—the legislature has provided for the possibility of companies without a profit purpose. Outstanding examples of this are joint-stock companies that manage “mutual funds for the promotion and development of cooperation”, established in accordance with art. 11, Italian Law 31 January 1992, no. 59, and “social enterprise” companies that may be established under Italian Legislative Decree 24 March 2006, no. 155.

⁴ The requirement that ordinary cooperatives achieve a mutual purpose, which is understood in the classical sense as the provision of services to members, is now an almost undisputed conclusion in Italian scholarship, especially (but not only) in light of the requirements under arts. 2512 and 2513 of the Italian Civil Code (cf. BONFANTE, *La società cooperativa*, in *Trattato di diritto commerciale* directed by Cottino, V, Padova, 2014, p. 129 ff.). A similar conclusion is valid at the international level (cf. FICI, *An Introduction to Cooperative Law*, in CRACOGNA, FICI & HENRY (eds.), *International Handbook of Cooperative Law*, Berlin-Heidelberg, 2013, p. 3 ff.). Nevertheless, the preceding conclusion applies only to ordinary cooperatives, since (as, indeed, happens for commercial companies) there may well exist special cooperatives that are required by the law to pursue different purposes, also of general interest, and which, therefore (as we shall see later in the main text), can be situated within the conceptual framework of the social enterprise. Another clarification concerns the relationship between the mutual purpose (of ordinary cooperatives) and the social function of cooperatives: The exclusion of ordinary cooperatives with a mutual purpose from the social

As one legal scholar has correctly observed, “social enterprise lawmaking is a growth industry”⁵. Indeed, in the United States alone, over the last few years, there has been a proliferation of state laws establishing specific legal forms for social enterprises—which, in this country, manifest in different ways, such as low-profit limited liability companies (L3Cs), benefit or public benefit corporations (BCorps), and social purpose corporations (SPCs), to mention only the most well-known⁶.

The situation is not different in Europe, although, here, the process began much earlier than in the United States. Today, at least 15 EU member states have specific laws for social enterprise (while some, such as Greece and Italy, have more than one). Furthermore, in many other member states, the adaptation of ordinary legislation has permitted the establishment and operation of organizations attributable to the conceptual category of the social enterprise⁷.

This legislative process began in 1991, when a law for social cooperatives, which later became a model for many EU (and non-EU) countries, was promulgated in Italy⁸. This article will explore the developments of this process—and, therefore, will examine the various models of social enterprise legislation that may be found both in Italian law (as a result of the evolution) and EU law (since this theme assumes central importance for the thesis that this article intends to propose).

This article will describe the current state of the legislation on social enterprise, inquiring into the fundamental role it plays in the development of the social economy and its particular logics as distinct from those of the for-profit capitalistic economy. It will also explore the models of social

enterprise sector does not deny that they, too, have a social function, as acknowledged by the Italian Constitution (see art. 45). Indeed, as will become clear in the text, it is the inherent social function of cooperatives that makes the cooperative structure a privileged base on which to “graft” the social enterprise.

⁵ In these terms, GALLE, *Social Enterprise: Who Needs It?*, in 54 *Boston College Law Review*, 2013, p. 2025.

⁶ Further denominations include those of the general benefit corporation, the sustainable business corporation and the specific benefit corporation. Lists of these laws, with useful tables presenting their main content, may be found in MURRAY, *Corporate Forms of Social Enterprise: Comparing the State Statutes*, 2015, in www.ssrn.com; and BISHOP, *Fifty State Series: L3C & B Corporation Legislation Table*, Legal Studies Research Paper Series, Research Paper 10-11, April 1, 2014, in www.ssrn.com.

⁷ The list of sources considered for the purposes of this article can be found *infra* at fn. 44.

For lists and data on laws on social cooperatives and social enterprises in Europe, cf. BOUCQUIAUX, FICI & ROELANTS, *Comparative table of existing legislation in Europe*, in ROELANTS (ed.), *Cooperatives and social enterprises. Governance and normative frameworks*, Brussels, 2009, Annex; and, now, 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. This last research report enumerates 20 member states with specific legislation for social enterprises (including social cooperatives). However, we have chosen to indicate in the text the lower number of 15 as a precaution, since, in some of the 20 countries mentioned in the ICF’s report, the legislation on social enterprise is, in fact, “under development”—and, thus is not yet in force. Moreover, with regard to other countries (e.g., Germany), the existence of specific legislation on social enterprise may be questioned. It is possible, at the very least, to discuss whether existing legislation, although not specifically designed for social enterprises, permits their establishment and operation through the adaptation of general legal forms (and, in particular, the cooperative form).

⁸ Although the cornerstone of the European legislation on social enterprise is considered, by most scholars, to be the Italian law on social cooperatives of 1991 (cf., among others, DEFOURNY & NYSENS, *op. cit.*, p. 3; and, more recently, CRAMA, *Entreprises sociales. Comparaison des formes juridiques européennes, asiatiques et américaines*, Think Tank européen Pour la Solidarité – PLS, Juin 2014, p. 17; as well as GALERA & BORZAGA, *Social Enterprise. An International Overview of Its Conceptual Evolution and Legal Implementation*, in 5 *Social Enterprise Journal*, 2009, p. 210 ff.)—and, indeed, it cannot be denied that this law initiated a process that involved several European 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 possibility of a Community Benefit Society (Bencom), or a company whose economic activity “is being, or is intended to be, conducted for the benefit of the community” (see sec. 1(2)(b) IPSA 1965, and now sec. 2(2)(a)(ii) of the Co-operative and Community Benefit Societies Act of 2014).

enterprise regulation that appear to be more consistent with the economic growth inspired by the paradigms of the social economy than that inspired by those of the for-profit capitalistic economy.

Before entering *in medias res*, however, it seems appropriate to first state some methodological considerations, some general background observations, and a *caveat* to scholars and, especially, operators of the social economy sector.

Firstly, a study on the legal forms of social enterprise today cannot overlook the comparative perspective. Albeit “social”, the organizational forms in question are, in fact, “enterprises”—and, therefore, are subjects and actors of commercial law, which, as known, has a natural tendency towards trans-nationality, especially in times of socio-economic and legal globalization⁹. The same is true of other entities of the social economy, notably cooperatives¹⁰. The comparative perspective provides insights that domestic legal scholars can no longer neglect. It should be added, moreover, that in the study of joint-stock companies and other typical subject matters of the capitalistic economy, the comparative method is now the norm, largely because of the increasing importance that foreign law assumes for the purposes of the interpretation, reconstruction or even integration of national law¹¹. Thus, legal scholars’ consideration of the external situation is necessary for strengthening the role of the social economy and its ability to contribute to a better world¹².

Secondly, the analysis conducted in this article will be based on existing law, which will be re-examined through a critical perspective and *de iure condendo*, which has at least three main reasons.

The first is that the subject matter of the Italian social enterprise, as introduced and regulated by Legislative Decree no. 155/2006, might soon be subject to changes and integrations, given the ambitious bill of reform recently passed by a chamber of the Italian Parliament and addressing the law of the third sector, which involves social enterprises and their regulation¹³.

The second is that, at the EU level, the issue of “the need for ... a possible common European statute for social enterprises” was included in the important European Commission Communication “Social Business Initiative” of October 2011¹⁴ as an issue that would require further consideration¹⁵. If it were introduced, such a European statute would stand beside the existing ones

⁹ A thesis recently reiterated by PORTALE, *Tra diritto dell’impresa e metamorfosi della s.p.a.*, in *Società, banche e crisi d’impresa. Liber amicorum Pietro Abbadesse*, directed by Campobasso, Cariello, Di Cataldo, Guerrera, Sciarrone Alibrandi, I, Torino, 2014, p. 107 ff., and, in particular, p. 126.

¹⁰ Something that we have had the opportunity to emphasize several times, most recently in FICI, *Intervención en la presentación del International Handbook of Cooperative Law*, in *Congreso Continental de Derecho Cooperativo* (Guarujá, San Pablo, Brasil, 8, 9 and 10 October 2013), Buenos Aires, Intercoop, 2014, p. 195 ff.

¹¹ Cf. PORTALE, *Il diritto societario tra diritto comparato e diritto straniero*, in *Rivista delle società*, 2013, p. 325 ff., which concludes (*ivi*, p. 333) in the sense that, especially in certain areas of law, “the portability of foreign solutions [constitutes] a tool for the development of the law” [translation ours].

¹² Indeed, under the slogan “cooperative enterprises build a better world”, the United Nations declared 2012 to be the International Year of Cooperatives.

¹³ Cf. A.S. no. 1870, *Delega al Governo per la riforma del Terzo settore, dell’impresa sociale e per la disciplina del Servizio civile universale*, approved by the Italian Chamber of Deputies on 9 April 2015. For a more detailed comment on the current (at the time of writing) version of this bill, cf. FICI, *L’impresa sociale nel progetto di riforma del terzo settore italiano: appunti e spunti*, in *Impresa sociale*, no. 5/2015, p. 83 ff.

¹⁴ 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*.

¹⁵ In these terms, COM(2011) 682 final, *cit.*, p. 12.

on the European Company (SE), the European Cooperative Society (SCE), and the European Economic Interest Group (EEIG)¹⁶. Given the relative novelty of the topic, the present variety of national approaches, and, above all, the absence of specific legislation on social enterprise in most EU member states, this cannot help but raise the question: “Which European social enterprise?”

