10. Cooperatives and social enterprises: comparative and legal profile

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1. Introduction. What is the relationship between cooperatives and social enterprises?

As we can see in the contributions published in this volume, the cooperative movement would appear to be particularly interested in this new, «partially still indistinct» subject that, in the legislation in the countries that have already begun to contemplate it, is referred to as «social enterprise».

Indeed, it is possible to detect a note of concern in some of these contributions with regard to the social enterprise, almost as if there is a risk that the new form of enterprise may occupy the areas occupied thus far by more traditional forms of enterprise and, since it has gained accreditation on the market and in the eyes of the public institutions as a result of the «social» status that has been granted to it by legislation, it may push the sociality of cooperatives into the background, particularly as far as worker cooperatives are concerned.

In this contribution, a «social enterprise» is considered to be any private organisation which, regardless of its legal form, undertakes, either exclusively or at least for the most part, activities that are of a social utility and whose purpose is the general interest.

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34 Cf. Scalvin, in this Volume
35 Cf. In particular the Finnish law no. 1351, dated 30 December 2003, Act on social enterprises, and the Italian legislative decree no. 155, dated 24 March 2006, n. 155, Act on social enterprise. As a result of their different approach to the subject, neither the Belgian nor the British law refer to the «social enterprise» as such. Instead, they refer, respectively, to enterprises with a social purpose (included in article 164 bis of the Codes on enterprises of the law dated 13 April 1995) and to community interest companies (cf. Companies (Audit, Investigations and Community Enterprise) Act 2004; Community Interest Companies Regulations 2005). All of these provisions are taken into account in the comparative table of existing legislation on social enterprises that has been put together by CECOP and is included in this Volume
36 CF notably Canal in this Volume
Naturally, the definition given above, which, for the time being, is only a very concise and brief definition, will have to be further developed and broken down into its various component parts (activities of social utility, general interest purpose, etc.) and in order to do this it will be necessary to compare the notions of social enterprise that are in force in each piece of legislation. In order to achieve this objective, we feel that it is relevant to look not only at the legislation on social enterprise, but also at legislation on individual forms of social enterprise and therefore at legislation on social cooperatives and enterprises with a social purpose.

The debate on the possible consequences of recognition being given, in legislation, to social enterprises has been, and continues to be, particularly intense in those countries, such as Italy, in which the phenomenon of social cooperation is widespread. Nor should this come as a surprise to anyone, since if we consider the comparison with this new form of enterprise to be necessary for the cooperative movement in general, then it is even more so for the part of the cooperative movement which, for some time now, in a series of European countries, has assumed the «social label» and has directed its activities towards the general interest.

The analysis provided in this contribution will be predominantly legal and, as such, may also reflect the inability of the legislators to acknowledge and to represent the phenomena of these realities as they really are, as they can be submitted to a historical analysis, and as they are perceived by those who are their main architects. Therefore, the «social enterprise» examined in these pages is only the «social enterprise» as it is recognised in legislative texts and does not include examples of social enterprise that may be different, broader or more complex and that may be object of discussions between practitioners, of particular public policies, etc.

An analysis of this type might, therefore, appear to be partial or limited, but since it presents a higher degree of certainty and is more error-free than other types of analysis.

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37 Cf. SCAVVA, op. ult. cit., who talks about it being an unavoidable issue that has to be addressed
38 Cf. the first to do so was the Italian law no. 381, dated 8 November 1991, Act on Social Cooperatives, followed by the statutes introduced for the Portuguese cooperativa de solidariedade social (cf. art. 4, para. 1, letter. “m”), law no. 51, dated 7 September 1996, n. 51, Código cooperativo, and legislative decree no. 7, dated 15 January 1998, Regime jurídico das cooperativas de solidariedade social; the Spanish cooperativa de iniciativa social (art. 106, law no. 27, dated 16 July 1999, Regime jurídico das cooperativas de solidariedade social); the French société cooperative d'intérêt collectif (art. 19 quinquies, law no. 1775, dated 10 September 1947, statut de la coopération, as an annex to law 624, dated 17 July 2001). Cf. now also see the regulation on social cooperatives as introduced into Polish legislation on 27 April 2006 and the Hungarian legislation on cooperatives in 2006. All of these provisions are taken into account in the comparative table of existing legislation on social enterprises that has been put together by CECOP and is included in this Volume.
(since the value judgements are contained within cogent legislative provisions), it should be considered to be the necessary (albeit insufficient) precondition for any comparison between organisational forms, particularly since these forms (such as cooperatives and social enterprises) are characterised by their common approach to economic activity and the market. Furthermore, only by analysing and contrasting the legislative texts on the organisational forms under comparison, will it be possible to establish whether or not the existing legislation reflects, and if it does so, to what extent, the reality of these forms, at least as they are perceived by someone who assumes an opinion that is neutral from a legal point of view.

2. The social function of cooperation.

Before looking at the relationship between cooperatives and social enterprises, it would first of all seem appropriate to establish whether there exists a link between the cooperative form of enterprise and social utility and, if this link does exist, what is its nature.

The social-economic purpose of cooperatives is something that has been spoken about for some time now at different levels and by various parties.

In its recommendation (no. 193, dated 20 June 2002) on The promotion of Cooperatives, the International Labour Organisation (ILO) recognises that, «cooperatives in their various forms promote the fullest participation in the economic and social development of all». The recommendation states that the promotion of cooperatives – that are guided by the specific values and principles set out by the International Cooperative Alliance (ICA) and which were formally acknowledged in the very same ILO recommendation – «should be considered as one of the pillars of national and international economic and social development».

In its Communication COM(2004) 18, of 23 February 2004, on the promotion of

40 According to this Recommendation, these are: self-help, self-responsibility, democracy, equality, equity and solidarity (cf. ILO Recommendation, point 3.4)
41 These principles are: voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; and concern for community. Cf. ICA, Declaration on the Cooperative Identity, Manchester, 1995
42 Cf. Recommendation cit., point 7.1
cooperative societies in Europe, the European Commission states that «cooperatives are an excellent example of a company type which can simultaneously address entrepreneurial and social objectives in a mutually reinforcing way» and recognises their «increasingly important and positive roles… as vehicles for the implementation of many Community objectives in fields like employment policy, social integration, regional and local development, agriculture, etc.».

It is also well known that, for some time now, the European institutions include cooperatives, together with associations, foundations and mutuals, in the sphere of the so-called «social economy organisations».

Indeed, this recognition is also to be found in legislation, sometimes at the highest level of the hierarchy of legal instruments.

Perhaps the most important case (without being the only one) is that of the Italian Constitution, which includes an article on cooperative societies, thereby making the cooperative the only legal form of enterprise that enjoys a mention in the constitution and therefore benefits from constitutional protection.

