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THE SOCIAL ENTERPRISE IN THE COOPERATIVE FORM

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ABSTRACT

Notwithstanding its historical roots, the cooperative is a legal form of organization increasingly used by legislators to house the phenomenon of the "social enterprise". Although a universally-recognized concept of social enterprise does not yet exist, researchers and legislators are converging upon some indicators or legal requirements that identify this particular type of business organization. These indicators or legal requirements are in principle compatible with any legal form of an entity's incorporation, including the shareholder company and the cooperative ones. There are, however, several reasons why the cooperative may be considered the legal form more suitable for social enterprises. This article first illustrates the concept and characteristics of a social enterprise according to the relevant legislation in Europe. It then presents and compares the different models of legislation on social enterprise that may be found in Europe and emphasizes the primacy of the cooperative legal form for social enterprises. Conclusions concern the consequences of the preceding analysis in terms of cooperative legal theory.

KEY WORDS: social enterprise, cooperative, law.

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1 Introduction

Notwithstanding its historical roots, the cooperative is a legal form of organization increasingly used by legislators to house the phenomenon of the "social enterprise" (SE).

Yet, a universally-recognized concept of SE does not exist, nor is it foreseeable that it will emerge in the near future. However, as this article points out, researchers and legislators are converging upon some indicators or legal requirements that identify SEs and distinguish them from ordinary business organizations or other phenomena that combine the economic and the social dimensions in a different manner and for different purposes (such as, for example, corporate social responsibility). As a result, a distinct identity of SEs is quickly developing both in legal and socio-economic research and in the law.

The indicators or legal requirements for the qualification of an organization as an SE are in principle compatible with any legal form of an entity's incorporation, including the shareholder company and the cooperative forms. This is demonstrated by the increasing number of jurisdictions that regard SE as a legal category including (or, which is substantially the same, as a legal status or qualification attributable to) entities established in different legal forms. There are, however, several reasons why the cooperative legal form may be considered the most suitable for SEs. It is therefore the legal form that legislators should not only consider, but also promote when legislating upon SE.

This article is organized as follows. Section 2 illustrates the concept and characteristics of an SE as delineated by the current legislation in Europe. Section 3 presents and compares the different models of legislation on SE that may be found in Europe. Section 4 discusses the role of cooperatives in this legislation and ex-

plains why the cooperative legal form is the most suitable for SEs. Conclusions reflect upon the consequences of the preceding analysis in terms of cooperative legal theory.

2 The legal identity of social enterprises

In socio-economic research, many attempts have been made to define the piece of organizational reality that the concept of SE should isolate and evoke. One of the most influential, especially at the European level, is that of EMES, which identifies nine indicators, falling into three subsets, to describe the "ideal-type" of SE. These indicators depict an organizational form with three combined dimensions: an entrepreneurial dimension, which connotes its activity; a social dimension, which qualifies its purpose; and a participatory dimension, which characterizes its governance[1].

An operational definition, which draws upon EMES' previous work, is that offered by the European Commission in the Communication "Social Business Initiative" of October 2011, according to which "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"[2].

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

[2] Cf. COM(2011) 682 final, of 25 October 2011, Social Business Initiative. Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation, 2. The EC goes on to specify the types of business covered by the term "social enterprise", namely: "• those for which the social or societal objective of the common good is the reason for the commercial activity, often in the form of a high level of social innovation, • those where profits are mainly reinvested with a view to achieving this social objective, • and where the method of organisation or ownership system reflects their mission, using democratic or participatory principles or focusing on social justice. Thus: • businesses providing social services and/or goods and services to vulnerable persons (access to housing, health care, assistance for elderly or disabled persons, inclusion of vulnerable groups, child

Yet, anyone who wishes to know what an SE is, cannot now avoid taking into primary consideration the *ad hoc* legislation on SE existing in an increasing number of jurisdictions in the world. In the European Union alone, at least 18 countries have specific laws dedicated to SEs, which depending on the model of legislation adopted – as we shall clarify in section 3 – include laws on social enterprise and laws on social (purpose) cooperatives or social (purpose) companies. Notwithstanding the still perceivable differences across jurisdictions, this tailor-made legislation shapes a common identity of SEs founded on all the requirements described below.

2.1. The social enterprise as a legal entity established under private law and independent of the state and other public administrations, but subject to external control

SEs are almost everywhere legal entities (or legal persons). Natural persons (*i.e.* individuals) may not, *per se*, qualify as SEs. This is the implied result of the law providing for legal entities as the legitimate applicants for qualification or the effect of explicit legal prohibition, as in the case of sec. 4(2) of Danish Law no. 711/2014 on SE. Yet, exceptions may be found in Finland and in Slovakia, where also an individual entrepreneur (or sole proprietor) may acquire the SE status[3].