The third reason is that, in Europe (and not only in Europe¹⁷), laws on the social economy are being passed that identify social economy entities or that lay down principles and criteria for their identification¹⁸. These general laws on the social economy need to be coordinated with those dedicated to the individual actors of the social economy, notably social enterprises, in order to avoid contradictions and inconsistencies that might jeopardize the understanding and visibility of the sector.

Thirdly, this article will seek to incorporate some suggestions from behavioural law and economics¹⁹. It should be noted that this methodology must be applied not to individuals, but to organizations—specifically organizations like social enterprises—and their constituent bodies. This complicates the picture, largely because this specific type of analysis is not well developed, even in the US, where the behavioural economic analysis of law is more advanced.

In this communication, the European Commission attempts, among other things, to define social enterprises, as it does in the following terms: “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” (*ivi*, p. 2). The Commission goes on to specify the particular enterprises to which it wishes to refer (cf. *ivi*, p. 2-3).

According to DEFOURNY & NYSSSENS, *op. cit.*, p. 19, the European Commission adopts a definition of social enterprise that clearly exists at the crossroads of the three major schools of thought on social enterprise: “A social enterprise is an operator in the social economy [EMES school] whose main objective is to have a social impact rather than make a profit for their owners or stakeholders [the three schools]. It operates by providing goods and services for the market [earned income school] in an entrepreneurial and innovative fashion [social innovation school] and uses its profits primarily to achieve social objectives [the three schools]. It is managed in an open and responsible manner and, in particular, involves employees, consumers and stakeholders [EMES school] affected by its commercial activities”.

¹⁶ 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.

¹⁷ In the Canadian province of Quebec, for example, a law on social economy was adopted on 10 October 2013. Similarly, in many Latin American countries, there exist laws on the *economía social y solidaria* (social and solidarity economy): cf., for example, in Honduras, *Ley del sector social de la economía* of 1985; in Colombia, *Ley por la cual se determina el marco conceptual que regula la economía solidaria* no. 454 of 1988; in Ecuador, *Ley orgánica de la economía popular y solidaria y del sector financiero popular y solidario* of 2011; and in Mexico, *Ley de la economía social y solidaria* of 2012.

¹⁸ 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 which, cf. respectively, ARRIETA IDIAKEZ, *Concreción de las entidades de la economía social*, in 116 *Revesco*, 2014, p. 36 ff.; APARÍCIO MEIRA, *A lei de bases da economia social portuguesa: do projeto ao texto final*, in 24 *CIRIEC-España. Revista jurídica de economía social y cooperativa*, 2013, p. 21 ff.; HIEZ, *La richesse de la loi Économie sociale et solidaire*, in *Revue des sociétés*, Mars 2015, p. 147 ff. 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 social economy (at least, taking the above-mentioned laws as reference models), as it is, in fact, a law on social cooperatives (see, in this sense, NASIOULAS, *Greek Social Economy at the Crossroads. Law 4019/2011 and the Institutionalization Challenge*, CIRIEC WP no. 2011/10, p. 13).

¹⁹ The theoretical foundations of which are well illustrated by G. RESTA, *Gratuità e solidarietà: fondamenti emotivi e “irrazionali”*, in *Rivista critica del diritto privato*, 2014, p. 39 ff.

Finally, the *caveat* mentioned above has less of a legal flavour; it expresses, instead, a personal assessment by the author of this article *qua* enthusiast of this matter. The feeling—which, obviously, can be shared or not and is open to reconsideration by its originator or in light of supervening factors—is that the autonomy of the non-profit sector; of the social enterprise; and, more generally, of the social economy relative to the for-profit sector, the capitalistic economy and its own logics, is at risk. Thus, its autonomy should now be reaffirmed with force and, especially, defended against various attempts by the for-profit capitalistic sector to “invade the field”—not, as would be desirable, in order to establish virtuous relationships of collaboration with social economy entities²⁰, but to “capture” the sector and “control” it, thereby extending its capitalist paradigms, which may result in a *de facto* annulment of the peculiarities of the social economy sector.

The “feeling” is that this strategy, which embodies various arguments, is developing and evolving by availing itself of important studies, especially from an influential area of US scholarship (*i.e.*, the “Chicago School”), and of legislators ever more inclined to support the dominant thought of the tiny minority of the wealthiest people.

This strategy was initially confined to denying a specific meaning to the non-profit—namely, to the profit non-distribution constraint—and, therefore, to the legal forms and categories based on this element, by maintaining that the “for-profit philanthropy” is more efficient. The consequences of this thesis are self-evident in, for example, the field of taxation (since, if non-profit legal forms do not carry particular advantages over for-profit forms, the latter should be granted access to the same tax benefits as the former)²¹. Now it seems that, in a more sophisticated manner, this strategy tends

²⁰ On this point, cf. FICI, *Imprese cooperative e sociali*, cit., p. 149 ff.

²¹ In this latter sense, cf. especially MALANI & E. POSNER, *The Case for For-Profit Charities*, in 93 *Virginia Law Review*, 2007, p. 2017 ff., which, based on these assumptions, holds that there is no compelling reason to connect special tax benefits (exclusively) to charitable activities conducted by non-profit organizations rather than (also) by for-profit entities. Therefore, an entity’s legal form (*i.e.*, profit or non-profit), can be considered irrelevant in terms of its tax treatment; what matters is only the activity conducted. According to these authors, there are, indeed, good reasons to believe that for-profit organizations are able to provide community services more efficiently than non-profit organizations. Primarily, the profit purpose encourages the most efficient entity management and discourages the waste of resources that otherwise occur, often on a massive scale, in the non-profit sector (and which, moreover, could never be solved by competition among non-profit organizations alone). Abuses of the non-profit form are also made possible by “inefficient non-altruistic” entrepreneurs, who may choose this form only because the tax benefits allow them to stay on the market despite their inefficiency. It must also be noted that the authors consider their thesis to be equally valid both with regard to charities or donative non-profits (*i.e.*, what we would call the distributive third sector) and with reference to commercial non-profits (*i.e.*, the entrepreneurial third sector, including social enterprises). They also include in their conclusions for-profit enterprises that perform, from a perspective of corporate social responsibility, secondary activities that can be deemed to pursue public or community interest. In relation to these secondary activities, it is suggested that these enterprises should receive the same tax treatment enjoyed by non-profit organizations. This is particularly true in light of the consideration that such enterprises might be more efficient in pursuing public or community interest, since they may rely on economies of scope deriving from the commercial activities that constitute their core business (the example that the authors offer is that of Starbucks buying coffee beans from poor producers from the Third World). The overlap between the concept of social enterprise and that of corporate social responsibility appears clear here—and, in fact, the authors consistently point out the irrelevance, for the purposes of their thesis, of the real motivations for doing good (*ivi*, p. 2064). About one thing, there is no doubt that the authors are right: Devices are necessary to avoid the organizational inefficiencies of non-profits. Furthermore, the tax benefits reserved for non-profit organizations may attract the interest of non-altruistic entrepreneurs—an issue that would not arise if the benefits were not related solely to the legal form (cf. *ivi*, p. 2066 s.). Along the same lines, but with special attention to the subjects of corporate social responsibility and taxation, cf. HENDERSON & MALANI, *Corporate Philanthropy and the Market for Altruism*, in 109 *Columbia Law Review*, 2009, p. 571 ff. Cf. also BRAKMAN REISER, *For-Profit Philanthropy*, in 77 *Fordham Law Review*, 2009, p. 2437 ff., which examines “google.org” as a philanthropic department of Google, Inc., and investigates the reasons (essentially, to avoid legal limits and constraints) that prompted Google, Inc. to adopt this organizational solution (rather than the enterprise foundation, which was initially established by this company for the

to appropriate the instruments of the social economy to distort or bend them to the objectives and logics of the capitalistic economy, as will be later explained in addressing the hypothesis of the social enterprise in the company form.

Therefore, it is also the duty of legal scholars to contribute to the development of appropriate distinctions, as this article seeks to do, by providing concrete solutions to the previously highlighted issues.

2. The essential function of social enterprise law

Although it is impossible to separate these two profiles, as they influence each other and are mutually interconnected (for the role of a legal regime is inseparable from its contents, and vice versa), this article will first discuss the function of a specific regulation of social enterprise and, subsequently, explore its possible models.

As already observed, *ad hoc* legal forms for social enterprise began to be adopted by European legislatures in the 1990s. The social cooperative of Italian Law no. 381/91 initiated this process. Today, at least 15 EU countries have laws specifically dedicated to the phenomenon of the social enterprise²², while, in other EU countries, bills addressing this object are under either discussion or approval²³. Moreover, the matter of the social enterprise does not concern only the EU; it also extends to the US, among other countries²⁴.

One of the primary and most common justifications offered, both in Italy and elsewhere, for the emergence of the studied regulations on social enterprise has been the inadequacy of the existing legislative framework. Extant laws are considered incapable of awarding appropriate legal status to entrepreneurial phenomena characterized by the absence of a profit purpose and/or the pursuit of community or general interest.