According to article 45 of the Italian Constitution, «the Republic recognises the social function of cooperation of a mutual nature without private speculation», and consequently it is incumbent upon the legislator to promote and to favour its increase through the most appropriate means.

The «social function» of cooperation is therefore established as a fact in law (this is the interpretation that should be given to «recognises» in the abovementioned article 45). This is what distinguishes it from an ordinary enterprise, with regard to which the very same Constitution states, on the one hand, that it «may not perform

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44 Lo., point 1.2
45 More recently, cf. COMMISSION COMMUNICATION COM(2008) 412, of 2 July 2008, The renewed Social Agenda: opportunities, access and solidarity in 21st century Europe, point 4.5, in which cooperatives (together with mutuals) are mentioned as being «social economy enterprises»
46 In fact, amongst others, both the Portuguese (art. 61) and the Spanish Constitutions refer to cooperative societies and the latter requires the legislator to promote cooperatives (art. 129). The Hungarian Constitution also contains a similar article (art. 12).
47 Since the Italian Constitution is a «rigid» constitution, then even should it wish to do so, the legislator (the Italian Parliament) could not abolish cooperative societies with an ordinary law, rather it would have to adopt a law to revise the constitution which requires a larger majority in parliament and may even have to call upon the people to give their approval through a referendum (cf. art. 138)
its activities in such a way that it is contrary to the social utility or that it harms human safety, liberty and dignity», clearly anticipating this probability (article 41, comma 2), whilst on the other, it requires the legislator to guide and to coordinate it towards social purpose activities, on the basis of the clear condition that it does not pursue social purpose activities (art. 41, comma 3).

There still remains the problem of establishing what should be understood by the «social function» of cooperation, or perhaps why the cooperative should be deemed to be a legal form of enterprise of a social utility.

Italian doctrine has identified and recognised the social function of a cooperative in the fact that it is an institute of economic democracy that represents «one of the ways in which the workers may participate in the «economic organisation» of the country», and therefore can influence the «shaping of political life» and the «exercising of sovereignty»⁴⁸. By granting the workers ownership and control of the enterprise (which, furthermore, should be carried out in a democratic way), thereby allowing them to participate effectively in the country’s economic and political life, the cooperative form may contribute to the efforts made to implement the social reform project that the members of the Italian parliament envisaged and called for in art. 3, comma 2 of the Constitution⁴⁹.

This is a position that is not only correct from an interpretative point of view, but it is also extremely topical from a political point of view, since the European Commission has also expressed its view that cooperatives contribute to the development of knowledge (since they are «schools of entrepreneurship and management» for the members, notably the workers, who take part in their activities)⁵⁰ and also that they are the most appropriate and least traumatic legal form for the transfer of an enterprise that has no hope of continuing in its present form: in these cases, the ownership of the company may be transferred to the workers, in other words the very people who, on the one hand, have a huge interest in its survival and have a good

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⁴⁸ See GALANNO, sub art. 41, in Commentario della Costituzione, edited by Branca, Rapporti economici, t. II, Bologna-Roma, 1982; cf. also NIGRO, sub art. 45, ibidem

⁴⁹ «It is the responsibility of the Republic to remove the obstacles of an economic and social nature that, by limiting the freedom and equality of the citizens, prevent the complete development of the human person and the effective participation of all workers in the political, social and economic organisation of the country.» With great awareness and political-institutional sensitivity, the members of the Italian parliament were therefore conscious of the fact that the legislative recognition of formal equality and the prohibition of discrimination are not sufficient to guarantee the exercise of fundamental rights in the absence of the material means required to exercise these rights

⁵⁰ Cf. COMMISSION COMMUNICATION COM (2004) 18, cit., point 2.1.1
knowledge of the sector in which they operate, whilst on the other would not have the required financial means to acquire the enterprise unless they were organised within a cooperative\textsuperscript{51}.

The sociality of cooperatives implies that due respect is given to several fundamental rules of function, structure and governance that are present in almost all of the legal systems.

First of all, from a functional point of view, the cooperative is the only type of enterprise whose main purpose, regardless of how this has been identified in the various pieces of legislation\textsuperscript{52}, is not that of providing a return on the members’ capital through the distribution of operating profits, accumulated reserves or in any other way. Indeed, this form of distribution is either completely prohibited or (as does happen) is only allowed to a limited extent\textsuperscript{53}. This makes cooperatives (unlike stock companies or corporations) not-for-profit\textsuperscript{54} enterprises or at least partially so: obviously this does not mean that they do not have a legitimate right to generate profits, rather it means that, as has already been said, these profits may not be allocated (either fully or in part) to the members according to the capitalistic criteria for the distribution of profits, that is to say in proportion to the amount of capital paid in by each member (non-distribution constraint)\textsuperscript{55}.

In this way, legislation on cooperatives reflects the ICA’s 3\textsuperscript{rd} principle, which states that, «Members usually receive limited compensation, if any, on capital subscribed as a condition of membership». On a similar note, the Italian Constitution makes its

\textsuperscript{51} Cf. Io., point 2.3.1
\textsuperscript{52} Italian law refers to «mutualist purpose», in the sense that the cooperative provides its members with goods or services (consumer or user cooperatives) or receives goods or services from its members (production cooperatives) or benefits from the labour activities of its own members (worker cooperatives) under the best possible conditions for the members (cf. arts. 2511 and 2512, Italian Civil Code). Similarly, cf. art. 1, para. 1 and 2, of the French law on cooperatives; also see section 56 of the Hungarian law on cooperatives, which refers to «modes of personal involvement of members» and specifies that this personal involvement may be achieved «by way of production, processing products, and preparation for marketing, sales, consumption or by other means», and that «one mode of personal involvement . . . is the obligation to perform work». Even the Community regulation on the European Cooperative Society (SCE) states that the satisfaction of the members’ interests should take place through «the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out.» Other laws limit themselves to stating, more generically, that the cooperative is an enterprise that has been established with the purpose of satisfying the economic or social interests of its own members: cf. art. 1 para. 1 of the Spanish law on cooperatives; art. 2, para. 1, of the Portuguese cooperative code; sec. 2 of the Hungarian law of 2001 on cooperatives; also see the concluding part of art. 1, para 3, of the French legislation
\textsuperscript{53} Cf., for example, art. 2514 of the Italian Civil Code; art. 48 para. 2 of the Spanish law; art. 14 of the French law
\textsuperscript{54} This is stated very clearly in art. 2, para. 1 of the Portuguese cooperative code (see also art. 73)
\textsuperscript{55} Italian doctrine expresses this concept by stating that cooperatives are prohibited from generating a subjective profit, but are allowed to have an objective profit
granting of recognition of the «social function» of cooperation conditional upon the «absence of private speculation».