To qualify as SEs, legal entities must be private, both in the sense that they must be entities regulated by private law and in the sense that they must not be controlled by public entities. For example, Italian Law no. 155/2006 on SE explicitly states that public administrations may not acquire the SE status (art. 1, par. 2). It permits public administrations to become members of an SE, but at the same time refuses the SE status to organizations directed and controlled by a public administration (art. 4, par. 3). Similar restrictions may be found in Slovenian Law no. 20/2011 on SE (art. 9, par. 2) and in Danish Law no. 711/2014 on SE (sect. 5(1) no. 3), among others.

Nevertheless, no SE legislation would be adequate without an effective system of public enforcement and, in particular, of protection of the SE legal form or qualification. This is also considering that existing laws protect, in the interest of SEs, the legal denomination of SE, by reserving the exclusive right to use the

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care, access to employment and training, dependency management, etc.); and/or • businesses with a method of production of goods or services with a social objective (social and professional integration via access to employment for people disadvantaged in particular by insufficient qualifications or social or professional problems leading to exclusion and marginalisation) but whose activity may be outside the realm of the provision of social goods or services" (ivi at 2 f.).

[3] See sect. 4(1), Finnish Law no. 1351/2003 on SE, allowing the registration as SEs of all traders, including individuals, registered under sect. 3, Law no. 129/1979, and art. 50b, par. 1, Slovak Law no. 5/2004 on WISE.

name "social enterprise" for entities that are established and operate in accordance with the relevant regulations[4].

External control of SEs may be exercised *ex ante*, before registering SEs or before issuing a certificate that declares the possession of the status[5], and/or *in itinere*, during the existence of an SE, as well as upon dissolution. Existing laws provide for all these types of public control and define times, forms and procedures thereof.

The public institution in charge of the enforcement and control of the SE form or status varies across jurisdictions[6]. In some countries, the control of SEs may be delegated by the state to secondary organizations composed of SEs[7].

Sanctions also differ depending on the model of SE legislation. When the SE is a qualification or status, the ordinary sanctions are removal from the register of SEs or revocation of the SE certification, upon prior injunction to regularize irregularities[8]. When the SE is a legal form of incorporation, the ordinary final sanction is dissolution by order of the authority. In any event, the law prescribes the disinterested devolution of an SE's residual assets at the loss of the SE status or at the entity's dissolution, as the case may be[9]. Fines for improper use of the SE legal denomination and other violations are also found in some laws[10].

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

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

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

[7] This is the case, for example, of Italian social cooperatives.

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

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

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

2.2. The pursuit of an exclusive or at least prevalent purpose of community or general interest

The pursuit of a purpose of general or community interest (or similar formulas, like social purpose) typifies SEs according to the existing legislation and contributes to their distinction from other types of entities, notably for-profit entities, like (ordinary) companies, and mutual entities, like (ordinary) cooperatives[11].

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

In some instances, the law connects the pursuit of the typical purpose directly to the activity performed. For example, a Belgian Social Purpose Company's (SPC) by-laws "define precisely the social purpose to which the activities referred to in the stated social object are devoted" (art. 661, par. 1, no. 2, Company Code). As regards British Community Interest Companies (CIC), sect. 35(3) of the Companies Act of 2004 provides that "an object stated in the memorandum of a company is a community interest object of the company if a reasonable person might consider that the carrying on of activities by the company in furtherance of the object is for the benefit of the community". French social initiative cooperatives (SCICs) "have as their object the production or supply of goods and services of collective interest, which are of socially useful character" (art. 19-*quinquies*, par. 2, Law no. 47-1775)[12].

[11] "Ordinary" in brackets is intended to distinguish these companies and cooperatives from community interest companies (CICs) and social cooperatives (SCs) or, more in general, companies and cooperatives with the status of SEs. See infra sect. 3.

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

2.3. The total or partial constraint on profit distribution, and the obligations regarding the allocation of profits and assets

According to existing legislation, SEs face specific limits on the distribution of profits generated by their businesses to shareholders, members, and other persons ("profit non-distribution constraint")[13]. More precisely, in several cases SEs are explicitly obligated by law to use possible profits either exclusively or prevalently for the pursuit of their social purpose[14]. This "asset lock" entails the prohibition of an SE from using profits for different goals – including wealth maximization of founders, members, shareholders, directors, employees, etc. – at any stage of its life, including dissolution, and in case of loss of the SE qualification.

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

In order to be effective, the non-distribution constraint should cover a number of potential circumstances, notably the payment of periodic dividends, the distribution of accumulated reserves, the devolution of residual assets at the entity's dissolution[15], the SE's transformation into another type of organization, if permitted by law, and the loss of the SE status[16]. In effect, many laws opportunely specify the constraint in this manner.

The non-distribution constraint could also be indirectly violated by means of acts that are particularly favourable, without reason, to those who cannot be advantaged by an SE, such as the payment of unjustifiable, above-market remunerations to employees or directors ("indirect distribution of profits"). Indeed, there are some laws that explicitly prohibit such acts in order to protect the profit non-distribution constraint or reinforce the rules on profit allocation[17].

