I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

544TH EESC PLENARY SESSION, 19.6.2019-20.6.2019

Opinion of the European Economic and Social Committee 'Towards an appropriate European legal framework for social economy enterprises'

(own-initiative opinion)

(2019/C 282/01)

Rapporteur: **Alain COHEUR**

Plenary Assembly decision	12.7.2018
Legal basis	Rule 32(2) of the Rules of Procedure Own-initiative opinion
Section responsible	Single Market, Production and Consumption
Adopted in section	28.5.2019
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1. Conclusions and recommendations

1.1. At a time when the European project needs fresh impetus, promoting diversity in types of enterprise is a factor in job creation, social innovation and cohesion, and competitiveness in Europe. EU law is based on a simplistic perception of the existing types of enterprise in the Single Market, such that social economy enterprises (SEEs) slip through the cracks, being neither capitalist-type for-profit firms nor not-for profit (financially altruistic) entities.

1.2. Social economy enterprises and organisations are run according to shared features, values and principles such as the primacy of the individual and the social objective over capital, voluntary and open membership, and democratic governance. They seek not to maximise short-term profits, but to ensure their long-term viability. Profits are reinvested in creating and maintaining jobs or in developing activities that pursue the social objective, or else are distributed among the members on the basis of their personal contributions.

1.3. EU law does not take account of the intrinsic nature of the social economy, in particular its different approach to profits. Article 54 of the Treaty on the Functioning of the European Union (TFEU) is interpreted as drawing a distinction between financially altruistic (i.e. not-for-profit) entities and companies whose operations are rewarded by financial gain. The latter category thus comprises all companies, without distinction and regardless of their legal form, which make a profit, whether or not that profit is distributed.

1.4. The case law of the Court of Justice of the EU (CJEU) and the European Commission's decision-making do not pay sufficient attention to businesses that are deemed 'not-for-profit' under their national law or that, irrespective of that classification, are founded on ownership, governance and profit-use criteria that clearly distinguish them from capitalist-type for-profit firms, particularly in terms of their conditions for accessing sources of financing. What is more, the need to unlock the potential of all types of enterprise, and the principle of neutrality of EU law in relation to the various company forms, should make it possible to avoid a situation where only one single business model develops.

1.5. The EESC therefore:

— proposes introducing into EU law a legal framework suited to better recognition of SEEs. This framework would be based on a new concept — limited profitability — which would apply to all enterprises that can make a profit but do not intend to distribute that profit to their owners, as their purpose is based on solidarity or the general interest;

— urges the Commission to launch a study on the concept of limited profitability and on business models that operate in this way, in order to identify more precisely what is required, in terms of legal, financial and tax frameworks, for cultivating the competitive strengths of these enterprises and ultimately, where appropriate, to prescribe good practice;

— urges the Commission to continue the efforts it indicated in its communication on the classification of State aid with regard to cooperative societies, by extending the relevant provisions to all SEEs;

— also asks the Commission to draft an interpretative communication on Article 54 of the TFEU and on the Treaty articles relating to competition law, in order to clarify the concept of 'not-for-profit' in EU law;

— finally, believes that a Protocol on diversity in types of enterprise should be annexed to the TFEU, along the same lines as Protocol No 26 on SGIs, and calls on the Member States to include this revision on the upcoming reform agenda.

2. General comments

2.1. *Recognition of the social economy by policy-makers*

2.1.1. The social economy (SE) is a growing reality in the economy and territory of the EU. It comprises 2,8 million enterprises and organisations in different forms — including cooperatives, mutuals, social enterprises, associations and foundations — engaged in economic activity, representing 8 % of GDP in the EU and 13,6 million workers, or 6 % of employees in Europe. Social economy entities, from very small enterprises (VSEs) and SMEs to large groups, operate in every sphere of activity. Given its importance and the breadth of its activities, the SE is a major driver of innovative and enduring economic growth in Europe that is socially inclusive and environmentally sustainable.

2.1.2. The SE now needs to be recognised by policy-makers. Some progress has been made, as evidenced by the Luxembourg Declaration on the Social and Solidarity Economy in Europe — 'A roadmap towards a more comprehensive ecosystem for social economy enterprises' — the conclusions of the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council on 'The promotion of the social economy as a key driver of economic and social development in Europe' — adopted for the first time unanimously by the 28 Member States — the Commission's renewal in 2018 of its Expert Group on the social business initiative (GECES), and the European Parliament's call on the Commission to ensure that the features of the SE are taken into account when framing EU policies.

2.1.3. The EESC has several times pointed out the advantages of recognising the SE, the need for EU legislation to take proper account of the diversity of social enterprise forms that exist, and the need to establish a specific action plan for the SE.