It is not that organizational law does not permit the establishment and operation of social enterprises, but, rather, that it appears to be ineffective in several respects. The law of associations; foundations; and, in other legal systems, non-profit corporations and charities has limited or hindered the ability of these legal types of organizations to carry out business activities. Alternatively, organizational law has not, thus far, offered a comprehensive legal framework consistent with this option (since these legal forms were originally conceived by legislatures for the development of donative or redistributive activities, rather than for business activities)²⁵.

same purpose). The mentioned research also discusses the effects of this original organizational model on the law of non-profit organizations, on that of for-profit entities, and on the boundaries between these two fields (which this model evidently makes less clear), inquiring into the risks and dangers that the model generates (in terms, *e.g.*, of the possible contamination of altruistic objectives, the re-appropriation of resources due to the absence of an asset lock, and the negative consequences that these latter circumstances may have on the overall image of the non-profit sector). Explicit criticism for the theses of Henderson, Malani and Posner may be found in GALLE, *Keep Charity Charitable*, in 88 *Texas Law Review*, 2010, p. 1212 ff.

²² For the legal sources considered in this article, cf. *infra* at fn. 44; other lists and references in the literature cited at fn. 7.

²³ Among these countries, Latvia, Luxembourg, Malta, Poland and Romania: cf. *A map of social enterprises and their eco-systems in Europe. Executive summary*, Report submitted by ICF Consulting Services, 31 October 2014, p. 3.

²⁴ Cf. *supra* at fn. 6.

²⁵ For example, with regard to the Italian jurisdiction, while it is now undisputed that associations and

Furthermore, these organizations could not, and still may not, have equity or, thus, make use of this method of business finance, largely because they are barred from distributing profits.

On the other hand, company law was, and still is, designed for entities characterized by a profit purpose—or, as stated in other contexts, to maximize shareholder value. Depending on the legal system, this either makes it impossible to pursue a different purpose through existing structures (because the law does not permit the establishment of companies without a profit purpose) or, at least, hampers such a pursuit, thus placing this different purpose at substantial risk (by preventing a company from committing itself, both throughout its existence and at the time of dissolution, to pursue a purpose other than the profit of the shareholders, while remaining subject to possible changes of the shareholders' (majority) will)²⁶.

Therefore, the pure legal forms of the non-profit sector and the pure legal forms of the for-profit sector each appeared inadequate to accommodate the phenomenon of an enterprise with purposes of general interest. Such ventures required a specific legal form, suited to the needs of a “hybrid” organization combining the typical activity of a for-profit organization with the typical purpose of a non-profit organization²⁷.

In fact, however, other and more fundamental reasons can be identified as fuelling the legislative choice to introduce tailored legal forms for social enterprises. These reasons are independent from possible incongruities or lacunae in existing organizational law; rather, they involve matters of policy related to the role of organizational law in promoting a certain type of organization.

After all, 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 focal type of organization, can a function be identified that cannot be effectively fulfilled by other branches of law, such as contract law or property law, such that organizational law becomes essential for the existence and development of the organizational model?

foundations may perform entrepreneurial activities even in a principal or exclusive manner (which, however, is not possible, for example, in Belgium, where the introduction of the company with a social purpose, the SFS, facilitated the combination of the performance of commercial activities, as main activities, with the pursuit of social purposes: cf. CRAMA, *op. cit.*, p. 19), the pertinent legal framework is so poor as to require complex hermeneutic operations to identify a minimum applicable statute in order to protect creditors and the market (on this point, cf. for all CETRA, *L'impresa collettiva non societaria*, Torino, 2003). Filling these lacunae is one of the most obvious objectives (relative to others, which, by comparison, appear somewhat obscure) of the Italian bill on the reform of the third sector with regard to the entities of Book I of the Civil Code (namely, associations and foundations): cf. A.S. no. 1870, Art. 3, lit. b) and lit. d).

²⁶ In Italian law, the general linkage between companies and profit purpose, in accordance with art. 2247 of the Italian Civil Code, makes it impossible to establish a company for a non-profit purpose in the absence of a special rule (*i.e.*, with respect to the general one in art. 2247, Civil Code) permitting such a purpose (on this point, cf. for all MARASÀ, *Le “società” senza scopo di lucro*, cit.). Similarly, with regard to cooperatives, the requisite pursuit of a mutual purpose has, in the past (*i.e.*, before the approval of the Law no. 381/91 on social cooperatives), led some judges to deny registration to cooperatives pursuing the general interest and not the interest of their members: cf. FICI, *Cooperative sociali e riforme del diritto societario*, in *Riv. dir. priv.*, 2004, p. 75 ff.

With regard to the North American and English contexts, cf. BRAKMAN REISER, *Governing and Financing Blended Enterprise*, in 85 *Chicago-Kent Law Review*, 2010, p. 643 ff.

²⁷ Cf. BRAKMAN REISER, *Governing and Financing Blended Enterprise*, cit., p. 645.

In a famous article on the essential role of organizational law, Professors Hansmann and Kraakman conclude that, in general, organizational law is necessary for establishing the autonomous and separate patrimony of an organization (which they call “asset-partitioning”). Neither contract law nor property law is an effective substitute for organizational law in performing this function²⁸.

This conclusion can hardly shock the European legal scholar, since, in European legal doctrine, albeit with different language and arguments, this concrete function of the law of organizations—and, in particular of juridical personality—has already been highlighted²⁹. More relevant to our discussion, however, is what Hansmann and Kraakman claim with specific regard to the law of non-profit organizations: namely, 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 organizations³⁰. This contention is definitely valid, and can be extended beyond the field of non-profit organizations³¹.

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 interest purpose that distinguishes social enterprises—organizational law plays a vital and irreplaceable role in defining the specific identity of the organizations, which is defined (first of all) by their particular goals. Therefore, the primary, essential and irreplaceable role of social enterprise law is (and should be) to establish a precise identity of social enterprises and to preserve their essential features. This justifies, *per se*, the existence of specific legislation on social enterprise and helps to identify its minimum and essential content.

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 social enterprises’ founders and members and is, consequently, a precondition for the existence and development of this particular type of business organization³².

²⁸ Cf. HANSMANN & KRAAKMAN, *The Essential Role of Organizational Law*, 110 *Yale Law Journal*, 2000, p. 386 ff.

²⁹ Cf., also for references to the European scholarship, GALGANO, *Persone giuridiche*, 2^a ed., in *Commentario del codice civile Scialoja-Branca* edited by Galgano, Bologna-Roma, 2006, p. 17 ff., 25 ff., 50 ff., which highlights the role performed by the concept of the juridical person (*i.e.*, concealing the special rules to which, in a deviation from ordinary rules, the legislature subjects the members of the group): that “sum of privileges”, including members’ limited liability, which, under certain conditions, the legislature grants to the members of an organization.

³⁰ Cf. HANSMANN & KRAAKMAN, *op. cit.*, p. 435 ff., and fn. 77 for the explanation.

³¹ Cf. already, but with reference to cooperatives and their mutual purpose, FICI, *The Essential Role of Cooperative Law*, in *The Dovenschmidt Quarterly*, 2014, no. 4, p. 147 ff.

³² In general, this particular interest of social entrepreneurs is protected by the European laws on social enterprises by reserving for social enterprises (*i.e.*, for entities that are established and operate in accordance with the relevant regulations), the exclusive right of use of the term “social enterprise” in their denominations (see, *e.g.*, art. 7, par. 3, Italian Legislative Decree no. 155/2006; art. 667, Belgian Company Code; art. 2, par. 2, Finnish Law no. 1351/2003; art. 18, par. 3, Slovenian Law no. 20/2011; art. 759, Czech Law no. 90/2012). The same laws, on the other hand, typically obligate social enterprises to include this formula in their denominations (see, *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 of Polish Law of 2006 on social cooperatives) and provide for rolls, registers, particular sections of the latter, documents or certificates specifically dedicated to social enterprises (see, *e.g.*, art. 3, par. 2, Italian

All this requires is a very precise legal definition of social enterprise, to enhance its distinctive features.

If, on one hand, it is true that “the diversity and openness of the concept are probably some of the reasons for its success”³³; on the other hand, as has been correctly noted by other scholars, 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”³⁴.

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 social enterprises is necessary. Moreover, by imposing specific identities on social enterprises, legislatures do not constraint their freedom uselessly; rather, they enable such enterprises to affirm and make their distinct identities visible.

The specific legal identity of the social enterprise allows:

- i). To design specific public policies in favour of social enterprises³⁵, and, above all, to justify these policies under EU competition and state aid law. The proof of this was offered by a September 2011 judgment by the EU Court of Justice³⁶. The Court held that the specific tax treatment of Italian cooperatives was (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 and non-plutocratic, 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 social enterprises would have a similar effect with respect to social enterprises. In its absence, the law of cooperatives and the 2011 EU Court judgement can certainly help (by way of analogy);
- ii). To protect the various stakeholders of the social enterprise, such as customers, investors, and socially responsible suppliers, since the use of the term of “social enterprise” without a legal standard to guarantee a corresponding substance would have a distorting effect on the market;

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; sec. 33 and 36(8), English Companies Act of 2004; art. 42, Slovenian Law no. 20/2011). Therefore, not only do social entrepreneurs have the exclusive right to use this title, but they also tend to be obligated to do so.