The surplus generated by a cooperative enterprise is used for purposes that are determined by modalities designed to not only satisfy the particular interests of the cooperative’s members.

Indeed, according to current legislation, cooperatives are generally required to allocate a part of their surplus to indivisible reserves (this does not mean that these reserves are no longer available, rather it means that they cannot be shared out amongst the members in the event of the dissolution of the cooperative)\(^{56}\) and a part to support the development of the cooperative movement (for example into a fund established for this purpose by the associations that represent the cooperative movement)\(^{57}\).

Rather than allocating the surplus in proportion to the capital subscribed, they may only allocate the residual portion of the surplus to their members, according, and in proportion, to their transactions with the cooperative (in other words their contribution to the activities of the cooperative)\(^{58}\); furthermore this is sometimes only possible within specific limits\(^{59}\).

It is also important to emphasise the fact that these successive allocations (which have different names, for example in Italian they are known as «returns») only represent an ex post settlement (on the basis of the authenticated surplus) of the contractual consideration due to be paid by the cooperative to its own members. This is because, in a cooperative, the relationship between a cooperative and its members are normally governed by «open-terms contracts», in which the financial consideration to be allocated to the members is not fixed or pre-determined, rather

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\(^{56}\) Cf., *ex plurimis*, art. 2545-quater, comma 1, Italian Civil Code; art. 55 of the Spanish law; art. 69 of the Portuguese cooperative code; section 9 of the Finnish law; art. 65, para. 2 of the SCE Regulation

\(^{57}\) Cf., for example, the requirement to allocate 3% of the net annual profits to mutual funds for the promotion and development of cooperation (established by the national associations that represent the cooperative movement), that is imposed upon Italian cooperatives by article 11 of law no. 59, dated 31 January 1992

\(^{58}\) This part of the surplus, which is allocated to the members in accordance and in proportion with the mutual relationship with the enterprise, is called the «rebate» in Italian law (cf. art. 2545 sexies, Italian Civil Code). The distinction between limited remuneration of capital (or rather the distribution of profit) and the allocation of rebates is made clear in the 3\(^{rd}\) principle of the ICA, in which a distinction is made between «limited compensation, if any, on capital subscribed» and «benefiting members in proportion to their transactions with the cooperative». Also see articles 66 and 67 of the Regulation on the SCE, the first of which refers to dividends, whilst the second refers to the profit available for distribution

\(^{59}\) Cf., for example, article. 3, comma 2, of the Italian law no. 142, dated 3 April 2001, which limits the dividend that may be paid to the worker-members to 30% over the basic remuneration due to them
it is susceptible to further adjustment (either up or down) according to the economic results achieved by the enterprise  

These rules – which reflect not only the provisions of the 3rd principle of the ICA, but also those of the 6th and 7th principle – establish a company profile in which the degree of sociality is quite clear.

On the one hand, the indivisible reserves constitute resources that may be used for the purposes of the running or development of the enterprise, thereby contributing to the well-being of all of those (users, workers, etc.) who derive a benefit from the enterprise, whilst on the other, if they are not used in this way, they enable the perpetuation of the enterprise to the benefit of future generations of co-operators.

As for the provision of support to the cooperative movement, this is just one way of sharing the economic profits generated by individual cooperatives and groups of co-operators.

In terms of the company structure, one factor of a cooperative's sociality is the variable nature of its corporate capital and its consequent tendency to be open to the outside world (the admission of new members, just like the exclusion of members, does not require a specific modification of the statutes). In this way, cooperatives apply the ICA’s 1st principle, which states that cooperatives are organisations open to all persons able to use their services.

At this stage it is necessary to make it clear that, quite apart from the substantial degree of sociality of their purpose, as illustrated above, ordinary cooperatives (a

60 For further information on open-terms contracts (or incomplete contracts), see article 2.14 of the Unidroit Principles on international commercial contracts, as well as article 6:104 and successive articles of the Principles of European contract law

61 According to the ICA’s 3rd principle on Member Economic Participation, «Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.»

62 The 6th principle on «Cooperation among Cooperatives» states that, «Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.» According to the 7th principle on «Concern for Community», «Cooperatives work for the development of their communities through policies approved by their members.»

63 Cf. articles 2511 and 2524, Italian Civil Code; art. 13 of the French law; articles 2, para. 1, and 18, para. 1 of the Portuguese Cooperative Code; section 2 of the Finnish law; section 7 of the Hungarian law, art. 1, para. 2 of the SCE regulation
different approach will have to be taken regarding social cooperatives and we will have the opportunity to comment upon this later on) are still an organisational form that pursues a particular interest, since it aims to satisfy the needs and aspirations of its members\textsuperscript{64}. By admitting new members, the cooperative extends the benefits it is able to generate beyond the original circle of its own members and in this way it is able to generalise its own «particular» purpose.

However, it should be said that this latter profile is highly dependent on the specific way in which the cooperative conducts itself and on its effective good qualities, because although the existing legislation does protect third party interests upon admission, they do not recognise their right to admission (indeed, it would be difficult to do so, since what is at stake here is the freedom to manage the enterprise). The Italian law is very efficient in this area, since it states that the statutes must set out the requirements, conditions and procedure for the admission of members and it also specifies that such criteria may not be discriminatory and that they must be coherent with the purpose pursued and the activity carried out (art. 2527, Italian Civil Code); it also states that in the event that an application for membership be denied (reasons must be given) by the board, then the third party may ask for the application to be submitted to the general assembly of the members (art. 2528); finally, it requires the members of the board to provide details of the decisions it has taken with regard to the admission of new members in the annual report (art. 2518, last comma).

As far as the issue of governance is concerned, it is worthwhile recalling the well-known rule of «one member, one vote»: in cooperatives – and this is a rule that is common to all legislations, although there is the possibility of a small exemption, so that they reflect the contents of the 2\textsuperscript{nd} and 4\textsuperscript{th} ICA principles\textsuperscript{65} – each member has one vote, regardless of the capital he/she has subscribed.

\textsuperscript{64} The proof of this is to be found in the fact that, in many legislations, the undertaking of activities with non-member third parties is subject to limitations: cf. art. 2513 Italian Civil Code; art. 4 para 2 of the Spanish law; art. 3, para. 1 of the French law. Clearly the statements made in the text are based on the concise interpretation of the strictly legal data, since practice shows that cooperatives go beyond their legal requirements and allocate a further part of their available surplus to the general interest.

\textsuperscript{65} The 2\textsuperscript{nd} ICA principle: Democratic member control, states that «Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.» The 4\textsuperscript{th} ICA principle: Autonomy and independence, states that «Co-operatives are autonomous, self-help organisations controlled by their members. If they enter to agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.»
The social importance of the principle of democracy is evident, if we think that not only does this make the cooperative an instrument that satisfies people’s needs and aspirations, rather than the interests of capitalists, but also, and above all, it encourages the participation of everyone in the control and the running of the enterprise, making the cooperative the «school of entrepreneurship and management» referred to in the abovementioned European Commission Communication, or even the instrument of economic democracy alluded to in the Italian Constitution.

