

A comparative perspective on legal frameworks for the social economy

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1. Introduction

Multiplicity of traditions, concepts, forms of organisation, legal patterns and approaches to solutions

2. Definition of key terms

(a) Social economy (SE)

Traditions of co-operative economics and social economy:

- Spiritual Roots in Christian Socialism, Marxist-Socialism, Liberalism and social market economy
- From vague to less vague to clear concept.

8 Principles on which SE is based and which are also those of co-operatives and associations built on mutuality (Jeantet 2000 and Charter of SE of 1983):

1. Voluntary membership of individuals.
2. Democratic governance – one person – one vote.
3. Non-accumulation of profit for the benefit of individuals or – in a positive way – equitable distribution of surplus.
4. Formation of collective assets – indivisible reserves.
5. Internal as well as external solidarity.
6. Meeting needs, demands and quality by offering goods and services at the lowest possible price or – in case of associations – free of charge.
7. Respect for the human being and for the environment.
8. Development of the human being by education and culture – to be implemented in full autonomy from the state.

Critics: SE is a largely political concept seeking to justify access to public subsidies, tax exemptions and putting together organisations under one label even against their will.

(b) Enterprise with social objectives – Social enterprise

Need to balance:

- Economic efficiency and social aims
- Economic activities and non-profit (distribution) orientation
- Self-help and solidarity

Difference between co-operative society and social enterprise

Co-operative	Social Enterprise
Primarily economic objects	social objects through economic activities
Member-orientation	User-orientation
Self-help – narrow solidarity	Common/community/public interest – broad solidarity
Member-control	Multi-stakeholder control
Internal propelling force: self-interest, self-help	Propelling force: mission, social responsibility, solidarity

There are also co-operatives with social objectives, broad solidarity, multi stakeholder control and concern for the community

(c) Forms of organisation

Different forms of organisation for different purposes interest constellations

Typical for social enterprise:

- Long term economic activities with social purpose,
- Meeting human needs and demands – rather than rent-seeking
- (user-oriented rather - not investor-oriented, service near cost, beneficiaries beyond the membership group, multi-stakeholder- approach)
- Democratic and participatory management and control,
- Working with mixed resources – seeking “patient” capital,
- Special requirements for measuring success: social balance sheet, bilan sociétal, promotion report.

(d) Legal patterns

No time to discuss different legal systems

Only one remark:

- full and detailed codification (prevailing in continental Europe) versus
- combination of unwritten, written and judge-made law (prevailing in the UK)

Elements of legal pattern relevant for SE:

- Organisation law
- Tax law,
- Competition law
- Regulations governing access to public contracts, support and subsidies

3. Organisation law

General rule: Purpose determines Form

A closed number of legal patterns offered for typical, frequently pursued objects.

- Social or economic purpose
- With or without common economic unit
- With or without incorporation
- Emphasis on individual or on group
- Closed or fluctuating membership
- Based on agreement among parties or on by-laws binding all present and future members
- Personal (group) property or collective, indivisible assets
- Small or big

Standard legal patterns

Association

Fluctuating membership, based on by-laws, incorporation, making the organisation independent from the original members, perpetual succession, limited liability

Society/partnership

Based on contract of founder members, personal participation, no changes in membership, joint ownership of society's assets, personal and unlimited liability.

Special legal patterns e.g. in the UK: Industrial and Provident Society (either for community benefit -Bencoms or for co-operatives – bona fide co-operatives)

Legal framework suitable for SE, characterised by:

- Social purpose pursued by economic activities
- Internal democratic and participatory structure
- Non-profit orientation
- Special rules for assessment of results

No simple standard form but rather a multiplicity of forms to cater for the different forms of SE

Association and variations of association suitable for economic activities (i.e. co-operative and company):

- Economic association (Germany)
- Modified co-operative (e.g. social co-operative, Italy, multi-stakeholder co-operative, SCIC, France)
- Modified company (e.g. CIC, UK).

The form of association is normally suited for social purpose.

It can be made suitable for SE if:

- Allowed to participate in trading
- Given structures allowing efficient management
- Obligation to keep books, accounts, to report and provide transparency
- Be subject to internal and external audit
- Follow rules to protect beneficiaries and other stakeholders.