³³ In these terms, DEFOURNY & NYSENS, *op. cit.*, p. 20.

³⁴ In these terms, KRAAKMAN, ARMOUR, DAVIES, ENRIQUES, HANSMANN, HERTIG, HOPT, KANDA & ROCK, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 2nd ed., New York, OUP, 2009, p. 22.

³⁵ Sometimes this happens, appropriately, under the same laws that institute social enterprises, as in the case of Slovenian Law no. 20/2011, which, in addition to identifying social enterprises, contains several provisions dedicated to their promotion by public bodies.

³⁶ Cf. EU Court of Justice, 8 September 2011 (C-78/08 a C-80/08), and, for commentary, FICL, *La sociedad cooperativa europea: cuestiones y perspectivas*, in 25 *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, 2014, p. 69 ff. and, in particular, p. 79 ff.

- iii). To prevent the creation and operation of “false” social enterprises, which would cause serious harm to the image of the social economy as a whole³⁷;
- iv). To establish clearer boundaries between social enterprise and other concepts, such as, notably, corporate social responsibility (CSR). As mentioned earlier, this is necessary in order to avoid confusion among sectors, which would blur the specificities of the social enterprise and jeopardize the independence of the non-profit sector from the for-profit sector, with all the possible and conceivable consequences (e.g., in terms of specific public policies and taxation).

In conclusion, it must be held that the law—and, in particular, organizational law—is necessary to establish, preserve, convey and disseminate the distinct identity of an organizational model that is primarily, though not exclusively, based on a specific purpose (as is the case with social enterprises). In essence, in this instance, organizational law performs a necessary and otherwise non-replaceable identifying function.

The Italian example of the law on social cooperatives sufficiently demonstrates the importance of specific legislation on social enterprise for the latter’s promotion and development, especially when substantive rules are coupled with policy measures, especially of a fiscal nature³⁸.

In Italy, social cooperation has experienced substantial growth since the founding law of 1991. According to the Italian National Institute of Statistics (ISTAT), the number of social cooperatives increased from just over 2,000 prior to 1991, the year of approval of the law, to nearly 3,500 in the mid-90s and just over 6,000 in late 2003³⁹. Today, according to the last ISTAT census at the end of 2011, there are more than 11,000 social cooperatives⁴⁰.

Far less, at least to date, has been the impact of Italian Legislative Decree no. 155/2006 on the establishment of social enterprises. In fact, at the end of 2013, only 774 social enterprises were registered in the pertinent special section of the register of enterprises⁴¹. This small number is certainly the result of the absence of a consistent and adequate tax treatment of social enterprises (whose introduction is now under discussion within the systematic reform of the Italian third

³⁷ Cf. YUNUS, *Creating a World Without Poverty. Social Business and the Future of Capitalism*, New York, 2007, p. 178; as well as ID., *Building Social Business*, New York, 2010, p. XXV and 117.

³⁸ However, there is the risk that the favourable tax treatment of social enterprises might activate individuals’ selfish motivations. This possibility stands in contrast to the idea of social enterprise as an expression of spontaneous altruism, not determined by external incentives, especially when these incentives are benefits of a financial nature, cf. YUNUS, *Building Social Business*, cit., p. 123. In general, concerning the side effects of incentives in this field, cf. ZAMAGNI, *Introduzione: slegare il terzo settore*, in ZAMAGNI (ed.), *Libro bianco sul terzo settore*, Bologna, 2011, p. 49 ff.

³⁹ Precisely, 6,159: cf. ISTAT, *Le cooperative sociali in Italia. Anno 2003*, Roma, 2006.

⁴⁰ Precisely, 11,264: cf. ISTAT, 9° Censimento dell’industria e dei servizi 2011. Many more (namely, 13,938) were instead recorded by Euricse and his researchers in 2008: cf. *La cooperazione in Italia. 1° rapporto Euricse*, novembre 2011; ANDREAUS, CARINI, CARPITA, COSTA, *La cooperazione sociale in Italia: un’overview*, Euricse Working Paper no. 27/12 (2012). In other studies, 12,570 social cooperatives were counted in 2013: cf. VENTURI & ZANDONAI (eds.), *L’impresa sociale in Italia. Identità e sviluppo in un quadro di riforma. Rapporto Iris Network*, Trento, 2014, p. 15.

⁴¹ Cf. VENTURI & ZANDONAI, *L’impresa sociale alle soglie della riforma*, in VENTURI & ZANDONAI (eds.), *L’impresa sociale in Italia*, cit., p. 65 s., which notes that the term “social enterprise” appears in the names of 574 other companies, which could be additional social enterprises that escaped enrolment in the pertinent special section of the register of enterprises.

sector⁴²) and of the predominance in the national territory of social cooperatives incorporated under Law no. 381/91—which, at present, have no interest in complying with Legislative Decree no. 155/2006 to qualify as social enterprises⁴³.

Having clarified this background, it is now necessary to move to the second central theme of this article, which, as already stated, is inevitably linked to the first: What social enterprise?

3. Models of social enterprise regulation

Given the objectives of this article, we shall limit ourselves to discussing some common profiles in the laws of the EU member states on social enterprises. Afterwards, we will concentrate our attention on the issues of the ownership and control (to be understood in the sense of management) of social enterprises—which is to say, in a language more familiar in the European jurisdictions, on the legal forms of social enterprise (with each legal form being, in a sense, the result of particular rules on the ownership and control thereof). This seems, in fact, to be the aspect that will not only become key in the future debate on social enterprise, but will also be crucial for separating and distinguishing the social economy sector from the for-profit capitalistic sector—and, thus, for reaffirming the independence of the former from the latter. The profile of the ownership and control of the social enterprise, in short, appears to be one in which the autonomy of the social economy sector is pitted against the attempts of the capitalistic sector to impose its logics.

From an overall examination of the European laws on social enterprise⁴⁴, it emerges that these laws substantially agree on defining the social enterprise as:

⁴² Cf. art. 9, A.S. no. 1870.

⁴³ Italian social cooperatives, in fact, enjoy very favourable tax treatment, regardless of their status as social enterprises—which, as already stated, is (for the moment) irrelevant under tax law (furthermore, it must be considered that social cooperatives automatically assume, *ope legis*, the qualification of social enterprises if the bill of reform of the third sector, in its current terms, is approved: cf. art. 6, lit. c), A.S. no. 1870). Indeed, social cooperatives cumulate (at least) the benefits awarded to all cooperatives (which, when applied to social cooperatives, are yet more conspicuous), those provided for by their specific Law no. 381/91, and those granted to all non-profit, social utility organizations (known as ONLUS) by Legislative Decree no. 460/97, given their status as social cooperatives that are considered ONLUS *ope legis*. It must be underlined, moreover, that a large portion of social enterprises enrolled in the 2013 register of enterprises (namely, 260 out of 774) was comprised of social cooperatives: cf. VENTURI & ZANDONAI, *op. cit.*, p. 66.

⁴⁴ In this article, the following laws will be given particular consideration. These laws are drawn from 15 EU jurisdictions and are here listed in chronological order of approval:

- Italian Law, 8 November 1991, no. 381, on *cooperative sociali* (social cooperatives);
- Articles 661 ff., on the *société à finalité sociale* (social purpose company, or SFS), of the Belgian Company Code of 1999 (already provided for by Law, 13 April 1995, which was subsequently repealed);
- Portuguese Law-Decree no. 7/98 of 15 January 1998 on *cooperativas de solidariedade social* (social solidarity cooperatives);
- Art. 106, on *cooperativas de iniciativa social* (social initiative cooperatives), of Spanish Law no. 27/1999 of 16 July 1999 on cooperatives (in this state, due to the competence of the autonomies in the field of cooperatives, there are also various regional laws and regulations on cooperatives and social cooperatives that may not be taken into consideration here);
- Greek Laws no. 2716/1999 and no. 4019/2011 on *Κοινωνικοί Συνεταιρισμοί* (social cooperatives);
- Articles 19-*quinquies* ff., on the *société coopérative d'intérêt collectif* (collective interest cooperative society, or SCIC), of French 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;
- Finnish Law of 30 December 2003, no. 1351/2003, on *sosiaalisista yrityksistä* (social enterprises);
- Lithuanian Law of 1 June 2004, no. IX-2251, on *socialinių įmonių* (social enterprises);

- a) A private legal entity⁴⁵,
- b) which conducts an entrepreneurial activity of social or common benefit⁴⁶,
- c) for a general or community interest purpose, and not to distribute profits to its members, founders, directors or employees⁴⁷.

Of course, across these laws, one may find differences and peculiarities in terms of the regulation of the social enterprise. Here, we limit ourselves to reporting only some of these particularities—specifically, those concerning the objective pursued, the distribution of profits and the nature of the activity.