Finally, it clearly emerges from the analysis carried out thus far that the same positive evaluation of the social utility function that is performed by the cooperative movement with regard to its members is to be found not only in the opinions expressed by the national and international institutions, but also, and above all, in the respective legal systems.

Having established these facts, we will continue by attempting to assess if, and to what extent, the social utility, which is a feature of cooperative societies, is different from the social utility which, in a variety of forms, is a distinguishing feature of social enterprises.

3. The private provision of welfare and community services: from providers to social enterprise

In the contributions published in this volume, many of the authors contemplate the possible reasons behind the penetration of the economic and market dimension into sectors, such as welfare services (assistance and healthcare services, etc.) and community services (cultural and environmental services, etc.), in which, historically, this dimension has never played a prominent role. Understanding these reasons also means pinpointing the reasons behind the birth and the development of the phenomenon we are currently examining, namely social enterprises.

In this regard, it should be said first of all that in the sectors under consideration, the economic and market dimension has predominantly come to the fore due to a transformation in the operating modalities of the not-for-profit private provision of services, rather than as a direct response to the scarcity of public provision66. The traditional theory of the «failure of the state» to provide welfare and community

66 Cf., regarding the Italian experience, BORZAGA and LANES, L’economia della solidarietà. Storie e prospettive della cooperazione sociale, Roma, 2006, 99 ss
services therefore cannot be used to provide an adequate and direct explanation for the emergence of the social enterprise.

Nor can this emergence be explained by the other traditional theory on the «failure to establish a contract», since this refers to the incapacity of the private for-profit enterprises to inspire trust in their counterparts in a context in which trust is necessary for the success of the company, due to the presence of an asymmetric flow of information between the producer and the consumer. This theory, therefore, explains why they are able to assert themselves in sectors in which they are considered to be not-for-profit without, however, making a distinction between social enterprises and non-entrepreneurial provider bodies.

Whilst it is true that the social enterprise is created out of the transformation, in an entrepreneurial sense, of many voluntary organisations and other provider bodies, we still need to ask ourselves what are the reasons behind this transformation.

One possible, first reason is that of the limitation imposed on the free of charge provision of welfare and community services, since, by their very nature, these services tend to be affected by what is known as «Baumol's cost disease».

The provider bodies act as providers in the sense that they deliver services without receiving remuneration from the users or they may receive remuneration that is lower than the costs entailed in producing the services: the provision of the services and the survival of the body are therefore assured by the resources granted free of charge to the body: donations, public contributions, voluntary provision of work, etc.


As correctly affirmed by Spear elsewhere in this volume, the state providers are making increasing use of managerial methods to seek out resources to guarantee their own sustainability. This gives rise to the following question: are they or do they become social enterprises for this reason? If we were to respond in technical/legal terms, then the answer is complex. In fact, entrepreneurs are only subjects who undertake economic activities and whose revenue is at least equal to the operating costs (see art. 2082 of the Italian Civil code, which affirms that the enterprise is an economic activity). If the provider does not generate revenue because it does not ask its users to pay for its services, then it should not be considered to be an entrepreneur and not should it be considered to be performing economic activities as carried out by enterprises: its sustainability does not depend upon the market, rather it is dependent upon the fact that those who contribute to its activities do so free of charge. However, if the provider does not receive subsidies or receives subsidies that are not linked to the activity carried out, rather it receives payment for services rendered or to be rendered to third parties, then the legal assessment of this provider may also change. In this case, whoever supports the provider would not be acting free of charge, rather they would be purchasing services for third parties and in this way the economical and entrepreneurial dimension of the activities would be reinstated.
However, as the cost disease theory teaches us, there are some specific labour-intensive forms of production, such as cultural services, in which there is no relationship between a rise in salaries and an increase in labour productivity and consequently an increase in costs gives rise to issues regarding their sustainability. What is of interest to us here is that this means that an increasing demand (which is due to the emergence of new needs and the incapacity of the public and for-profit private bodies to satisfy them) requires an increasing amount of resources that are free of charge in order to support the provider bodies and therefore, in the long-term, the provider body will no longer be able to satisfy the demand for welfare and community services that are specifically aimed (as a result of the failures of the state and the for-profit enterprises) at the not-for-profit target group.

Therefore, in order for the not-for-profit services to be sustainable, then the users must, either fully or in part, pay a price for the services that they receive. The social enterprise therefore contributes to the sustainability of the private, not-for-profit provision of welfare and community services.

The second possible reason is connected to the enhanced capacity of prices to indicate the users’ real preferences. Indeed, if the users are required to make a payment in order to obtain a service, then they will ask for the service only, and within the limits, of when they really need them. The market therefore acts to prevent any wastages of resources that may otherwise be encouraged by the resources being provided free of charge, as is illustrated by the phenomenon of the «abuse» of drugs faced by free of charge public health services (which the compulsory minimum prescription charge system should help to reduce).

Thus, the social enterprise is more efficient than the provider bodies in cases in which it is possible to identify a demand for which payment may be made (even though it is quite clear that this may be difficult). The non-economic activities undertaken by the provider bodies (and by voluntary organisations) should, therefore, be aimed at categories of users who are unable to pay for the services they require.\textsuperscript{69}

The third possible reason is to be found in the greater efficiency (both in terms of productivity and internal organisation) that the private, not-for-profit organisations may achieve when they are autonomous, in other words when they are not dependent

\textsuperscript{69} It should also be said that, with an appropriate price diversification policy between the categories of users, then even social enterprises could be in a position to satisfy demand for which payment is not made or at least take into account its users’ different levels of spending power
on private benevolence or public contributions, rather they are dependent on the impersonal entity that is the market.  

The fourth possible reason may be the fact that private, not-for-profit provision is more inclined to satisfy a demand that the private, for-profit provision is not prepared to satisfy because it is not particularly profitable. Indeed, companies, such as social enterprises, that carry out their activities with a view to balancing their books, rather than to distributing their profits to their members, have no incentive to accord priority to activities that are more economically advantageous over those that are not so lucrative or are not lucrative at all. This also creates a market in the sectors under consideration.

The progressive spread of the social enterprise into sectors that have traditionally been occupied by public bodies and private, not-for-profit providers is not dependent on a single factor, rather it has been brought about by a combination of a range of different factors. If we agree upon this conclusion, once we have clarified the economic needs of the social enterprise, then we must develop a further knowledge of this new reality, which is what we will be doing in the following pages.