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

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

[15] In this last respect, cf. art. 13, par. 3, Italian Legislative Decree no. 155/2006; art. 661, par. 1, no. 9, Belgian Company Code; sect. 31, English Companies Act of 2004 and sect. 23, CIC Regulations of 2005; art. 8, Portuguese Law-Decree no. 7/98 on social solidarity cooperatives; 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).

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

[17] Cf. art. 3, Italian Legislative Decree no. 155/2006; art. 11, paragraphs 2 and 3, Slovenian Law no. 20/2011; chap. 3, sect. 9, Danish Law no. 711/2014; Art. L3332-17-1, I, 3º, of the French Labour Code. To "indirect financial benefits" refers, yet more broadly, the Belgian Company Code in regulating

More precisely, there are laws that fully prohibit profit distribution[18], and laws that authorize a limited distribution of profits (these are the majority and the most recent laws)[19].

2.4. The conduct of a socially useful entrepreneurial activity

Another essential element of the SE legal identity is the performance of a socially useful enterprise. The entrepreneurial character of the activity conducted distinguishes SEs from more traditional non-profit organizations, which pursue the same objectives as the SE but through activities of a distributive and non-commercial nature, and are therefore also known as donative non-profits[20]. Indeed, existing laws explicitly require an SE to perform its activities in an entrepreneurial form and in certain cases dwell upon the characteristics that an activity must possess to be considered entrepreneurial[21].

Social Purpose Companies (art. 661, par. 1, no. 2). Art. 5, par. 1, Luxembourgian Law of 12 December 2016, prohibits worker remuneration higher than six times the amount of the minimum social wage.

[18] Cf. art. 3, Italian Legislative Decree no. 155/2006. The prohibition is total also for Portuguese social cooperatives (cf. articles 2, par. 1, and 7, Law-Decree no. 7/98), for Spanish social 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 (sect. 59(3), Law no. X-2006).

[19] Sect. 30, English Companies Act of 2004, gives the CIC Regulator the power to set limits on the distribution of assets to a CIC's shareholders. Since 1 October 2014, the limit that the Regulator has imposed is 35% of annual net profits (the issue concerns only CICs that are companies limited by shares, since those limited by guarantee have no shareholders to pay dividends). This limit is named "maximum aggregate dividend cap". On the other hand, the "dividend per share cap", previously provided for (and equal to 20% of a shareholder's paid-up capital), has been removed. Furthermore, it must be noted that this limit applies only to dividends paid to entities that are not asset-locked bodies, because destinations to asset-locked bodies are not subject to any limits if approved by the Regulator: cf. Office of the Regulator of CICs: Information and Guidance Notes (no. 51) 6 f. The prohibition is partial also for Danish SEs (see chap. 2, sect. 5(2), Danish Law no. 711/2014), French SCICs (see art. 19-nonies, Law no. 47-1775), Belgian SFSs (see art. 661, par. 1, no. 5, Company Code), Italian SCs (see art. 3, Law no. 381/91, to be read in conjunction with art. 2514 of the Civil Code), Slovenian SEs (see art. 11, par. 2, Law no. 20/2011), and Spanish integration enterprises (Law no. 44/2007); among many others. In Luxembourgian Law of 12 December 2016 a distinction appears between "impact shares" and "investment shares": while no remuneration is admitted for the former, the latter may be remunerated under certain conditions (see articles 4 and 7).

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

[21] For example, to produce goods and services on a commercial principle is one condition for the registration of Finnish SEs in the respective register (see sect. 4, par. 1, no. 2, Law no. 1351/2003);

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

There are laws that recognize SEs only as work integration SEs (WISEs). In this case, it is not the type of business but work integration of people with difficulty accessing the labour market that makes the enterprise socially useful. The law therefore prescribes that, regardless of the nature of the business, WISEs must employ a certain minimum percentage of disadvantaged people or workers[22].

In contrast, there are laws that afford a twofold possibility: The SE is identified either by the performance of an activity considered socially useful by law (health care, social assistance, social housing, etc.), or by the work integration of disadvantaged people or workers in any activity (even not socially useful *per se*). Following the Italian example, it is very common in Europe to use the expression "social enterprise of type A" to refer to an SE that produces socially useful goods or services and "social enterprise of type B" to refer to a WISE[23].

Laws that provide only for SEs of type A are rarer[24].

Italian SEs of Legislative Decree no. 155/2006 must carry on a stable economy activity of production of goods or services of social utility.