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- Sections 26 ff., on the CIC, of the English Companies (Audit, Investigations and Community Enterprise) Act of 2004, as well as the Community Interest Company Regulations of 2005;
 - Italian Legislative Decree no. 155/2006 on the *impresa sociale* (social enterprise);
 - Articles 8, 10(4), 51(4), 59(3), 60(1), 68(2)(e), on *szociális szövetkezetek* (social cooperatives), of Hungarian Law no. X-2006 on cooperatives;
 - Polish Law of 27 April 2006 on *spółdzielni' socjalnà* (social cooperatives);
 - Slovenian Law no. 20 of 2011 on *zakon o socialnem podjetništvu* (social entrepreneurship);
 - Art. 66 on *socijalne zadruge* (social cooperatives), of Croatian Law of 11 March 2011, no. 764, on cooperatives;
 - Articles 758 ff., on *sociální družstvo* (social cooperatives), of Czech Law no. 90/2012 on commercial companies and cooperatives;
 - Danish Law no. 148 of 2014 on *Forslag til lov om registrerede socialøkonomiske virksomheder* (registered social enterprises).

To be more precise, it must be noted that, to the above-mentioned regulations, other regulations should be added that are not properly of substantive law (*i.e.*, of organizational law), but of tax law. 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 social enterprise. 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. In the social enterprise sector, the interplay between substantive/organizational law and tax law gives rise to problems of such complexity that they cannot be presented here.

⁴⁵ Only in Finland, to our knowledge, may an individual entrepreneur register as a social entrepreneur. Finnish Law on Social Enterprises no. 1351/2003, in fact, allows the registration of all traders, including individuals, registered under sec. 3 of Law no. 129/1979. A different situation occurs, when a legal entity is composed of only one person, where permitted by law. Here, formally, the nature of the social enterprise as a legal entity is unquestionable, even when the entity has only one member, who might well be a natural person. For example, Italian Legislative Decree no. 155/2006 on the social enterprise, while listing the types of entities that may qualify as social enterprises, does not explicitly exclude joint-stock and limited liability companies established by a single person.

With regard to public bodies, an explicit denial of their potential to acquire social enterprise status may be found in Italian Law no. 155/2006 on the social enterprise (art. 1, par. 2). The legal provision concerning the private nature of the social enterprise is not, in itself, capable of preventing public bodies from being or becoming members/owners of social enterprises—and, therefore, of preventing the formally private entity to become substantially public. Therefore, in the same Italian Legislative Decree no. 155/2006, the status of social enterprise is also denied to organizations subject to direction and control by public bodies (art. 4, par. 3). The same restrictions are stated explicitly by Slovenian Law no. 20/2011 (art. 9, par. 2) and substantially by Danish Law of 2014 on social enterprises, in which independence from public authorities is one of the requirements for an entity’s registration as a social enterprise (see <http://socialvirksomhed.dk/en/about-social-economy-i-denmark/the-criteria-to-be-labelled-a-social-enterprise>).

⁴⁶ This element, as explained above, distinguishes social enterprises from traditional non-profit organizations (which do conduct activities of social utility, but not in an entrepreneurial form). As will be discussed later in the main text, the social utility of the enterprise may stem either from the nature of the good or service produced or traded or from the types of persons employed in the business.

⁴⁷ This element, as explained above, distinguishes social enterprises from for-profit organizations (which conduct entrepreneurial activity for their members’ profit). As we shall soon discuss, the prohibition of profit distribution can be total or partial.

3.1 *The purpose of general or community interest*

With regard to the objective of the organization, many European laws on social enterprise are clear in stipulating the latter's pursuit of a general or social interest or the interest of the community, which is presented as the exclusive (or, at least, primary) purpose of the social enterprise⁴⁸.

On this point, a clear difference between US and European legislation on social enterprise emerges. In fact, in the US, the various state laws dedicated to this subject matter (at least, most of them) not only fail to take the general interest or the interest of the community as the sole purpose of social enterprises, but are also not clear in giving priority to the objective of general interest relative to the for-profit purpose. It is for this very reason that this legislation receives strong criticism from certain areas of US scholarship (also because the “dual mission” raises the concern that “serving two masters means serving none at all”)⁴⁹. After all, the specificity of US legislation on social enterprise consists precisely of the implantation of the social enterprise within a for-profit legal form, which has been adapted to accommodate the social enterprise and allow its establishment and operation, but without giving up the lucrative component. All this results in an unclear institutional mission, in which the boundaries between non-profit and for-profit are quite relaxed (as are those related to the concepts of social enterprise and corporate social responsibility, which should, instead, be kept well distinct).

3.2 *The ban on the distribution of profits*

In the European laws on social enterprise, the purpose of general interest is protected by limits on the distribution of profits: If the social enterprise generates profits (what is not prohibited), it cannot distribute them to its members, founders, directors, employees, etc., but it must employ them for the

⁴⁸ Admittedly, there are some laws that explicitly attribute this specific purpose to social enterprises and other laws that only obligate social enterprises to conduct activities of social utility and set precise limits for the distribution of profits (thereby ensuring, albeit only indirectly, the pursuit of general, social or community interests). For example, Italian Law no. 381/91 expressly provides 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) [author's translation]; Italian Legislative Decree no. 155/2006 on the Social Enterprise (art. 1, par. 1) also speaks of “objectives of general interest”, although it refers these objectives to the economic activity rather than the organization; the Belgian Company Code, too, clearly identifies the purpose of SFSs, or, indeed, their by-laws: “*définissent de façon précise le but social auquel sont consacrées les activités visées dans leur objet social et n'assignent pas pour but principal à la société de procurer aux associés un bénéfice patrimonial indirect*” (art. 661, par. 1, no. 2; cf. also art. 661, par. 1, no. 6); Spanish social initiative cooperatives must assume as their social object “*el desarrollo de cualquier actividad económica que tenga por finalidad la integración laboral de personas que sufran cualquier clase de exclusión social y, en general, la satisfacción de necesidades sociales no atendidas por el mercado*” (art. 106, par. 1, Law no. 27/1999); French SCICs “*ont pour objet la production ou la fourniture de biens et de services d'intérêt collectif, qui présentent un caractère d'utilité sociale*” (art. 19-quinquies, par. 2, Law no. 47-1775); and, finally, for English CICs, see sec. 35(3) of the Companies Act of 2004, which reads: “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”. See also art. 2, par. 3, of Polish Law of 27 April 2006; arts. 3 and 4 of Slovenian Law no. 20/2011; and art. 762 of Czech Law no. 90/2012.

⁴⁹ Criticisms of both this aspect and those (relatedly) of the absence of an asset lock and the ineffectiveness of the enforcement of the social mission: cf. especially BRAKMAN REISER, *Theorizing Forms for Social Enterprise*, cit.; BRAKMAN REISER, *Regulating Social Enterprise*, in 14 *UC Davis Business Law Journal*, 2014, p. 231 ff. and *ivi*, p. 245). Strong critical remarks of this US state law legislation can also be found in GALLE, *Social Enterprise: Who Needs It?*, cit., according to which this is the result of a regulatory “race to the bottom” between States competing for social enterprises' incorporations (cf. *ivi*, p. 2041).

pursuit of its general interest objective⁵⁰. This “asset lock” ensures that assets are used for the benefit of the community rather than for the benefit of a social enterprise’s members, employees, directors, etc.⁵¹. What is prohibited—to use e.g. the formulas of Italian law (art. 3, Legislative Decree no. 155/2006), which substantially coincide with what provided for in other contexts, such as in the UK regulation of community interest companies (CICs)—is both a direct distribution of profits (e.g. through the payment of dividends on the capital) and an indirect distribution of profits (e.g. through the payment of an unjustifiable, above-market remuneration to employees or directors)⁵².

This prohibition, however, may be total, such as in the current version of article 3 of Italian law of 2006 on social enterprises⁵³, or only partial, such as in the English regulation of CICs, where the distribution of not more than 35 per cent of a CIC’s annual profits is permitted⁵⁴.

In contrast, in the US laws on social enterprise, precise limits on the distribution of profits do not exist, which, together with what previously observed with regard to the entity’s purpose, confirms the doubts about this model of legislation on social enterprise⁵⁵.

Extensive discussions could be held about whether social enterprises should be subjected by law to a total or rather a limited constraint on the distribution of profits and assets. While 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 social enterprise form to satisfy their private interests⁵⁶,

⁵⁰ Apparently, the only exception is represented by Finnish Law no. 1351/2003 on social enterprises, which does not contemplate express limits to the distribution of profits. Indeed, Lithuanian Law on social enterprises does not explicitly provide for the non-distribution constraint either, but identifies as the purpose of an entity aspiring to the status of social enterprise those of promoting access of certain individuals to the labor market, of reintegrating them into society, and of reducing social exclusion (cf. art. 2, Law no. IX-2251).

⁵¹ As the English CICs’ Regulator finely underlines: cf. Office of the Regulator of Community Interest Companies: Information and Guidance Notes, *Chapter 6: The Asset Lock*, October 2014, p. 3 s.

⁵² Cf. art. 3, Italian Legislative Decree no. 155/2006; art. 11, paragraphs 2 and 3, Slovenian Law no. 20/2011. To “indirect financial benefits” refers, yet more broadly, the Belgian Company Code in regulating SFSs (art. 661, par. 1, no. 2).

⁵³ Cf. art. 3, Italian Legislative Decree no. 155/2006. The prohibition is total also for Portuguese social solidarity cooperatives (cf. articles 2, par. 1, and 7, Law-Decree no. 7/98), for Spanish social initiatives cooperatives (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 social cooperatives (art. 10, par. 2, Law 27 April 2006); for Hungarian social cooperatives registered as public utility organizations (sec. 59(3), Law no. X-2006).