4. Social cooperatives as a legal form of social enterprise

The legislative process for the recognition of the phenomenon of the social enterprise began with the introduction of rules to govern social cooperatives and therefore through the legislative specialisation of the ordinary cooperative form, which was clearly considered, by the legislators, including the European Commission today, to be a particularly efficient model for the integration of social objectives.

For the purposes of the more general debate on social enterprise, it is important to understand the outcome of this specialisation, particularly in terms of the distinction between cooperatives in general and social cooperatives in particular.

70 Cf. in this context S.CALVINI, La legge 118 e l’evoluzione del terzo settore, ovvero «Finalmente non saranno tutte le imprese sociali», in Impresa sociale, 2005, n. 2, pag. 180
71 The low profitability level may be due to the «cost disease» referred to here or even to presence of users who have a low income and therefore limited spending power
72 Cf. SPEAR in his article in this Volume in which he highlights the pioneering role played by social cooperatives in the process for the recognition of social enterprises
73 Cf. COMMISSION COMMUNICATION COM(2004) 18, cit., point 2.3.2., which, with reference to social cooperatives, states that, «the effectiveness of cooperative forms in integrating social objectives has led some Member States to adopt specific legal forms in order to facilitate such activities.»
From a functional point of view, in other words the institutional objectives of the organisation, only the Italian legislation on social cooperatives contains an appropriate identification of the particular purpose pursued by social cooperatives. This legislation states that «the purpose of social cooperatives is to pursue the general interest of the community in terms of human development and the social integration of the citizens», (art. 1, comma 1, law no. 381/1991).

However, as we can see in the legislative table published in this volume, in other national legislations social cooperatives are not given this status because they pursue a particular purpose, but rather because they carry out a specific activity: the «sociality» of the cooperative is therefore made primarily dependent upon the nature of the activity carried out, rather than upon the final objectives it has in view when carrying out activities of a certain type.

Therefore, the Italian legislator would not consider a cooperative which, for example, carries out social and healthcare activities for the elderly with the objective of earning the highest possible salaries for its worker-members, to be a social cooperative; rather it would be considered to be an ordinary worker cooperative. However, it would be an authentic and genuine social cooperative if it were to propose (and to operate in such a way to achieve this) to provide assistance to the largest possible number of the elderly, providing services of the highest possible quality, at the lowest possible price. In other words, if its mission were to satisfy the general interest of the community, maximising the utility of the services provided to the elderly beneficiaries.

The purpose of social cooperatives is therefore completely «altruistic» (in terms of the destination of the advantages), since all of the benefits generated by the enterprise must be used for the purposes of the pursuit of the general interest, rather than the particular interests of the members. This point is well made in the preamble to the French legislation on the SCIC (even though the French law does not go on to explicitly state this concept, which it evidently believes to be implicit), which affirms that, «...the altruistic purpose of this new form, contrary to what happens within traditional cooperatives, may be ascribed to the fact that its objective is not

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74 Of course this does not mean that only social cooperatives have an altruistic purpose since all cooperatives, not only social cooperatives, are required, as has already been explained, to allocate a good part of the surplus for altruistic use. The difference is therefore perhaps only quantitative in nature, since, in general, cooperatives have a part of the surplus available that they are able to distribute to their own members (according, as we have already seen, to the cooperative, rather than the capitalist, allocation criteria), whilst social cooperatives must allocate all of the surplus generated to the general interest.
the simple satisfaction of its members, rather that of a wider public whose needs the cooperative aspires to satisfy.\textsuperscript{75}

Clearly this does not mean that the members cannot be the beneficiaries of the cooperative, but they are not considered to be beneficiaries because they are members, rather because they may belong to the category of persons identified by the social cooperative as being the beneficiaries of its activities. For example, a cooperative that has been set up by a group of elderly people with a view to providing assistance for this group (as user-members) as well as for other elderly people who are not members but who find themselves in the same circumstances (thereby making a distinction between «member-beneficiaries» and «non-member beneficiaries») may be considered to be a social cooperative.\textsuperscript{76}

The organisation’s planned objectives are therefore of fundamental importance if we are to talk about a «social enterprise» and also in order to identify, on the general cooperative landscape – even considering the already high level of «sociality», which is a characteristic common to all cooperatives, - a cooperative as being a «social enterprise» which, as well as the «sociality» possessed by all cooperatives, has an extra element of sociality that is formed by its direct and exclusive pursuit of the general interest (rather than the interests of its own members \textit{per se}), as well as by the fact that it carries out a specific activity of a social nature (social and healthcare services, the integration of disadvantaged persons through employment).

It would appear that the partial or complete prohibition on the distribution of the surplus to the members, which is applied to social cooperatives under the terms of the current legislation in force in this area (sometimes in a manner that makes its application more stringent than it is to cooperatives in general)\textsuperscript{77} cannot be considered to be an effective replacement for the clear statement of the fact that

\textsuperscript{75} Cf. \textsc{margado}, \textit{scic: società cooperativa di interesse generale}, in \textit{Impresa sociale}, 2004, n. 4

\textsuperscript{76} This is the interpretation that should be given to the provision set out in article 19\textit{sexies} of the French legislation on SCIC, which states, without imposing as a requirement (even though this would have been more appropriate) that, «\textit{non-member third parties may benefit from the goods and services of the cooperative general interest society}». Also see \textsc{margado}, \textit{op. cit.}, who believes that, «the cooperative exception provided for in article 19.6 satisfies this altruistic purpose. It states, in fact, that SCIC may interact with third parties free of any type of limitation, unlike other cooperative forms, whose activities are carried out predominantly for the benefit of their own members}

\textsuperscript{77} Some legal systems allow for a limited distribution of the profits: cf. Italia and France (for the latter, an important provision is made in article 19\textit{nonies}, para. 3, which states that, in any case, the resources received by the social cooperative in the form of public aid may not be distributed to the members). Other legal systems, on the other hand, exclude any form of distribution: cf. art. 7 of the Portuguese law 7/1998; art. 10, para. 2, of the Polish legislation; sec. 59, para. 3, of the Hungarian legislation
these cooperatives have a general interest purpose (even though this purpose does constitute a fundamental form of legislative protection), since the prohibition is merely a negative requirement. Whilst it is true that the undistributed profits are allocated to the indivisible reserves and therefore serve to increase the enterprise's assets, no indication is given, at present, as to the purpose to which these assets should be allocated, whether this be to satisfy the needs of the members (as is the case in cooperatives in general), or to satisfy the general interest (as is the case in social cooperatives).

With regard to the legal definition of the activities that a social cooperative may undertake, the legislation in the European countries under consideration does not take a uniform view, since in some countries the definition is at a «higher» level, whilst in others it is at a «lower» level; in some countries specific target groups are identified, whilst this is not the case in others. Two models of social cooperation are presented in some countries, whilst in other countries the distinction either does not exist or only one of these models is accepted.