[22] European laws on WISEs, indeed, fix a minimum percentage of disadvantaged people or workers (this percentage is, for example, 30% in Italian, Finnish and Romanian laws, as well as in Spanish Law no. 44/2007; 40% in Lithuanian law; 70% in Spanish Royal Legislative Decree no. 1/2013) and therefore do not require all employees of the SE to be disadvantaged people or workers. Another issue is the definition of the disadvantaged people or workers to be integrated by a WISE. Here, again, the situation is varied depending on the jurisdiction. For example, Finnish Law no. 1351/2003 (sect. 1) provides for the work integration of the disabled – understood as "employees whose potential for gaining suitable work, retaining their job or advancing in work have diminished significantly due to an appropriately diagnosed injury, illness or disability" – and the long-term unemployed, identified by reference to another national law. Also Lithuanian Law no. IX-2251 (sect. 4) assumes the disabled (which it divides into various groups, depending on the measure of invalidity) and the long-term unemployed as target groups for SEs. Italian SEs must employ either disadvantaged workers, identified by reference to art. 2, par. 1, lit. f), i), ix) e x), EU regulation no. 2204/2002, or disabled persons, identified by reference to art. 2, par. 1, lit. g), of the same regulation (this regulation has been replaced by EU regulation no. 651/2014 of 17 June 2014).

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

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

With regard to SEs of type A, it is also worth distinguishing between laws that define and enumerate the socially useful activities (welfare services, health care, etc.) that an SE must carry out[25], and laws, such as the UK law on CICs, that provide a general clause for the identification of the admissible activities[26]. An CIC must satisfy a "community interest test", i.e., it must demonstrate to the CIC Regulator that "a reasonable person might consider that its activities are being carried on for the benefit of the community" (including a section of the community, which could also be constituted by a group of individuals with common characteristics)[27]. It is also interesting to observe that in the UK law on CICs (as well as in some other laws) the destination of profits (whatever the business that generates them) to social or community purposes (*e.g.*, to support a charity) is an activity that passes the "community interest test"[28].

With regard to SEs of type B or WISEs, one must distinguish between laws, such as the Italian ones on SCs and SEs and the Finnish one on SEs, that do not require (though they permit) disadvantaged people or workers to be (in addition to workers) members of the SE[29], and laws that, instead, conceive of WISEs strictly as worker cooperatives, so that the disadvantaged people or workers must also be members of the SE (although other categories of members are admissible, given that only minimum percentages of disadvantaged worker-members are prescribed by law)[30].

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

[26] Two general clauses for the identification of the activity of the sociétés d'impact sociétal may also be found in the recent Luxembourgian Law of 12 December 2016 (see art. 1, par. 2).

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

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

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

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

2.5. Obligations concerning governance

The governance of an SE is influenced by the model of SE legislation that is in force in a given jurisdiction. For cases in which the SE is a particular type of company (e.g., a CIC) or a particular type of cooperative (e.g., an SC), its governance features are in general those of a company and of a cooperative, respectively[31]. In contrast, for cases in which the SE is a particular legal qualification or status, its governance features vary according to the legal form in which the organization has been established (association, foundation, company, cooperative, etc.). This distinction between models of legislation on SE will be presented and discussed in the next section of this article.

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

Among these governance requirements is, notably, the obligation to issue a report on the activities carried out and the benefit delivered to the community, as well as on other related aspects, such as the involvement of stakeholders and the use of profits and assets. This report may have different denominations (social report, community interest report, etc.) and contents across jurisdictions, but it performs the same function everywhere, namely for the SE to showcase the excellent and diverse work that it does and for the authority in charge to oversee the social impact of the SE in an ongoing manner[32].

Another legal requirement that is particularly worth mentioning is the obligation of SEs to involve their various stakeholders in the management of the enterprise. Normally, existing SE laws are not very precise in defining this requirement[33]. This is not surprising, since the possible forms and modalities of stakeholder involvement depend on several circumstances, such as the type of SE

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

[32] Cf., among others, art. 5, lit. e), Spanish Law no. 44/2007; sect. 34, English Companies Act of 2004 and sect. 26 ff., Community Interest Company Regulations of 2005; art. 6, par. 2, Luxembourgian Law of 12 December 2016; art. 9, par. 1, lit. c), Romanian Law no. 219/2015; chap. 2, sect. 8, Danish Law no. 711/2014; art. 10, par. 2, Italian Legislative Decree no. 155/2006.

[33] Cf., for example, chap. 2, sect. 5(4), Danish Law no. 711/2014, according to which an SE must be inclusive and responsible in the conduct of its activities; art. 12, Italian Legislative Decree no. 155/2006, according to which an SE must involve workers and beneficiaries of the activity, and involvement is understood as "any mechanism, including information, consultation and participation, through which workers and beneficiaries of the activity may exercise an influence on decisions to be taken within the enterprise, at least on topics that may directly affect the working conditions and the quality of the goods and services produced or exchanged".

(whether type A or type B), the nature of the business conducted, the size of the SE, etc. This is the reason why SE laws resort to general provisions.

Yet another significant legal requirement concerns the legal and economic treatment of an SE's employees. There are SE laws that simply insist, with particular regard to the disadvantaged people or workers employed by a WISE[34], on a treatment that must not be less favorable than that of the employees of ordinary business enterprises[35]. There are other laws that, for understandable equity and fairness reasons within an SE, lay down a limit on the variance of the salaries, such that it does not exceed a determined ratio[36].

