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DAKTARO DISERTACIJA

# LEGAL PRECONDITIONS OF SOCIAL ENTREPRENEURSHIP: PERSPECTIVES IN SELECTED EUROPEAN COUNTRIES AND IN THE EUROPEAN UNION LEGISLATION

SOCIALINIAI MOKSLAI,
TEISĖ (S 001)
VILNIUS, 2022

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MYKOLO ROMERIO UNIVERSITETAS

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# TEISINĖS SOCIALINIO VERSLO PRIELAIDOS: PERSPEKTYVOS PASIRINKTOSE EUROPOS VALSTYBĖSE IR EUROPOS SĄJUNGOS TEISINIAME REGULIAVIME

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# INTRODUCTION

**Relevance of the topic**

In the European Union (hereinafter also – the EU) as well as in the European Countries (not only EU Member States) legal regulation of different areas of social life constantly changes in accordance with social, economic, and political changes in the society. Legislation regulating the business relationships also changes inevitably. Legal sciences aim to consider the trends and features of such changes at the relevant time. Therefore, it is reasonable to study the primary reasons why the particular legal rule develops itself in one or other way, to define the current stage of development and to predict possible direction of future development, identify the advantages and possible gaps in the regulation, and suggest ways to remedy these gaps. Moreover, it is important to examine the emergence of a new regulatory approach and determine what goals are aimed with the introduction of new regulatory. In addition, there can be a lack of legal regulation, which occurs in society during the formation of new social phenomenon. Such lack of regulation also should be timely defined.

We can presume that the legislature (both, of the EU and of the particular states) creates a new legal regulation not accidentally, but with a specific purpose – to meet a need of society, which requires such new legal regulation. One such relatively new phenomenon in nowadays society is a concept of social entrepreneurship. In recent years, more and more one can hear about the social entrepreneurship initiatives. Different definitions of this phenomenon are being provided by the researchers across Europe and other continents (especially, in the United States). As the business relationship inevitably falls into specific regulatory area, it can be assumed that social entrepreneurship (or social business) also falls (or should fall) into area of specific legal regulation.

Social enterprises became an important topic in European and national political agendas in several recent years. The awareness constantly grows that social enterprises create sustainable and inclusive development of society and excite social innovation.[1] It is not surprising that focus on people as much as profit (which is characteristic for social entrepreneurship), fosters a sense and meaning of social "togetherness" and pro-

1 "Social Enterprises and the Social Economy Going Forward. A Call for Action from the Commission Expert Group on Social Entrepreneurship," GECES, published 31 October 2016, accessed 14 January 2021, http://ec.europa.eu/growth/content/social-enterprises-and-social-economy-going-forward-0_en

motes solidarity and common well-being. Social economy, however, cannot develop itself naturally. To have a greater development of social economy we have to develop for it adopted environment.

In this research, we will see that the justification of the concept of social entrepreneurship and definition of its legal framework and regulatory characteristics are important for every state individually. Lithuania is also starting its way toward the national definition of the social entrepreneurship and its legal framework. In this step, different legal approaches should be considered to define what kind of legal forms are available to facilitate the legal concept of social enterprises. In 2015, Lithuanian Ministry of Economy adopted the Concept of the Social Entrepreneurship, which aimed to define the main principles of the social entrepreneurship, identify the problematic areas, and determine general tasks to foster the development of the social entrepreneurship. The document did not define any specific legal form of the social enterprise yet, but it aimed to evaluate the best practices of other European countries in legislation of the social entrepreneurship.[2] Later on, in 2019, there was an attempt to adopt new Law on Development of Social Business. The Draft of this legal act is still under consideration.[3]

In this context, we see that there exist considerable number of difficulties related with the core definition of social enterprises. What are the main reasons for such situation? It should be mentioned that the Communication of the European Commission links the concept of social entrepreneurship more with the content of activity of social enterprise than with the particular form of legal entity. However, in some countries exists special legislation defining special forms of legal entities. We will see this from further investigation of the regulation in particular countries.