⁵⁴ Sec. 30 of the English Companies Act of 2004 gives the Regulator the power to set limits to the distribution of assets to a CIC’s shareholders. Since 1 October 2014, the limit that the Regulator has imposed is the only one indicated in the main text, that is, up to 35% of annual net profits may be distributed by the CIC to its owners (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 subsequently 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, *Chapter 6: The Asset Lock*, October 2014, cit., p. 6 s. The prohibition is partial also for French SCICs (see art. 19-*nonies*, Law no. 47-1775), Belgian SFSs (see art. 661, par. 1, no. 5, Company Code), Italian social cooperatives (see art. 3, Law no. 381/91, to be read in conjunction with art. 2514 of the Civil Code), and Slovenian social enterprises (see art. 11, par. 2, Law no. 20/2011).

⁵⁵ In criticizing both the English regulation on CICs and the US one on L3Cs in this respect, YUNUS, *Building Social Business*, cit., p. 129 s., states: “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”.

⁵⁶ What depends also on the issue of who are the subjects eligible for establishing, participating and controlling a

on the other hand there is the usual reasonable explanation for the partial constraint, namely, that it promotes investment in social enterprises⁵⁷. Yet, it seems to us that on this specific aspect of a social enterprise's regulation—that is, whether the profit non-distribution constraint should be total or partial—excessive hopes are placed relative to its actual ability to solve the instances 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 social enterprise form if the enforcement system (internal and/or external) of the social mission is not effective; on the other hand, it is not certain that a partial constraint might really attract investors, especially if they are not granted a corresponding power of control of the social enterprise.

However, whether total or partial, a profit non-distribution constraint, as the legal doctrine teaches, would not be real and effective if the members, at the time of the entity's dissolution or upon their withdrawal, could appropriate the resources generated by the organization, accumulated and not distributed during its life (or for the duration of individual membership)⁵⁸. The asset lock is truly effective only if safeguarded by prohibitions and restrictions at any time during the life of the social enterprise, including its liquidation. Not surprisingly, therefore, the European laws on social enterprise provide that, in these situations, subtracted any capital contributed by the members, the remaining assets of the social enterprise are to be devolved to other social enterprises or directed to objectives of general interest⁵⁹. This also happens in the case of transformation, if permitted⁶⁰, of the social enterprise into another type of organization, or in the case of loss of the social enterprise status⁶¹.

3.3 *The activity of social utility*

With regard to activity, all European laws substantially agree in binding social enterprises to performance that is beneficial to the society or the community. However, different approaches for achieving this objective exist.

First, some laws afford a twofold opportunity, defining a social enterprise to be, in fact, such either:

- a) if it conducts an activity deemed socially useful in itself by the law, due to the goods or services produced or the sector in which it operates; or
- b) if, regardless of the nature of the activity performed, it employs in it (a certain minimum percentage of⁶²) disadvantaged people or workers, including, in this case, the social

social enterprise, since the nature of the shareholder is fundamental to the analysis of this issue of social enterprise regulation.

⁵⁷ Cf. Office of the Regulator of Community Interest Companies: Information and Guidance Notes, *Chapter 6: The Asset Lock*, October 2014, cit., p. 6.

⁵⁸ Cf. MARASÀ, *Le società*, 2nd ed., in *Trattato di diritto privato* edited by Iudica & Zatti, Milano, 2000, p. 226.

⁵⁹ See art. 13, par. 3, Italian Legislative Decree no. 155/2006; art. 661, par. 1, no. 9, Belgian Company Code; sec. 31, English Companies Act of 2004 and sec. 23, Community Interest Company Regulations of 2005; art. 8 Portuguese Law-Decree no. 7/98; art. 28 Slovenian Law no. 20/2011. A limited percentage (not more than 20% of residual assets) may be distributed to the members of Polish social cooperatives (cf. art. 19, Law 27 April 2006).

⁶⁰ Indeed, there are cases in which transformation is not permitted, especially as regards social cooperatives, since the prohibition of transformation may apply to cooperatives in general.

⁶¹ Cf., for example, with regard to SFSSs, art. 663 of the Belgian Company Code; and with regard to the Italian social enterprise, art. 16, par. 4, which refers to art. 13, par. 3, of the Italian Legislative Decree no. 155/2006.

⁶² European laws on social enterprises of type b), indeed, fix a minimum percentage of disadvantaged people or

usefulness of the enterprise that depends not on the type of output generated, but on the type of input employed (*i.e.*, the work of people with difficulty accessing the labour market).

This model of legislation on social enterprise is widespread, and it has developed out of the 1991 Italian law on social cooperatives—so much so that (in correspondence with the provisions of this law) it is very common today in Europe to use the expression “social enterprise of type a)” to refer to a social enterprise that produces socially useful goods or services and to use “social enterprise of type b)” to refer to a work integration social enterprise (WISE)⁶³.

By way of contrast, there are some European laws that explicitly provide only for the second option, which is to say that they recognize only WISEs as social enterprises⁶⁴. Rarer is the occurrence of EU laws that provide only for the first option⁶⁵.

With regard to social enterprises of type a), it is also necessary to distinguish between laws, such as the Italian, that identify the activities of social utility exercisable by the social enterprise⁶⁶, and others, such as the English, in which a general clause is adopted: The CIC must satisfy a “community interest test”, which is considered passed when the organization demonstrates 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)⁶⁷.

workers (normally around one-third of total employees) and do not require all employees of the social enterprise to be disadvantaged people. 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 not the only condition present.

⁶³ In Italian law, this model of legislation addresses both social cooperatives (cf. art. 1, par. 1, lit. a) and lit. b), Law no. 381/91) and social enterprises (cf. art. 2, Legislative Decree no. 155/2006); along the same lines, consider Spanish social cooperatives (cf. art. 106, par. 1, Law no. 27/1999), Portuguese social cooperatives (with less clarity, however: cf. art. 2, par. 1, Law-Decree no. 7/98), and Slovenian social enterprises (cf. arts. 5, 6, and 8, par. 2, Law no. 20/2011).

⁶⁴ This is the case for Finnish and Lithuanian social enterprises. The same is also true for Polish social cooperatives (although their purpose, at least by virtue of the provisions in art. 2 of their law, appears to be, in principle, broader). A strictly different conclusion should be drawn when the law does not exclusively refer to work integration, thus opening the possibility of members’ social advancement in other forms (as is the case in Hungarian social cooperatives: see sec. 8 (1)(a) of Law no. X-2006). Here, indeed, a socially useful activity appears, which is comparable to the one that type a) social enterprises conduct (although, in a strictly mutual perspective, it is an activity limited to the members).

⁶⁵ 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*” (the production or supply of goods and services of collective interest, which have a social utility character); 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 work integration social enterprises (WISEs).

⁶⁶ Cf. 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, if the current bill on the reform of the third sector is approved. Cf. also art. 5, Slovenian Law no. 20/2011.

⁶⁷ Cf. sec. 35, Companies Act of 2004; sec. 3 ff., Community Interest Company Regulations of 2005; sec. 4, Community Interest Company (Amendment) Regulations of 2009; see also 661, par. 1, no. 2, Belgian Company Code; along the same lines, see art. 2, French Law no. 2014-856.

Furthermore, while the majority of laws on social enterprise require the entrepreneurial activity to offer social benefit through its very nature (e.g., welfare, health, social housing, etc.), there are laws (such as the English on CICs) that allow for a social enterprise to demonstrate actions taken in the interest of the community, while also proving that any profits (regardless of the nature of the business generating them) are intended for social or community purposes (e.g., to support a charity)⁶⁸. This (together with the less stringent constraints on the distribution of profits to shareholders) further extends the possibilities for action among English CICs relative to Italian social enterprises. As a result, and not surprisingly, the number of CICs established since 2005 is remarkable when compared with the number of Italian social enterprises (but not with the number of Italian social cooperatives⁶⁹): There were, in fact, 10,639 existing CICs as of March 2015. By comparison, CICs numbered 1,040 in April 2007 and more than 6,000 at the end of March 2012; they show a fairly consistent growth rate of around 1,000 a year, but concentrated particularly in the last five years⁷⁰.

With regard to WISEs, on the other hand, one must distinguish between the laws, such as the Italian ones on social cooperatives and social enterprises and the Finnish one on social enterprises, that do not require (though they permit) disadvantaged workers to be members of the organization, but do mandate that they (in a certain minimum percentage) be employed by the organization⁷¹, and the laws that, instead, conceive of WISEs strictly as worker cooperatives, such that the beneficiaries of a social enterprise and the members of a social enterprise coincide. In such a structure, the disadvantaged workers must also be members of the social enterprise (however, they are not necessarily the only category of members, since, here, too, only minimum percentages of disadvantaged worker-members are prescribed by law)⁷². In the latter case, the law equates mutuality and general interest—or, rather, requires that the general interest (*i.e.*, providing employment for disadvantaged people) be pursued through mutuality. This seems to be an anachronistic and inconvenient constraint, which is to be linked only to a vision of the cooperative as an organizational form that cannot be conceived of without an internal mutual purpose—which, though it certainly corresponds to the traditional notion of the cooperative (which dates back to Rochdale and is consecrated in the Principles of the International Cooperative Alliance), now seems an obsolete image in both cooperative legislation and theory (where, alongside the model of the mutual cooperative, stands the model of the general interest cooperative)⁷³.