Once again, the Italian legislation can be taken as an initial point of reference, since it was the first to be introduced in this area.

Two types of social cooperatives are recognised in Italian law: the so-called type a) cooperatives, namely those that manage specific services (notably social, healthcare and educational services) and the so-called type b) social cooperatives, or those that carry out a range of activities (of almost any type) that are designed to integrate disadvantaged people through employment. These disadvantaged people are considered to be persons who have a physical or mental disability, people undergoing psychiatric treatment, drug-addicts, alcoholics, young people of a working age who have family-related difficulties and some categories of people who have been given a conviction (the disadvantaged persons must represent at least 30% of the total workforce within the cooperative and they must also be members of the cooperative, as long as this is not incompatible with their personal status).

The Italian legislation on social cooperatives is, therefore, on the one hand a «high definition» law since it limits the sphere of activities that may be carried out by the type a) social cooperatives and it clearly specifies the people that the type b) cooperatives should be integrating through employment, whilst on the other hand, it is a generic law in the sense that it does not identify the target groups of the services carried out by type a) social cooperatives.
Other national legal systems are different from the Italian system, either because, although they include both type a) and type b) social cooperatives, they identify the activities of social cooperatives through a general approach (such as the Spanish legislation which, following a list of specific activities, contains a general clause that states, «other activities of a social nature» or «the satisfaction of social needs that are not met by the market»78); or because they do not distinguish between type a) and type b) social cooperatives and trace the origins of the latter back to the former (this would appear to be the case in the Portuguese legislation)79; or because they limit the definition of social cooperatives only to type b) social cooperatives, although this model is broader in its definition than its Italian counterpart, since it not only includes integration through employment but also social or other forms of integration (this is the case of the Hungarian legislation)80; or perhaps because they limit the definition of the social enterprise to type a) social cooperatives (this is the case of the French SCIC)81.

We will later note how this diversity of legislative approach regarding activities of social utility will also be encountered (albeit in partially different terms) in legislation on social enterprises.

With regard to the profiles of governance, the current laws on social cooperatives do not normally include particular rules or regulations that make social cooperatives any different from other types of cooperatives. The social cooperative is therefore established just like any other type of consumer, worker, etc. cooperative and is governed by the fundamental organisational principles of the cooperative form

78 Cf. art. 106 para. 1 of law no. 27/1999. Cf. also art. 2, para. 2 and 3 and the Polish law, according to which, «a social cooperative acts in favour of 1) social reintegration of its members, which should be understood as an action aimed at rebuilding the participation in the life of the local community by supporting the ability and fulfilling a social role in the place of work or residence 2) professional reintegration of its members, which should be understood as an action aimed at rebuilding and supporting the ability to provide work on the labour market in a self-reliant way» and «the social cooperative can carry out social and educational-cultural activities for its members and their local environment as well as activities that are socially useful in the sphere of public tasks defined by the law of 24 April 2003 on public benefit activities and voluntary activities» 79 Cf. art. 2 of law no. 7/1998 80 Cf art. 8 of the Hungarian law, according to which, the purpose of the social cooperative «is to find employment for its members who are without a job or are socially disadvantaged and to encourage the improvement of their social situation by other means» 81 However, here once again the wording is generic. In fact, the SCIC «have, as their object, the production of goods and services of collective interest that are of social utility». Also see on this point MARGADO, op. cit., who states that «the social utility is not defined by the law on the SCIC. It is a concept that goes beyond the law, since it does not belong to it, even though, nevertheless, it becomes perfectly part of it. The social utility may, in fact, only and exclusively be taken into consideration with reference to a particular, well-defined territory and considering the various human, geographic, cultural, political, economic, etc. aspects. Otherwise, who would benefit from it, who would be interested in it and according to what, exactly, would it be defined?»
(democratic, participation, open membership, etc.) and it is not the object of any particular rules (such as, for example, the composition and functioning of the enterprise’s bodies; involvement of the non-member beneficiaries, drafting of the social report, etc.) that may well be appropriate if we share the opinion that the specific altruistic purpose pursued requires a form of governance that is coherent with this purpose.

The only major exception to this is perhaps represented by the French legislation which, with a view to the involvement, within the membership base, of all of the categories of actors involved in the activities of the SCIC, imposes the multisociétariat model upon it. The SCIC must have at least three categories of members, two of which must be composed of workers and users (whilst the last category could be composed of volunteers or public bodies or all of the other actors that support the cooperative).

Finally, whilst the various legislations on social cooperatives may be considered to be laws to establish a particular legal form of social enterprise (and whilst, as a consequence, social cooperatives are the first social enterprises to be the subject of rules and regulations), they nevertheless have certain shortcomings that have perhaps represented one of the many reasons for the successive introduction of other, more general laws on social enterprises.

Indeed, the current laws on social enterprises are uncertain in their identification of the altruistic purpose and general interest of the social cooperatives and the way in which these features may be used to distinguish them, at a functional level, from other types of cooperative. Nor do these laws introduce any particular rules of governance which, without modifying the fundamental cooperative principles, would adjust the organisation and operation of social cooperatives to the altruistic purpose that they pursue. Without forgetting, of course, what has already been established at the beginning of this chapter, namely that it is the very intrinsic sociality of the cooperative legal form and its consequent particular effectiveness in integrating social objectives, that probably constitutes the reason behind the original legislative

82 Cf. Margado, op. cit., who states that the «multi-stakeholder dimension of the SCIC, its capacity to develop the joint decision-making process that provides for the involvement of persons characterised by a different relationship with the same activity, regardless of the activity in question, represent a milestone of this new form of cooperative. They are, at the same time, the distinguishing feature and the guarantee that the cooperative’s activity is well-rooted in the territory in which it operates.» It is significant that the multi-stakeholder structure may justify an exemption from the principle of «one member, one vote» through the provision of a collegial voting system (cf. art. 19 octies of the French law).

83 The Italian law, on the other hand only authorises, rather than imposes, this model, in that it provides for the admission of voluntary members and members, juridical or private person, who propose to promote and to support social cooperatives...
preference for the cooperative as the only legal model of social enterprise, and they should constitute, as we will have the opportunity to conclude in this article, the reason for a differentiated treatment of social enterprises in a cooperative form compared to social enterprises in other forms.

5. From social cooperatives to the social enterprise

Therefore, the social enterprise is born through social cooperation. Indeed, with the sole exception of Belgium\textsuperscript{84}, the first laws on the social enterprise are laws on social cooperatives. The legislators therefore deemed it appropriate to graft the social enterprise onto the legal cooperative form, having clearly decided that the virtues of the cooperative enterprise, with its inclination towards sociality, which is something that has even been enshrined in legislation (and therefore is not solely entrusted to the benevolence of the cooperative movement), were not only compatible, but were even necessary to the legal configuration of the social enterprise.