Co-operatives can be a suitable legal framework for SE if:

- Membership is open to disadvantaged persons (e.g. in Italy) and to different stakeholders (e.g. in France)
- If they go beyond members-promotion and pursue social, common or communal benefit objectives (e.g. German housing co-operatives between 1940 and 1990)
- If they do business with non-members
- Where co-operative law has been amended to suit mainly large-scale co-operative enterprises, new rules for small co-operatives are needed (e.g. in Italy).

Company may be suitable legal framework for SE if:

- Investor-orientation is turned into user-orientation, (excluding investor control)
- Profit distribution is restricted (distribution constraint)
- Demutualisation is avoided (asset lock).

To introduce a type of company with social objectives (e.g. in Belgium SFS) without modifying the main body of the Act to suit the new purpose, does not provide a suitable legal framework for SE.

Combinations

Where associations remain focused on social objectives and lack provisions protecting members, creditors and the general public (books, accounts, reports, audit e.g. in case of normal ASBL in Belgium), ASBL can be combined by social legal arrangements with a company or other commercial form of business organisation. This can also be done in the UK:

A foundation in the legal form of company limited by guarantee with charitable status can establish a trading company as a daughter society which transfers all profits to the parent foundation.

4. How to deal with the common/communal/public benefit criteria and the non-profit nature of SE in the legal framework?

In organisation law, in tax law or in regulations governing state support, access to public contracts and subsidies?

- Basic problem: Organisation law needs to be stable, reliable and lasting.
- Tax law and regulations governing state support, access to public contracts and subsidies change with changes of policy and government.

Matters subject to frequent change should preferably not be contained in organisation law.

4. Tax law:

- Conditions to qualify for tax advantages
- Conditions for recognition as a public benefit organisation
- Procedures for recognition and renewal of recognition

Who defines what is in the public/community benefit?

- Local tax authorities?
- Committees representing the stakeholders?
- The competent Minister?

Models:

UK:

“Reasonable person test” for CICs

‘Light touch approach’, no bureaucratic hurdles, no unnecessary cost, no privileges for CICs, hence no misuse of privileges, no need for control. However, stringent reserve” powers of the regulator to curb malpractices

Provisions in laws and regulations:

Non-profit character prevails if:

- The organisation is user-oriented
- Follows the distribution constraint
- Has an asset lock.

Mutual/public benefit or charitable status can be granted if the organisation works in certain fields of activities (Italy, ONLUS).

- Socio-sanitary assistance,
- Health care,
- Charity work,
- Education,
- Training,
- Amateur sports,
- Protection and promotion of places of historical/artistic interest,
- Protection of nature and the environment,
- Protection and promotion of culture and the arts,
- Protection of civil rights and
- Scientific research.

This should not be an exhaustive list but serve as guideline and examples.

5. Competition law:

Equal level playing ground for all enterprises

What is equal?

Compensation for additional (social) cost for working with persons with reduced productivity, for carrying out tasks which relieve the state from its responsibility.

Hence:

- Preferred access to public contracts
- Subdividing large public contracts into smaller contracts
- Adding social clauses to the purely economic valuation of offers in public tender

are justified advantages.

6. Regulations governing state support and subsidies

Same criteria as in case of tax law

Official recognition as being eligible for support and subsidies:

- When working in a defined field of activities,
- for/with a defined group of beneficiaries
- respecting the ‘mutuality clauses’ (i.e. distribution constraint and asset lock).

7. Summary and Conclusion

How to create a favourable climate for SE, including a favourable legal framework?

The concept of SE offers an answer:

- All user-based, promotion-oriented organisations and enterprises have to work together, to stress their common features and goals and co-ordinate their activities,
- speak with one voice (e.g. in France: GNC, CNLAMCA; in the UK: the Co-operative Group, Social Enterprise Coalition; in the EU: CCACE)
- Need to become politically active, communicate own models
- Approach policy makers and law-makers with proposals and demands
- Insist on participatory planning, policy-making and law-making

Good example for participatory law-making:

UK in case of CICs, publication of documents, broad public debate, presenting government's intentions for discussion

Good results in France:

Several amendments of co-operative law and other laws in favour of SE, e.g. law to promote certain activities of SE, co-operatives with social objectives (1992) and multi-stakeholder co-operatives (SCIC) in 2001.

In addition, a cabinet committee (délégation interministérielle à l'ES) in Government.