⁶⁸ The English legislation on CICs, in fact, does not limit the distribution of CIC 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 social enterprise to a charity is, reasonably (albeit indirectly, as it must filter through the activity of the charity funded by the CIC), beneficial to the community. In this latter case, therefore, it is not the social enterprise's economic activity *per se* to be social, but the use of the profits that the social enterprise generates.

⁶⁹ For data on Italian social cooperatives, cf. *supra* at footnotes 39 and 40 and the corresponding main text.

⁷⁰ Cf. The Office of the Regulator of Community Interest Companies, *Operational Report*, Fourth Quarter 2014-2015.

⁷¹ Cf. 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.

⁷² Among the possible examples, Polish social cooperatives, in light of the provisions in art. 2 of their instituting law, and Hungarian social cooperatives, by reason of the provisions in sec. 8 of the Hungarian Law on Cooperatives.

⁷³ Cf. FICI, *An Introduction to Cooperative Law*, cit., p. 32 ff.; Fici, *La función social de las cooperativas: notas de derecho comparado*, in 117 *Revesco*, 2015, p. 77 ff.

4. Ownership and control of the social enterprise

Turning attention now to the last profile, the one that we have already defined as key, of the ownership and control of the social enterprise (*i.e.*, of the legal forms that a social enterprise may assume), this article will focus on the alternatives of the cooperative form and the (joint-stock or limited liability) company form.

4.1 *The social enterprise in the cooperative form*

The legislative history of the social enterprise, as already stated, began with the cooperative model—or, more exactly, with the social cooperatives of Italian Law no. 381/1991. The Italian law on social cooperatives gave birth, both in Europe and beyond, to the first generation of laws on social enterprise—which were, in fact, laws on social cooperatives.

The Italian legal thought on this subject showed a remarkable degree of progress, to the point that it could be placed in a position of pre-eminence in the global context, not just in Europe⁷⁴. The model of the social enterprise in the cooperative form has been, indeed, followed, either fully or partially, with modifications and adaptations to national contexts, by the Portuguese, Spanish, Greek, French, Hungarian, Polish, Croatian and Czech legislators⁷⁵.

Outside the European continent, reference can be made to South Korea, where social cooperatives of both type a) and type b) were included in the framework law on cooperatives that entered into force in 2012⁷⁶.

Why was the social enterprise conceived of in Europe as a modified form of cooperative? Why was the cooperative form considered to be the appropriate “legal dress” for the new phenomenon of the social enterprise?

The explanation for these questions lies in the fact that, despite its particular purpose, the social cooperative remains, at its core, a cooperative.

The social cooperative is, in fact, a cooperative with a non-mutual purpose, since—as 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 (type a) or through the conduct of any entrepreneurial activity through the employment of disadvantaged people (type b)⁷⁷.

⁷⁴ This is usually also recognized by foreign commentators: cf., among others and recently, MAJDZIŃSKA, *Aid and Support for the Social Economy in Poland—The Case of Social Cooperatives*, WP-CIRIEC no. 2014/11, p. 8.

⁷⁵ For references to this legislation, cf. *supra* at fn. 44.

⁷⁶ As well as in a law of 2006 on the promotion of social enterprises, modified specifically to include social cooperatives: cf. JANG, *Republic of Korea*, in CRACOGNA, FICI & HENRÝ (eds.), op. cit., p. 653 ff.

⁷⁷ In 1991, the Italian legislature, thus, followed the teaching of Giuseppe Filippini, one of the first and primary promoters of the movement of Italian social cooperation—and, according to sources, the founder of the first social cooperative in 1963. As reported by economic historians (cf. BORZAGA & IANES, *L'economia della solidarietà. Storia e prospettive della cooperazione sociale*, Roma, 2006, p. 101 s.), Filippini identified this new method of cooperation as follows: “to cooperate no longer to serve – directly or indirectly – oneself, but to serve”. Despite the clear wording of art. 1 of Italian Law no. 381/91, some Italian scholars still hold that the social cooperative has the same mutual purpose as the ordinary cooperative, from which, therefore, the former may be distinguished only by its particular activity. This position appears untenable, not only because it conflicts with the clear wording of the law, but also in light of the

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

- a democratic social enterprise (since cooperatives are, in principle, managed according to the principle of "one member, one vote", regardless of the individually paid-up capital; this is also the primary reason cooperatives are commonly discussed as having a purely "servant" role of capital and a prevalence of people over capital within the organization),
- potentially open to new members, whose joining is favoured by the variability of capital (the principle of the "open door", which, if effective, is a manifestation of present cooperative members' altruism towards future cooperative members),
- jointly owned and controlled by its members (usually all or a majority of the directors must be members of the cooperative; external control of a cooperative or control by a single member is not permitted),
- and, by its very nature, supportive of other cooperatives (cooperative system), its employees and the community at large⁷⁸.

Not accidentally, therefore, the cooperative is considered in specific constitutional provisions that recognize its social function and/or provide for state support. The social function of cooperatives, which may be explained via several factors⁷⁹, can be considered to be even more intense when a cooperative aims to pursue the general interest of the community by acting as a social enterprise. Essentially, the combination of a cooperative structure and objectives of general interest create excellent results in terms of social relevance of an organization, since the social relevance of the cooperative structure can be added to the social relevance of the enterprise's objectives.

Those who, at that time in Italy, were looking for a legal form for social enterprises, could, therefore, easily find it in the cooperative form, from which only the purpose had to be legislatively adapted (since, otherwise, *de facto* non-mutual cooperatives could have faced problems with registration, as actually happened in certain cases⁸⁰). The cooperative model already provided for those organizational features—democracy, participation, self-management, openness to new members, etc.—that, according to the Italian promoters of the movement, would also characterize social enterprises; in this context, neither companies (based on the capital), nor associations (in which democracy was not the rule), nor foundations (with their hierarchical structures) appeared

treatment of social cooperatives in the reform of Italian company and cooperative law of 2003: on this point, cf., also for further references, FICI, *Cooperative sociali e riforma del diritto societario*, cit.

⁷⁸ It is not possible to discuss here these general characteristics of the cooperative model of the enterprise; instead, reference can be made, with regard to the Italian scholarship, to BONFANTE, op. cit., and for a perspective of general theory and comparative law, to FICI, *Cooperative Identity and the Law*, in *European Business Law Review*, 2013, p. 37 ff.; FICI, *An Introduction to Cooperative Law*, cit.

⁷⁹ Cf. FICI, *La función social de las cooperativas*, cit.

⁸⁰ Cf. *supra* at fn. 26.

appropriate. Thereby, the movement chose the cooperative form as the best suited for installing the enterprise of general interest⁸¹.

Concretely, then, economic historians report that the Italian social cooperation originated in the decision of groups of volunteers to organize themselves to give rise to entities that were stable, self-sustainable (thanks to market prices) and, therefore, no longer exposed to the risk of free support that could stop at any time. The initiative found its roots in the enterprise of citizens: It grew from a large and organized manifestation of civic participation—what, today, we would call a horizontal subsidiarity⁸².

Undoubtedly, the social enterprise in the cooperative form is an entity whose identity as a social enterprise is very strong. Not surprisingly, then, this model has spread widely and continues to circulate both in Europe and elsewhere. The democratic nature of the social enterprise in the cooperative form makes the model perfectly compatible with the notion of an entity of social economy that is growing common in Europe and in the laws, thus far approved, designed to identify this area. Under these laws, indeed, democratic governance—which, as has been correctly observed, is a “final value”⁸³—is a key identifier of the entities of the social economy⁸⁴.

From a general and legal policy perspective, the strong social enterprise identity, as stated earlier, helps their development and facilitates their defence against attempts of “capture” from the for-profit capitalistic sector.

4.2 The social enterprise in the company form

In other European jurisdictions, in contrast, legislatures chose to attribute a company form to social enterprises. The Belgian *société à finalité sociale* (SFS) and the English CIC are, in fact, companies⁸⁵. As noted above, even in the US, a company-based structure was employed.

The social enterprise, therefore, appears in these jurisdictions as a particular subtype of company, intended not to maximize shareholder value, but to pursue social objectives or community interest. In itself, the company form does not necessarily have particular consequences in relation to the purpose pursued by the social enterprise, to the extent that, of course, the law is clear in assigning a social mission (and restricting the distribution of profits) to social enterprises in the company form. Rather, what particularly changes with respect to the cooperative model of social enterprise, precisely because of the different legal form adopted by the social enterprise, is the structure of ownership and control of the enterprise.

In this regard, it is particularly useful to recall what is reported, in the form of an anecdote, by a British lawyer who celebrates himself as one of the inventors of the English law on CIC⁸⁶. In a

⁸¹ Cf. BORZAGA & IANES, op. cit., p. 99 ff., in particular, p. 107 s.

⁸² Cf. BORZAGA & IANES, op. cit., p. 109.

⁸³ Which is to say, a value that belongs to the order of the ends (in contrast to efficiency, which is an instrumental value—one that belongs to the order of the means): in these terms, ZAMAGNI, op. cit., p. 16.