3 Models of legislation on social enterprise

Elsewhere I have already emphasized the fundamental role of *ad hoc* legislation on SE for the development of this particular type of business organization. The real issue, therefore, is not whether, but how SEs should be specifically regulated[37].

Specific laws on SEs began to appear in Europe in the 1990s. Indeed, Italian Law no. 381 of 1991 on SCs is often considered the cornerstone of this legislation[38]. More than 25 years since Italian Law no. 381/1991 on SCs was approved,

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

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

[36] Cf. art. 8, par. 4, lit. d), Romanian Law no. 219/2015, according to which differences among salaries cannot exceed the ratio of 1:8. See also Art. L3332-17-1, I, 3º, of the French Labour Code.

[37] Cf. Fici, Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective, 27(5) European Business Law Review, 2016, 639 ff.; and more recently Fici, A European Statute for Social and Solidarity-Based Enterprise, Study for the Committee on Legal Affairs of the European Parliament, Brussels, 2017.

[38] In this sense, cf., among others, Defourny & Nyssens, 'The EMES Approach of Social Enterprise in a Comparative Perspective', cit., 3; Crama, Entreprises sociales. Comparaison des formes juridiques européennes, asiatiques et américaines (2014), Think Tank européen Pour la Solidarité – PLS, 17; Galera & Borzaga, Social Enterprise. An International Overview of Its Conceptual Evolution and Legal Implementation, in 5 Social Enterprise Journal 210 ff. (2009). However, although it cannot be denied that this law initiated a process that involved several EU Member States and, therefore, had a strong cultural impact even outside the borders of its application, it must be acknowledged that the UK's Industrial and Provident Societies Act (IPSA) of 1965 already provided for the establishment of a Community Benefit Society, that is, a company whose economic activity "is being, or is intended to be, conducted for the benefit of the community" (see sect. 1(2)(b) IPSA 1965, and now sect. 2(2)(a)(ii) of the Co-operative and Community Benefit Societies Act of 2014).

at least 18 EU Member States have specific organizational law on SE[39]. The panorama is varied: Different models of SE regulation may be identified, and the legislation on SEs may be classified in several ways.

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

(i) laws that recognize and establish the SE as a particular type (or sub-type) of legal entity, i.e., as a specific legal form of incorporation, and

(ii) laws that recognize and establish the SE as a particular category (or qualification/status) of various entity types meeting some common requirements.

3.1. The social enterprise as a specific legal form of incorporation

Laws belonging to the first typology represent the first wave or generation of laws on SE. They provide a specific legal form of incorporation for SEs, which is distinct from all the other legal forms. More precisely, the specific legal form found across EU jurisdictions is either a particular type (or, if one prefers, a modified type or sub-type) of cooperative or a particular type (or, if one prefers, a modified type or sub-type) of company.

Under these laws, therefore, an organization incorporates (or re-incorporates) as an SE. The SE may have different legal denominations across jurisdictions, depending on the legal structure of incorporation. The social cooperative (SC), and similar legal denominations, such as collective interest cooperatives and social solidarity cooperatives, which are provided for in many jurisdictions (France, Italy, Poland, Portugal, Spain, etc.), and the UK community interest company (CIC) are the most prominent examples of this sort of legislation.

While seeking to identify the most suitable legal framework for SEs under this model of legislation, one should therefore ask which legal form suits SE best, whether the cooperative form or the company form.

3.2. The social enterprise as a legal qualification (or status)

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

[39] Cf. Fici, A European Statute for Social and Solidarity-Based Enterprise, for a list of these laws.

The laws that provide a specific legal qualification (or status, certification, etc.) for SEs represent the second wave or generation of laws on the SE. As already observed, these laws do not consider the SE as a particular legal form of incorporation, but as a legal qualification that may be acquired by entities complying with certain requirements, regardless of the legal form in which they have been incorporated. More precisely, in some jurisdictions, like Finland and Italy, the law stipulates that all the available legal forms are eligible by an organization in order to qualify as an SE, while in other jurisdictions, like Belgium and Luxembourg, the law restricts the SE qualification to entities incorporated as companies or as cooperatives[40].

This model of legislation is increasingly being praised by legal scholars[41] and appears as the new frontier of SE regulation. In fact, the most recent national laws (or rules) on SE are laws (or rules) providing for the SE as a legal qualification, certification or status. The SE is a legal qualification in Romanian Law of 23 July 2015 and Luxembourgian Law of 12 December 2016. Moreover, some countries, like France and Italy, which already had a law on SCs, subsequently decided to introduce laws (or rules) of this second type[42].