2.1.4. The European Pillar of Social Rights cannot become effective without the participation of SEEs. It is therefore important to ensure, in practical terms, that they can take part in the EU's economic and social development. While in times of crisis SEEs demonstrate greater resilience and act as a social shock absorber, in daily life they maintain and promote social cohesion and are sources of social innovation. Moreover, many of them reflect the objectives of the Pillar in their operational principles as well as their activities: they are by their nature intended to honour objectives such as promoting secure and adaptable employment, social dialogue and involvement of workers, and a healthy, safe and well-adapted work environment, or to offer innovative responses to certain basic social needs.

2.2. *Lack of legal recognition — a binary and simplistic vision of types of enterprise*

2.2.1. There is very little recognition of SEEs in EU law. Initiatives have been taken in the past to support the development of European cooperatives, mutuals, associations and foundations. But the only draft regulation that came to fruition was that on European cooperatives.

2.2.2. Currently the approach of introducing statutes category by category seems to have been abandoned in favour of two alternatives:

— firstly, promoting the concept of social enterprises at European level and implementing a number of financial instruments to address their financing needs;

— secondly, non-binding Commission recommendations encouraging Member States to themselves promote SEEs in their countries, especially those that do not yet have national legislative frameworks.

2.2.3. Moreover, while the European Parliament (EP), Council and Commission have announced that they will focus on the development of the social economy as a whole, their various actions are tailored to social enterprises and do not apply to all SEEs; similarly, these actions are liable to propagate a narrow vision of the social economy as being limited to activities with a social purpose.

2.2.4. Above all, the legislation in effect and recent proposals ignore a key issue: that the whole body of EU law is built on a binary and thus simplistic understanding of economic actors.

2.2.5. This dichotomy has been in place since the Treaty of Rome, and is now enshrined in Article 54 of the TFEU on freedom of establishment. Under that article, EU law recognises two types of entity: non-profit-making, comprising only organisations with financially altruistic activities, and companies/firms, generally constituted under civil or commercial law, and which include cooperatives.

2.2.6. All enterprises — be they cooperatives, mutuals, social enterprises or associations — that undertake financially viable activities and in certain cases produce surpluses, are equated with capitalist-type, for-profit companies. However, SEEs do not pursue the objective of maximisation of profits or return on capital, but rather a social objective.

2.2.7. This failure to take proper account of the particularities of SEEs is also reflected in competition law, which equates SEEs to other companies, i.e. entities engaged in an economic activity in a market, regardless of the legal status of the entity and the way in which it is financed. This blindness to the legal nature and objectives of SEEs, and thus to the specific constraints they operate under from an economic and financial point of view, is sometimes reinforced by court and legal literature interpretations that regularly convey the idea that the standard market operator is a for-profit company that seeks to maximise profits or return on capital.

2.2.8. The model of a capitalist-type, for-profit company pervades all of European law. Thus, despite the general interest benefits from such entities' existence in the EU Member States, and with the exception of the identification of services of general economic interest, neither association and company law, nor public procurement law, nor tax law distinguish between SEEs and other types of enterprise.

2.2.9. Thus genuine political recognition can no longer dispense with legal recognition, enshrined in the Treaty on the Functioning of the European Union. This necessarily means eliminating the fundamental historic confusion.

2.2.10. EU law features a principle of neutrality with regard to property ownership systems in the Member States.

This implies that the ownership of enterprises does not fall within the EU's remit; but it also implies that EU rules should not lead to prescriptions about ownership systems.

2.2.11. By the same token, Union law does not impinge on any decision to adopt either a capitalist-type for-profit structure for a company, where power depends on the amount of shares (or equity) held, or a social economy structure under which power is distributed on the basis of people rather than capital, and in which redistribution of surplus is strictly limited or where all the surplus is reinvested in the social objective.

2.2.12. However, when neutrality leads to non-recognition of whole swathes of the economy and allows a certain type of enterprise to be imposed as the reference standard or model for law-making, the principle in question is being misapplied.

2.2.13. In an own-initiative opinion published in 2009 on diverse forms of enterprise, the EESC noted the need to recognise economic diversity in the Union.

2.2.14. The entire legal order of the EU needs to be revised to better incorporate the specific role and operating methods of enterprises that have a general interest purpose and whose use of the revenue generated by their activities is strictly in line with the pursuit of social objectives.

2.2.15. One way therefore would be to provide for recognition of SEEs as a third category of economic operators, alongside for-profit companies and enterprises with altruistic objectives, that limit their profit-making in order to prioritise other ends.

3. **Specific comments**

3.1. *Limited profitability: a shared characteristic of SEEs*

3.1.1. Introducing the concept of limited profit would allow a focus on the key difference between SEEs and capitalist-type enterprises. Qualifying an entity as limited-profit makes profitability a means and not the objective of its operations.

3.1.2. First, it is understood that activities must be financially viable, i.e. not dependent on subsidies or donations for the books to be balanced.