Hence, the question is how to define social entrepreneurship legally if there is no specific legal form or existing legal form is too narrow and does not cover all forms of social entrepreneurship or social business? In such situation, there must be found and defined certain *legal preconditions – what could be considered specifically as social business or social entrepreneurship*. Mostly social businesses operate providing public services. Meanwhile, the legal form of such business might be a limited liability compa-

2 "Socialinio verslo koncepcija, patvirtinta Lietuvos Respublikos ūkio ministro 2015 m. balandžio 3 d. įsakymu Nr. 4-207," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/353c1200d9fd11e4bddbf1b55e924c57/asr

3 "Lietuvos Respublikos socialinio verslo plėtros įstatymo projektas," e-seimas, https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/1ec626406a6e11e99684a7f33a9827ac?jfwid=-1c703921t9

ny, or other legal form of a private (or sometimes public) legal person. Such company, in its legal form, is adapted for the for-profit corporate governance and multiplication of its shareholders' welfare.

This kind of dichotomy must be thoroughly investigated in order to provide greater clarity and legal certainty in the legal regulation of social entrepreneurship. It was mentioned that this problem of legal certainty is relevant because of rapid development of social entrepreneurship in nowadays society. The lawmakers react in different ways, but the common features can be identified, and can be useful as possible best practice examples, or at least such practices could be modelled from different elements (both, theoretical and practical) that currently exist in different countries.

Authors like Antonio Fici, Giulia Galera, and Carlo Borzaga share their insights that company law was designed to maximize shareholder value. The pure legal forms of the non-profit sector and the pure forms of the for-profit sector are inadequate to accommodate the phenomenon of a social enterprise.[4] It has to be stressed that the social enterprises influence the theoretical concept of enterprise in general: the conception of enterprises as organizations promoting the exclusive interests of their owners is questioned by the emergence of enterprises supplying general-interest services and goods in which profit maximization is no longer an essential condition.[5] With this starting position, we can agree that the research field is really wide and covers various areas of legal regulation – from company law to public procurement, competition law and beyond. Within the scope of this research the attention must be payed not only to legal preconditions of social entrepreneurship but also answered such questions as what is the particular social good on which the legislation of social entrepreneurship focuses (or should focus).

**Significance of the problem**

In the sense of practical legal problem, we can speak about legal preconditions of social entrepreneurship, which become a complex topic that is not easy to contem-

4 Antonio Fici, "Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective," *Euricse Working Papers*, 82 (2015), https://dx.doi.org/10.2139/ssrn.2705354

5 Giulia Galera and Carlo Borzaga, "Social enterprise: An international overview of its conceptual evolution and legal implementation," *Social Enterprise Journal*, 5(2009): 224, doi: 10.1108/17508610911004313.

plate. The definition "legal preconditions" in the title of this dissertation was chosen not by accident. Usually speaking about things related with law we can discuss legal regulation, which refers to existing different kinds of legal acts. It is the most concrete thing in the legal research. In addition, we can speak about legal environment or legal framework, which refer to legal system or a legislation as a whole. It is also rather concrete criterion to evaluate the area of social entrepreneurship from the legal point of view. Third, we can speak about legal preconditions. This is the term chosen to operate in this research for several reasons. First of all, it is wider; however, this property is useful because of the particularity of social entrepreneurship not only as a legal category but also as a societal phenomenon. Research of this phenomenon balances between different areas of social sciences. Therefore, throughout this research we use an interdisciplinary approach to evaluate legal status and other different legal preconditions of social entrepreneurship together with such non-legal aspects by their nature as the purpose and impact of social entrepreneurship, phenomenon of social innovation, sustainable development, and several other non-legal aspects.

Practical examples illustrate global trends in today's rapidly changing society. This dissertation does not seek to emphasize the problems in the particular country. However, as a researcher from particular country we could provide an example for the sake of the introductory context. Due to the small social entrepreneurship awareness, social entrepreneurship in Lithuania is often identified only with the work integration social enterprise (hereinafter also – WISE). Later, we will see that the concept of WISE is widespread in the most of researched countries. Subsequently we will discuss the concept of WISE in detail.

For this moment, in Lithuania exists a law defining legal status of WISEs – the Law on Social Enterprises of the Republic of Lithuania[6] (not to be confused with the above-mentioned Draft Law on Development of Social Business). The definition of social enterprise in this Law is defined narrower than one defined in the European Commission's documents. Social enterprise, as it is defined in Lithuanian legislation, can be called as only one of the possible social business models. Therefore, it is particularly important to establish a common legal concept of social business.