If this is the case, we must therefore ask ourselves (and this is a valid question especially for countries such as Italy, which had already adopted a law on social cooperatives) why, rather than improving upon existing laws, a second group of laws, as shown in the table published in this volume, extended the social enterprise beyond the cooperative form, thereby allowing the establishment of social enterprises in the form of joint stock companies or (as has been the case in Italy and Finland) of associations or foundations.

One of the first reasons behind this situation may well be found in the shortcomings and imperfections of the previous laws and in the legislative will to develop more «sophisticated» provisions.

Indeed, as we have already seen, the laws on social cooperatives limit themselves, at most, to establishing the form, without regulating it sufficiently. The purpose of social cooperatives is therefore easily confused with that of general cooperatives, thereby blurring the distinction between a social cooperative enterprise and an ordinary cooperative enterprise. There are no specific rules of governance or of accountability, so that the social cooperatives remain a form of enterprise that should involve the

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84 The SFS may, in fact, have either the form of a cooperative society or limited liability company (or, if it prefers, a commercial company or a joint stock company)
parties concerned, but is not required to do so, that should be accountable to the community for the social utility produced, without being required to be and so on.

In the laws on the social enterprise (including the laws on enterprises with a social purpose) efforts have been made to bridge some of these gaps, even though this conclusion is true in particular for the Italian law, since the other laws remain very generic (as illustrated by some of the criticism levelled at them on these grounds in the contributions published in this volume).

If we compare the Italian legislative decree no. 155/2006 on the social enterprise with the Italian law no. 381/1991 on social cooperatives, then it is useful to note how many governance profiles are not taken into account by the latter, actually are included in the former. There is no doubt that the most important are the requirement to produce an annual social report, (art. 10, comma 2) and the requirement to involve the workers and the users (non-members) in the management of the enterprise (art. 12): these are rules of governance that are of fundamental importance for an enterprise that aspires to describe itself as being «social». Indeed, it would be a surprise not to find these rules in other laws on the social enterprise.

The second reason (which is only really applicable to countries such as Italy and Finland that allow the status of social enterprise to be given to associations and

85 That has to be written according to a precise outline that was adopted through a decree issued by the Minister for Social Solidarity on 24 January 2008
86 By «involvement», the Italian law (clearly drawing on European legislation on the involvement of workers within enterprises) means, «whatever mechanism, including information, consultation or participation, through which the workers and the beneficiaries of the activities may exert an influence on the decisions to be adopted by the enterprise, at least in relation to issues that directly affect the working conditions and the quality of the goods and services produced or exchanged.» As we can see, the Italian legislation is not particularly clear in requiring social enterprises to involve workers and users, partly because the method of involvement may use «whatever mechanism…» to be chosen by the social enterprise and partly because involvement may be limited to issues that are of direct interest to the workers and users («at least in relation to issues…»), thereby excluding the more general strategies of the enterprise
87 Whilst no specific mention is made of the «annual social report», both the Belgian and the British law require the social enterprise to prepare a special document that accounts for the enterprise's pursuit of social objectives. The Belgian law requires the directors to draft «a special report on the manner in which the enterprise makes sure that it achieves the (social) objective» (art. 661, para. 6), whilst the British law refers to a «community interest report» (sec. 26, CIC Regulations). There is no reference to the social report in the Finnish law; even though registered social enterprises are required to provide the Labour Minister with a range of information regarding their respect for the criteria to be fulfilled in order to be granted social enterprise status. Regarding the involvement of non-member stakeholders, there are no rules of this type in the Belgian law, however, the accessibility of the SFS is partially guaranteed by the provision contained in art. 661, para. 7. There is no real requirement for the involvement of the stakeholders in the CIC Regulations, but the community interest report must provide details of any consultation that takes place with persons «affected by the company's activities»
foundations, rather than just to enterprises) probably lies in the legislative will to «capture», through the attractiveness of the social enterprise legal «brand», the phenomenon of the undertaking of enterprise activities of social utility, either primarily or exclusively, by bodies other than enterprises, in other words by associations and foundations, where this is legally admissible\(^{88}\).

Generally speaking, the legislative framework of associations and foundations, unlike that provided for enterprises, is insubstantial and ambiguous and, in any case, not sufficient to truly regulate the running of an enterprise (in the interests of the workers, of the users, of the creditors, etc.). Furthermore, in performing enterprise activities in the absence of legislative restrictions and therefore of the related obligations, associations and foundations are engaged (in silence and therefore with the consent of the law) in a form of unfair competition to the detriment of those organisations, such as social cooperatives, that are subject to regulations imposed upon enterprises and therefore to various formal obligations that increase the costs to be borne by enterprises.

Since it is necessary to abide by the rules and regulations applicable to enterprises (registration on the company register, preparation and submission of an annual report, etc.) in order to acquire (and to use) the social enterprise status, then it follows that associations and foundations, should they wish to bear the social enterprise brand (although there is not an obligation to do so), will have to observe the very same operational rules that are applicable to other forms, thereby protecting the third parties that enter into contact with the social enterprises, as well as upholding the principle of fair competition between social enterprises, regardless of their legal form.

A further probable reason may consist in the legislative will to prefer legislation inspired by the principle of the plurality of legal forms, rather than legislation in which the social enterprise may only be established in one legal form (namely the cooperative form). This is applicable to countries that did not have a law on social cooperatives as well as to those that did have this type of legislation.

There may be many explanations behind this preference for the plurality of legal forms, ranging from the more political one according to which each legal form may

\(^{88}\) In Italy, for example, the civil code does not say that associations may not carry out entrepreneurial activities and this gives rise to the prevailing theory that they are allowed to undertake any type of activity, including economic activities. For an overview of this point regarding other legal systems, see the various national reports in the Digestus project, *Verso l’impresa sociale: un percorso europeo*, Roma, 1999, as well as, *ivi*, the summary report by CAFAGI.
be the expression of individual movements and cultures, so that admitting more legal forms means respecting social and economic pluralism, to the more technical reason, according to which each legal form is the expression of its own organisational principle, so that the admission of a series of legal forms may be translated into the attribution, to the economic operators interested in the social dimension, of more operational instruments (those, for example, who are interested in the democratic dimension will choose the cooperative form; those who are interested in controlling the capital invested will choose the form of a joint-stock company or of a corporation).

In comparing the laws on the social enterprise with those on the social cooperative, there would probably appear to be less uniformity between the former than the latter.

We have already commented, in part, on the legal forms and governance.