⁸⁴ 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.

⁸⁵ If, on one hand, it is possible to discuss whether SFSs and CICs may actually take the form of cooperatives via adequate provisions of their by-laws, on the other hand, it is certain that, as shown by the applicable rules, legislatures have conceived of these as capital companies characterized by particular purposes.

2010 article, this lawyer wrote 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”⁸⁷.

The following is, in fact, the substantial difference: The social enterprise in the company form may be subject to control even by a single person. In the English law of CICs, moreover, it does not matter who the controlling person is—or, in the case of a legal person, whether it is a non-profit or a for-profit entity. The social enterprise in the company form is not necessarily a democratic and participative social enterprise (though, one must underline, under the regulations of the Belgian SFS, no shareholder may have more than one-tenth of the votes in the shareholders’ general meeting⁸⁸). It may be managed according to the capitalistic principle of “one share, one vote” and led hierarchically even by a sole entity of a for-profit capitalistic legal nature. It could also be hetero-controlled as a pure subsidiary—and, hence, be part of a group, regardless of the nature and identity of the holding entity. It could also be a “closed club”, since company law does not protect the interest of third parties to enter into such a company of others.

The social enterprise in the company form might be, in fact, a manager-run enterprise, since the members’ control and active participation are not required the way that they are for the social enterprise in the cooperative form. One must add to this consideration some recent findings from behavioural law and economics. Laboratory experiments by German researchers have shown that, in the dictator game, managers, under certain conditions, 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 offices⁸⁹.

To be consistent with its institutional objectives, therefore, a social enterprise in the company form should have:

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

⁸⁶ Cf. LLOYD, *Transcript: Creating the CIC*, in 35 *Vermont Law Review*, 2010, p. 31 ff.

⁸⁷ Cf. LLOYD, *op. cit.*, p. 33.

⁸⁸ 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 social enterprises 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 social enterprise entity.

⁸⁹ 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*, 2015, p. 79 ff. 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*, 2010, p. 1826 ff.

- 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 (also) awards rights and powers to social enterprise 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.

A truly participatory and democratic governance, together with the constraint on profit distribution, can be a key factor in achieving the special “identity” of an organization capable of identifying those who work within it, thus giving rise to a virtuous circle that, through the personal satisfaction that identification with the organization produces in the individuals who belong to it, results in the organization's more effective and efficient pursuit of its statutory and institutional objectives, to the benefit of the ultimate beneficiaries of the organization⁹⁰.

In contrast, a social enterprise in the company form is a type of organization whose identity as a social enterprise is weaker and at continuous risk if limits are not set on the control by a single member or if precise rules on ownership and control are not adopted. This is the case, for example, in Italian Legislative Decree no. 155/2006, which stipulates that a social enterprise may be joined, but not controlled or directed, by a for-profit entity (or a public body)⁹¹. This approach resolves the issue almost completely, making the social enterprise in the company form a very interesting option, especially as a structure of second-degree aggregation among social enterprises 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 social enterprises, 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 social enterprise the enterprise or its assets)⁹².

The risk exists that—if the use of the company form of social enterprise is not carefully regulated through limits on who may hold and/or control its capital—the social enterprise might be used purely for purposes of corporate social responsibility (*i.e.*, purely for marketing). If this is the case, the autonomy of the social economy sector from the for-profit capitalistic sector could be seriously compromised.

⁹⁰ 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*, 2005, p. 9 ff.; RODRIGUES, *Entity and Identity*, in 60 *Emory Law Journal*, 2011, p. 1257 ff.; DAVIS, *Identity*, in BRUNI & ZAMAGNI (eds.), *Handbook on the Economics of Reciprocity and Social Enterprise*, Cheltenham-Northampton, 2013, p. 201 ff. More exactly, the entity's identity is not likely to motivate only the workers of the enterprise, but also its other stakeholders, such as its suppliers, lenders and consumers, as well as its donors and volunteers.

⁹¹ Cf. art. 4, par. 3, Legislative Decree no. 155/2006, as well as art. 8, par. 2, of the same act.

⁹² In addition, it is worth mentioning that the second paragraph of the same article of this Slovenian law suggests that an entity may not acquire the social enterprise status if it is subject to the dominant influence of one or more for-profit companies.

4.3 *The neutrality of the legal forms for qualification as a social enterprise*

Beginning with a study conducted by two Italian legal scholars⁹³, in the international research framework on the legal forms of the social enterprise, three models of legislation on social enterprise have been increasingly presented and distinguished: the cooperative model, the company model and a model based on a freedom of choice of legal forms. In accordance with this last model, the acquisition of the legal status of a social enterprise does not depend on an organization's possession of a particular legal form, since all legal forms are, in principle, compatible with the status of social enterprise. Therefore, not only the legal forms of the cooperative and the company, but also those of the association and the foundation, among others, may (depending on the legal system) be elected by an organization wishing to be recognized as a social enterprise.

This third model of legislation on social enterprise encompasses and allows, therefore, several legal forms of social enterprise, implying the existence of many models of ownership and control of the social enterprise as the legal forms that may be employed by the organization.

Under this model of legislation, hence, a social enterprise can be established in any legal form: as an association, a foundation, a partnership, a company or a cooperative. There are, of course, some minimum requirements that, whatever the legal form selected, a social enterprise must meet, including the ban on the distribution of profits (which, therefore, also applies to a social enterprise in the form of a company, either joint-stock or limited liability). This is the model followed by the Italian law of 2006 on social enterprise. It is also the model proposed in the Finnish law of 2003 on social enterprise (which, however, is limited to WISEs, as already mentioned).

This model of legislation is, hence, broader, including both the cooperative model and the company model. Its novelty is represented by social enterprises in the forms of associations and foundations—upon which, however, this article will not dwell, having assumed the limited purpose of comparing the cooperative model, which has been considered the most suitable for social enterprises, with the company model, which, in contrast, is the most problematic. Of course, where this model of legislation allows social enterprises to take, among others, either cooperative or company forms, it exposes itself to the same assessments that have been made so far with regard to these two organizational models of social enterprise.

5. Conclusions

As already stated in the introduction, a European statute of social enterprise has been envisaged by the European Commission and would be useful as an additional instrument of protection, promotion and development of social enterprises in both national and supranational contexts. However, setting aside the actual feasibility of this project—which, indeed, at the moment, appears to be rather improbable, particularly considering the recent interruption to the work on the Statute for a European Foundation—what a potential European social enterprise might look like is a very difficult question to answer. The ultimate form is particularly difficult to predict given the relative

⁹³ Cf. CAFAGGI & IAMICELI, *New Frontiers in the Legal Structure and Legislation of Social Enterprises in Europe: A Comparative Analysis*, in NOYA (ed.), *The Changing Boundaries of Social Enterprises*, OECD, 2009, p. 25 ff.

diversity of approaches among EU member states, especially with reference to total or partial constraints on profit distribution—and, even more so, to the legal forms of social enterprise (and, thus, its ownership and control structure).

If one shares concern about an improper and undesirable attempt by the for-profit capitalistic sector to “capture” the social economy sector, and if the social enterprise in the company form (not democratic, controllable by a single person or a parent for-profit entity, and subject to a profit non-distribution constraint after all bearable) is considered to be the most advanced and subtle form of manifestation of this attempt, then one can only conclude that the cooperative model is the more advisable model of regulation of social enterprise. The model of the cooperative social enterprise is the answer to those who deny that the profit non-distribution constraint may alone suffice to prefer non-profit organizations to for-profit organizations⁹⁴. Indeed, this model adds important factors of governance to the constraint on profit distribution, and it would be hard to deny that these governance features mark the difference, since they introduce participatory and democratic elements to the conduction of a social enterprise, which are clearly consistent with the altruistic and public benefit goals that connote a social enterprise. This model is also certainly compatible with the typical principles of social economy emerging from European national laws on the social economy, whereas the company model’s classification as such is questionable, at least in its pure form (where the capital acts as a reason and measure of a shareholder’s participation in the company’s governance, as well as in the division of the profits generated by the company, to the extent that they are distributed among shareholders), not adapted to the specific needs of the social economy.

In a recent book entitled *Cultivating Conscience*, Professor Lynn Stout, in applying to legal thought some findings of behavioural economics, reflects on the ways in which good laws can make human beings better⁹⁵.

In our opinion, a law on social enterprise that is “good”, in this sense, is one that shapes and requires a social enterprise to be both jointly and democratically controlled by a collective of members, participated in by present members and open to new members, from the perspective of horizontal subsidiarity. This structure, moreover, would nominate this type of social enterprise (to link this discussion with another subject much in vogue these days) as the most appropriate legal form for the management of the “commons”. Of more commons, effectively managed by social enterprises in the cooperative form, there is great need for a truly better society that is not dominated by the logic of capital accumulation, but based on people and their dignity⁹⁶.

⁹⁴ Cf. *supra* at fn. 21.

⁹⁵ Cf. STOUT, *Cultivating Conscience. How Good Laws Make Good People*, Princeton-Oxford, 2011.

⁹⁶ Recently on this subject, cf. SACCONI & OTTONE (eds.), *Beni comuni e cooperazione*, Bologna, 2015. For a very good overview on the topic of the commons, cf. MARELLA (ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, 2012.

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