In effect, there are some advantages that may be ascribed to this model of legislation in comparison to the preceding one. It permits an existing organization to become an SE without having to re-incorporate as an SE, and an existing SE to lose its status as an SE without having to dissolve, convert into, or re-incorporate in another legal form, thereby reducing costs and facilitating access to (and exit

[40] In Belgium, the société à finalité sociale (social purpose society, or SFS) is a legal denomination that all the types of companies provided for by art. 2, par. 2, of the Belgian Company Code of 1999 – namely, the société en nom collectif; the société en commandite simple; the société privée à responsabilité limitée; the société coopérative, à responsabilité limitée, ou à responsabilité illimitée; the société anonyme; the société en commandite par actions; the groupement d'intérêt économique – may acquire if they meet the relevant requirements (see art. 661, Company Code). Along the same lines, the qualification as an integration enterprise under Spanish Law no. 44/2007 is limited to those enterprises with the legal form of a sociedad mercantil or a sociedad cooperativa (art. 4, par. 1). Also in the recent Luxembourgian Law of 12 December 2016, only the société anonyme, the société à responsabilité limitée and the société coopérative may obtain the qualification as social impact societies (SISs). In contrast, the possibility exists that legislators permit even an individual entrepreneur to acquire the status of an SE, as happens in Finland, where Law no. 1351/2003 allows the registration as SEs of all traders, including individuals, registered under sect. 3 of Law no. 129/1979, and in Slovakia, where art. 50b, par. 1, of Law no. 5/2004, makes reference, in defining an SE, to both legal and physical persons.

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

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

from) the SE legal denomination[43]. This holds particularly true for an organization established in a legal form (for example, association or foundation) different from that usually chosen by legislatures, following the first model of SE legislation, to accommodate the SE, i.e., of company or cooperative. Imposing sanctions may be simpler for the authority enforcing the SE status (and less onerous for the same organization), because it may suffice to revoke the qualification of SE (or threaten to revoke it if irregularities are not removed), instead of dissolving or converting a legal entity[44].

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

On the other hand, inasmuch as the law imposes certain requirements on all SEs (or rather, on all organizations that wish to qualify as SEs and maintain this qualification over time), independently from their legal form of incorporation, this model of legislation ensures, in any event, that all SEs have a common identity as SEs[45]. Moreover, with regard to an entity's identity as an SE, there is no evidence that the laws attributable to this second model of SE legislation are, in general, less strict than those attributable to the previous one. At the same time, this model of legislation allows legislators to organize and combine the legal requirements for SE qualification in different manners depending on the legal form of the SE, thus avoiding rigidity of the SE status[46].

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

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

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

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

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

poses[47]. In addition, in some jurisdictions (e.g. Finland and Italy), it also permits SEs to assume the form of an association or a foundation, thereby taking advantage of the benefits that each of these legal forms is capable of conferring[48].

4 What is the proper legal form for social enterprises?

The question of whether the cooperative form should be preferred over the (capitalistic) company form when the regulation of SEs is in discussion arises regardless of the model of legislation on SE adopted, although, of course, the question is more relevant when a legislator, under the first model of legislation, has to decide the legal form of an SE incorporation. In fact, even under the second model of legislation presented above, the SE in the cooperative form might receive preferential legal treatment as compared to the SE incorporated under another legal form, notably the company form.

The following subsections of this article explain why the cooperative form suits SEs more and better than the (capitalistic) company form, and should be, therefore, preferred or at least privileged by legislators dealing with SEs.

4.1. The social enterprise in the cooperative form

As stated, beginning with Italy in 1991, many EU jurisdictions have provided for the establishment of SEs in the cooperative form, in which case they assume the legal denomination of "social cooperatives" or similar (e.g., "social initiative cooperatives").

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

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

The SC is, in fact, a cooperative with a non-mutual purpose, because – as, for example, Italian Law no. 381/91 literally states – it has the "aim to pursue the general interest of the community in the human promotion and social integration of

[47] This does not mean, however, that the SE in the company form does not require specific rules also under this model of legislation, in order to make it (more) consistent with an SE's identity, as we will clarify infra in the main text.

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

citizens", either through the management of socio-health or educational services (so called SCs of type A) or through the conduct of any entrepreneurial activity through the employment of disadvantaged people (so called SCs of type B)[49].

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

- a democratic SE (since cooperatives are, in principle, managed according to the "one member, one vote" rule, regardless of the individually paid-up capital; this is also the primary reason why it is commonly stated that, in cooperatives, the capital plays a purely "servant" role, the organization being person-centred rather than capital-centred);
- potentially open to new members, whose joining is favoured by the variability of capital (the principle of the "open door", if effective, is a manifestation of present cooperative members' altruism towards future cooperative members);
- jointly owned and controlled by its members (given that, usually, all or a majority of the directors must be members of the cooperative, and the external control of a cooperative or control by a single member are not permitted);
- and, by its very nature, supportive of other cooperatives (cooperative system), its employees and the community at large[50].

Not accidentally, therefore, the cooperative is considered in specific constitutional provisions that recognize its social function and provide for state support[51]. The social function of cooperatives can be considered to be even more intense when a cooperative aims to pursue (rather than the economic interest of its members) the general interest of the community by acting as an SE. Essentially, the combination of a cooperative structure and objectives of general interest results in increased social relevance of the organization, given that the social relevance

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

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

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

of the cooperative structure is added to the social relevance of the enterprise's objectives.