With regard to the legal forms of the social enterprise, the following distinctions may be made between:

- **i)** legal systems that allow all types of organisations (associations, foundations, joint stock or limited companies, social cooperatives) to be recognised as being social enterprises, such as the Italian and Finnish system

- **ii)** legal systems that grant recognition as a social enterprise only to companies, including cooperatives, such as the British and Belgian system

- **iii)** legal systems that recognise only the social cooperative as the sole general form of social enterprise.

In terms of governance requirements, on the other hand:

- **i)** some laws are particularly attentive to these aspects, such as the Italian law;

- **ii)** whilst others, such as the Belgian and British (where the role of the regulatory body, however, plays an important function in compensating for certain legislative shortcomings) are not so attentive to these requirements;

- **iii)** laws that are not at all attentive to this aspect, such as the Finnish law.

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89 In fact, due to the transversal nature of the regulation, the designation used is actually that of the «social enterprise».

90 In which the denomination of «social enterprise» does not exist, rather reference is only made to «enterprise with a social purpose»

91 Such as the French system where, as we already know, when discussions were held on the introduction of the social enterprise, it was decided, in keeping with the conclusions of the Lipietz report, that it was not necessary
If we then look at the modalities used to pursue the social utility, the following distinctions may be made between:

i) laws, such as the Italian law, that confer the status of social enterprise on an enterprise because it mainly carries out a specific enterprise activity that has been rigorously identified with reference to particular sectors (social assistance, healthcare, etc.);

ii) laws, such as the British law, that prefer to adopt a general clause, leaving the community interest company free to demonstrate the social utility of the activities undertaken (at the most only excluding certain activities) under the control of the regulatory authority;

iii) laws, such as the Finnish law, that only recognise enterprises that help disadvantaged people into employment as being social enterprises;

iv) laws, such as the Italian law, that specifically recognise as being social enterprises those enterprises that provide goods and services of social utility, or those that, regardless of the type of work carried out, help to get disadvantaged persons into employment;

v) laws, such as the Belgian law, that do not grant recognition to a social enterprise (enterprise with a social purpose) on the basis of the fact that it carries out a specific activity, but rather because it devotes this activity, whatever it may be, or rather the surplus it generates, to a social purpose.\textsuperscript{92}

Finally, in terms of the mission of the social enterprise, it would appear that only in the Italian law is there a clear reference to the requirement to pursue the general interest (and therefore the interests of the users and disadvantaged workers within the enterprise over any other interests). This is also accompanied by highly stringent obligations regarding the destination of the surplus generated by the enterprise, whereas the other laws limit themselves to sanctioning a total or partial prohibition, according to different circumstances, on the distribution of the profits to the members.

\textsuperscript{92} If this is the case, then it is also possible to note a profound difference between the Italian social enterprises and the Belgian SFS, since the former directly and predominantly carries out enterprise activities of a social utility to which it must allocate all of its operating profits (cf. art.3 of law no. 155/2006), whilst the latter could have the ultimate purpose of acting as a provider, with regard to which the activity represents a mere instrument.
6. Conclusions

In attempting to draw conclusions from the analysis carried out thus far, it would seem that it is possible to say that, in reality, given the current state of legislation in this area, then rather than witnessing a shift from the social cooperative to the social enterprise, we are seeing the establishment of this new form alongside the more traditional form. Indeed, this shift is sometimes prevented, as is the case in Italy, by the absence of tax or other types of incentives in favour of social enterprises, which means that economic operators are not prepared to make use of this new legal form due to the obligations that it imposes.

Looking to the future, we may perhaps imagine that, as a result of the effect of the introduction of general and transversal laws on the social enterprise, in countries, such as Italy, where it is already well developed, social cooperation will undergo a quantitative reduction, since other legal forms, as well as cooperatives, will be eligible to operate as a social enterprise. However, it is highly probable that this quantitative reduction will be followed by a substantial increase in the quality of social cooperation, since the debate on the social enterprise will also highlight the objectives and the mission of social cooperatives (and at the same time it will also serve to make clearer their functional differences compared to other types of cooperative).

A further scenario is that of the creation of aggregations between social cooperatives in a form that is different from the traditional secondary level cooperatives: indeed, the possibility of adopting the legal form of a joint-stock company, whilst at the same time remaining within the sphere of the social enterprise, may well encourage social cooperatives to create, for the purposes of jointly carrying out some entrepreneurial functions, a joint-stock «social enterprise» company, rather than a secondary level cooperative should this better serve their interests, particularly considering the lack of homogeneity amongst its membership (which often gives rise to operational problems for cooperatives). This is further matter for reflection for the cooperative movement.

In any case, our underlying hope is that the legislation moves in the direction of the most effective and efficient pursuit of the interests of those who are the real beneficiaries of the social enterprise: the users, the disadvantaged workers, their families and the community in general.

If we are in agreement upon this, then we must, on the one hand, express a favourable opinion on the legislation on the social enterprise if, by increasing the number of
legal forms available to economic operators, it leads to the creation of a greater number of social enterprises (as long as they are «real» social enterprises); whilst on the other hand, we should hold true to our belief that, amongst all of the forms of social enterprise, there is one, namely the social enterprise in the cooperative form, that offers something extra that the legislators should take into account (for example in terms of concessions and incentives). In fact, the cooperative «social enterprise» combines the sociality of the purpose and of the activity, which is common to all social enterprises, with the sociality of the democratic method of managing the enterprise which, as we have tried to explain in these pages, in itself is a factor of a country’s economic, social and democratic growth.

The fears and sometimes criticism associated with the social enterprise, some of which have been expressed in the chapters published here, would appear to be rooted in the failure to share the idea that a social enterprise may exist without it being subject to democratic control.

However, our proposal is to accept the plurality of legal forms (even those that are not democratically controlled), on the following conditions that:

i) the social enterprise is carefully regulated in terms of both its internal and external governance, so that the absence of democratic control is compensated for by rules on transparency, social accountability, involvement of the beneficiaries;

ii) the social enterprise is appropriately monitored and therefore that the legal «brand» is subject to careful checks so as to avoid the abuse of the legal form to the detriment of the traditional interests and operators, such as the social cooperatives;

iii) the legislators recognise that, as a result of the fact that they operate in a democratic way and also of the socialisation of the benefits, which is something that they already do, cooperative «social enterprises» play a leading role amongst all of the social enterprises, and provide them, for example, with concessions from which all social enterprises established in a different form are excluded.

In my opinion, only in this way will the legislation on the social enterprise not represent a missed opportunity to increase the sociality of the market economy (if we also consider that legislation on the social enterprise provides for-profit enterprises with a powerful incentive to adopt practices of corporate social responsibility); only in this way will the legislation on the social enterprise not have a negative effect on the economy and society and will not harm organisations, such as cooperatives and social cooperatives, that have sociality firmly imprinted in their DNA.

93 Cf. the abovementioned observations made by CANNELL