3.1.3. Second, if activities generate any surplus, then all or the bulk of that surplus, depending on the structure of the entity, must be set aside or ploughed back into the operation to ensure that activities are sustained and developed through investment. For example, cooperatives may distribute part of their surplus to their members in the form of dividends or interest, but only a limited portion of the surplus may be distributed, and that amount theoretically depends on members' transactions rather than their share of the capital.

3.1.4. Third, profitability cannot be the only purpose of the activities. The purpose of an SEE's activities is to meet objectives other than those of a return on capital invested or maximisation of profits. These objectives consist in serving either the interests of the enterprise's members or the general interest, while in many cases pursuing other objectives relating to social, territorial or environmental cohesion.

3.1.5. The operational and management constraints that are integral to an enterprise's purpose are formalised in its statutes. However, EU law must also provide for the existence of entities that adopt these particular types of enterprise and must allow them to develop within the internal market.

3.1.6. Using the concept of limited profitability makes it possible:

a) to avoid limiting recognition of the social economy to social enterprises, i.e. entities with selected social operations, when SEEs across all sectors address economic, social and territorial needs. Any surplus that is created primarily benefits the members of cooperatives or mutuals, and local users of associations providing services. It will never be channelled into hedge funds or to investors on the other side of the globe;

b) guarantees that national variation in types of enterprise will be respected, with due regard for the subsidiarity principle.

3.2. *Horizontal application*

The concept of limited-profit enterprises should become established in different EU policies.

3.2.1. Freedom of establishment

3.2.1.1. In relation to freedom of establishment, a simple re-drafting would allow the existence of limited-profit enterprises to be recognised.

3.2.1.2. In other words, Article 54 TFEU and freedom of establishment provisions could cover companies or firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law, regardless of whether these are for-profit or limited-profit entities.

3.2.1.3. Freedom of establishment is a real issue for certain types of SEE. Because legal forms vary widely between Member States, exercising this freedom in most cases obliges enterprises, when they set up in a Member State, to adopt a form there that is at odds with the rules of operation laid down in their Member State of origin. No equivalent to the European company concept exists for SEEs. Very basic recognition of SEEs — for example via an interpretive communication on Article 54 TFEU — would make it possible both to take better account of their specific features in EU law and at the same time to begin a debate on the different potential responses to the establishment issue, for example via enhanced cooperation.

3.2.1.4. That would be the first step in a broader process of becoming aware of the social economy and supporting its promotion at EU level. The process should involve both the EU and the Member States, which must be encouraged to create their own national social economy frameworks that accommodate flexible structures for limited-profit companies.

3.2.2. Competition law

3.2.2.1. Limited profitability should also become a concept in competition law, without prejudice to the rules applicable to services of general economic interest under Article 106(2) TFEU and its supplementary and interpretive texts.

3.2.2.2. Even if the only criterion for falling within the scope of competition rules is that an entity operates a business in a market, at the point of applying the rules adjustments could be made so as to take account of certain specific features of SEEs.

3.2.2.3. Thus in relation to state aid, the CJEU has recognised the specific situation of cooperatives compared with for-profit companies as regards the constraints they face in accessing financing for their activities. In a legal judgment, the Court stated that tax advantages granted to cooperative societies could not be described as giving them a selective advantage since the respective situations of cooperatives and for-profit entities were not comparable.

The Court of Justice based its reasoning on the specific characteristics of cooperatives: their control structure and the fact that relations with their members are not purely commercial, their limited access to equity markets, and their necessary dependence on their own capital or credit financing for growth.

3.2.2.4. In its Notice on the notion of State aid, the Commission took note of the CJEU's position on cooperatives, and pointed out that preferential tax treatment for cooperatives cannot qualify as state aid.

3.2.3. Freedom to provide services and public procurement

3.2.3.1. The Commission has identified SEEs' access to public procurement as worthy of attention, pointing out that it is difficult for some of these entities to take part in tenders.

3.2.3.2. Reserved contracts are *a priori* out of reach. However, there is a blanket exception for economic operators whose principle purpose is to support the social and professional integration of disabled or disadvantaged people. Directive 2014/24/EU also allows contracts relating to health, social and cultural services to be reserved by the Member States for limited-profit enterprises meeting certain operational criteria.

3.2.3.3. However, it should be noted that the tendering process, where a competition is set up between enterprises based on the free market and private enterprise model, does not always put limited-profit enterprises in a comfortable competitive position. Here again, their sometimes modest size and their more tenuous access to sources of investment financing can be a competitive handicap, whatever the type of activity envisaged. Thus, the division of tenders into lots and award criteria based on the most financially advantageous tender should take account of this difference in situation.

3.2.4. Taxation

3.2.4.1. With regard to taxation, in 2013 the Commission still recognised that a favourable tax framework rewards the social impact of social enterprises. There should be a discussion about a preferential tax framework that offers a more generous reward for the social impact of all enterprises with regard to social, environmental and territorial cohesion.

Brussels, 19 June 2019.

The President
of the European Economic and Social Committee
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