Undoubtedly, the SE in the cooperative form is an entity with a strong identity as SE, because its governance has the participatory (and human) dimension that characterizes the "ideal-model" of SE. Moreover, the democratic nature of the SE in the cooperative form makes it perfectly compatible with the notion of an entity of the social economy that is growing common in Europe and in the laws on the social economy approved thus far in Europe. Under these laws, indeed, democratic governance is a key identifier of the entities of the social economy[52].

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 gain of the ultimate beneficiaries of the organization[53].

4.2. The social enterprise in the company form

Among the EU jurisdictions, only the UK's provides a specific company form, namely, the CIC, for the establishment of SEs[54].

An SE in the company form is a particular type of company intended not to maximize shareholder value, but to pursue the interest of the community. In itself, the company form does not raise particular concerns for the pursuit of an SE's purpose, to the extent that the law is clear in assigning a social or general interest objective (and in restricting the distribution of profits) to these companies. Furthermore, the SE in the company form has, in theory, more financial capacity than an SE established in other forms, since an organization based on the amount of capital individually held ("one share, one vote") may attract more investors than an organization, as the cooperative, in which equity is irrelevant to governance

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

[53] We draw this conclusion, whose basic arguments cannot be developed here, from a wide literature, including, in particular, Akerlof & Kranton, Identity and the Economics of Organizations, in 19 Journal of Economic Perspectives 9 ff. (2005); Rodrigues, Entity and Identity, in 60 Emory Law Journal 1257 ff. (2011); Davis, Identity, in Bruni & Zamagni (eds.), Handbook on the Economics of Reciprocity and Social Enterprise, 201 ff. (Cheltenham-Northampton, Edward Elgar, 2013). More exactly, the entity's identity is not likely to motivate only the workers of the enterprise, but also its other stakeholders, such as suppliers, lenders and consumers, as well as donors and volunteers.

[54] Of course, an SE in the company form may also be found in those jurisdictions that adopt a model of legislation in which the SE is a legal category or qualification, open to entities incorporated under various legal forms, including that of a company.

("one member, one vote"). Indeed, what particularly changes with respect to the SE in the cooperative form, precisely because of the different legal form adopted, is the structure of ownership and control. An SE incorporated as a company is, in principle, a capital-driven organization led by investors as shareholders, which may moreover be subject to control, even by a single shareholder[55].

The SE in the company form could also be, in fact, a manager-run enterprise, since the members' control and active participation are not required the way that they are for the SE in the cooperative form. One must add to this consideration some recent findings from behavioural law and economics. Laboratory experiments have shown that, under certain conditions, managers prove less inclined to transfer resources to third party enterprise beneficiaries (*e.g.*, charities) not only than the owners of the company, but also than they would be if they were not acting as agents. This is probably due to the fact that managers tend to curry favour with company ownership in order to satisfy the interests of shareholders as their principals and retain their offices[56].

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

– either a governance structure that directly involves the shareholders in the management of the enterprise, if they are actually motivated by a sense of altruism;
– a governance structure that completely frees the managers from the competitive pressures of shareholders, so that they do not have any incentive to align themselves with the latter's interests; or
– a governance structure that awards rights and powers (also) to an SE's beneficiaries who are not shareholders (or to their representatives), so that they

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

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

might push managers to efficiently and effectively achieve the social mission of the organization.

In conclusion, an SE in the company form is a type of organization whose identity as an SE is weaker and at risk if limits are not set on the control by a single member or if precise rules on the ownership and control are not adopted[57]. This is the case, for example, in Italian Legislative Decree no. 155/2006, which stipulates that an SE may be joined, but not controlled or directed, by a for-profit entity[58]. This approach resolves the issue almost completely, making the SE in the company form a very interesting option, especially as a structure of second-degree aggregation among primary SEs (even in the cooperative form). Another interesting provision to this effect is the one found in art. 9, paragraph 1, of Slovenian Law no. 20/2011 on social entrepreneurship, which limits the potential for for-profit companies to establish SEs, providing that they may do so only in order to create new jobs for redundant workers (and explicitly providing that they may not do so in order to transfer to the SE the enterprise or its assets)[59]. Yet another interesting measure is that regarding the Belgian *société à finalité sociale* (SFS), in which no shareholder may have more than one-tenth of the votes in the shareholders' general meeting[60].

In the EMES' definition of the ideal-type of SE, a high degree of autonomy and a decision-making power not based on capital ownership are – together with the stakeholder involvement – essential elements of the governance of SEs. One cannot affirm that these aspects are taken into consideration by all existing laws on SE. This depends on the model of legislation adopted and in particular on whether an SE can take the legal form of a company. Indeed, where an SE may be established as a company, it may be managed according to the capitalistic principle "one share, one vote", and it may be directed and controlled by even a single

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

[58] Cf. art. 4, par. 3, Legislative Decree no. 155/2006, as well as art. 8, par. 2, of the same act. Even stricter is the solution found in Spanish Law no. 44/2007, given that only not-for-profit entities, associations and foundations may promote the establishment of integration enterprises (see articles 5, lit. a) and 6).

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

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

shareholder or as a pure subsidiary. If legislators want to preserve the autonomy and democracy of SEs – and moreover, to make them compatible with the concept of social economy that is emerging in the EU, of which, as already pointed out, democracy is an essential element – they should either exclude the legitimacy of an SE in the company form or – what is recommended – regulate the use of the company form so that its potential contradictions with an SE's autonomy and democracy are eliminated or at least reduced.

5 Conclusions

The Rochdale Society of Equitable Pioneers – which was registered on 24 October 1844 and opened its first store on 21 December of the same year in Rochdale, near Manchester, UK – is almost universally regarded as the first structured manifestation of that kind of business organisation to which the title and substance of "cooperative" have been referred until today. The Rochdale Society began its operations by selling basic foodstuffs to and in the interest of its members. In the declaration of its objects, it was stated that the Society acted "for the pecuniary benefit, and improvement of the social and domestic condition of its members" by performing several economic activities, beginning with "the establishment of a store for the sale of provisions", and including the manufacture of articles for the employment of the unemployed or underemployed members, as well as the purchase or rent of estates of land to be cultivated by the members.

The Rochdale Society's objectives substantially coincide with those that existing cooperative laws attribute to cooperatives in general. This institutional purpose of cooperatives may be referred to as 'mutual purpose'[61].

There are, however, cooperatives that do not pursue a mutual purpose, but a purpose of general interest, and they are recognized by law as well as mutual cooperatives. The analysis conducted so far in this article has shown that the cooperative form has been used by legislators to host the SE, and that the SE in the cooperative form is a legal entity acting in the general interest of the community and not in the interest of its members as such. Cooperative legal theory has to recognize this fact and also start dealing with general interest cooperatives, which relative to mutual cooperatives present different problems of regulation, due to their distinct objective[62].

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[61] Cf. Fici, An Introduction to Cooperative Law, in Cracogna, Fici & Henrÿ (eds.), International Handbook of Cooperative Law, cit.; Fici, The Essential Role of Co-operative Law and Some Related Issues, in Michie, Blasi and Borzaga (eds.), Mutual, Co-operative, and Co-Owned Business, Oxford University Press, 2017, 539 ff.

[62] For example, the governance structure of a general interest cooperative should be designed by law in coherence with its purpose which is external in character, e.g. by giving voice to beneficiaries who

Taking this into account, the Principles of European Cooperative Law (PECOL), drafted by the Study Group on European Cooperative Law (SGECOL), provide for general interest cooperatives (or GICs) in addition to mutual cooperatives[63]. It is a first attempt to include non-mutual (or general interest) cooperatives in cooperative legal reasoning, conscious of a legislative reality in which mutual cooperatives are no longer the only type of cooperatives.

6 BIBLIOGRAPHY

Akerlof & Kranton, *Identity and the Economics of Organizations*, in 19 Journal of Economic Perspectives, 2005.

Cabrelli, 'A Distinct "Social Enterprise Law" in the UK? The Case of the 'CIC'' (2016), University of Edinburgh - School of Law - Research Paper Series no. 2016/27

Davis, *Identity*, in Bruni & Zamagni (eds.), *Handbook on the Economics of Reciprocity and Social Enterprise*, Cheltenham-Northampton, Edward Elgar, 2013.

Fajardo, Fici *et al.*, *Principles of European Cooperative Law. Principles, Commentaries and National Reports* (Cambridge, Intersentia, 2017) (forthcoming).

Fici, *Italy*, in Cracogna, Fici & Henrÿ (eds.), *International Handbook of Cooperative Law*, Berlin-Heidelberg, Springer, 2013.

Fici, *Cooperative Identity and the Law*, in 24 European Business Law Review 37, 2013.

Fici, *Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective*, 27(5) European Business Law Review, 2016.

Fici, *The Essential Role of Co-operative Law and Some Related Issues, in Michie, Blasi and Borzaga (eds.), Mutual, Co-operative, and Co-Owned Business*, Oxford University Press, 2017

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.

Hamman, Loewenstein, & Weber, *Self-Interest through Delegation: An Additional Rationale for the Principal-Agent Relationship*, in 100(4) American Economic Review, 2010.

Hansmann & Thomsen, 'Managerial Distance and Virtual Ownership: The Governance of Industrial Foundations' (2013), ECGI Working Paper Series in Finance, no. 372/2013.

Rodrigues, *Entity and Identity*, in 60 Emory Law Journal, 2011.

Sørensen & Neville, *Social Enterprises: How Should Company Law Balance Flexibility and Credibility?*, in 15 European Business Organization Law Review, 2014.

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are not members or, more in general, to representatives of the community within which the cooperative operates.

[63] Cf. Fajardo, Fici et al., Principles of European Cooperative Law. Principles, Commentaries and National Reports (Cambridge, Intersentia, 2017) (forthcoming).