For example, the Law on Social Enterprises of the Republic of Lithuania links social enterprises only with the employment of people from specific social groups

6 "Lietuvos Respublikos socialinių įmonių įstatymas," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.EEC13A0B85BA/asr

who have lost their professional and general capacity for work, are economically inactive and are unable to compete in the labour market under equal conditions, to promote the return of these persons to the labour market, their social integration as well as to reduce social exclusion. According to this Law, a social enterprise shall be a legal person who has acquired this status in accordance with the procedure laid down by this Law and fulfils all the conditions related to recruiting of certain social groups (Article 3).

We know that traditional business, as a core driver of market economy cannot be exchanged by any alternative (including and social entrepreneurship). Social entrepreneurship, however, offers an additional option besides conventional business models or the corporate social responsibility (hereinafter – CSR), which can be exploited while seeking social goal (mission) and profit-generating sustainable action. Moreover, innovativeness of social entrepreneurship is unique because it not only pursues a social mission, but also it provokes creation of new forms of partnership between business and society. From such situation benefits not only target groups (to which social enterprise activity is usually directed), but also the entire society. *The main problem in this context is lack of legal certainty*. This legal uncertainty manifests itself whether in legal non-recognition of social enterprise as such, or unclear rules and general legal environment for social entrepreneurship. Those aspects can be distinguished as main problem in the research area of legal preconditions of social entrepreneurship.

The legislator in particular country should answer the question what the main legal approaches are to facilitate the creation of social enterprises. What kind of advantages or disadvantages have these models? These questions are especially important before starting establishing particular legal framework for social entrepreneurship in particular country.

Typically, business legal regulation serves for the general public purposes, enabling businesses (entrepreneurs) to increase profits and also create the benefit for the general society in easily measurable financial terms. Besides, however, there does exist another concept – business whose mission is not to make a profit, but to meet through its activities the social needs of society. Therefore, from the point of view of legal sciences, this phenomenon is interesting in the way the business law interacts with the legal aspects of social entrepreneurship, because both subjects have common points, but also have and conceptual differences. The development of this phenomenon should be studied in more detail.

**Research purpose and objectives**

The main purpose of this research is to determine legal preconditions of social entrepreneurship in the European Union as well as in the particular EU and European Free Trade Association (hereinafter – EFTA) Member States.

To implement the purpose of this research the following tasks are raised:

1. To find out whether the legal regulation of social entrepreneurship is adequate and identify potential weaknesses, differences, and contradictions of this legal regulation in the EU, the particular EU and EFTA Member States;

2. To determine main elements of the definition of social entrepreneurship or social business, (and related definitions) based on legislation, scientific literature, and our own observations;

3. To define the place of social entrepreneurship legal regulation in the legal system of the EU and particular countries;

4. To compare the regulatory relationship of social entrepreneurship with other regulatory areas in the context of legal system (social innovation, CSR, legal technology, and such global initiatives as the United Nations Sustainable Development Goals) in order to identify possibly best regulation practices and to estimate the potential of social entrepreneurship.

**Assumptions, limitations, and defensive statement**

This research looks for the legal preconditions of social entrepreneurship in the EU legislation and examines in comparative manner the legal preconditions of social entrepreneurship in several EU Member States (Austria, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, and Sweden) and States of the EFTA (Iceland, Norway, and Switzerland). From the literature review, we will see that most of the academic texts look into economic peculiarities of the functioning of social enterprise. However, from the legal point of view, there is a lack of studies evaluating legal preconditions for social entrepreneurship in the comparative manner.

It is quite difficult to start the research by defining one or several fundamental legal acts regulating this specific area, whereas there is a lack of such legislation in the EU. European Commission (hereinafter also – the EC; and – Commission) published

in 2011 its Communication on Social Business Initiative (hereinafter also – SBI).[7] This Communication defines a social enterprise as an operator in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involving employees, consumers and stakeholders affected by its commercial activities. It should be noted that the Communication does not emphasize any specific form of legal entity as a social enterprise.

Such definition of social enterprise is provided in the above-mentioned Communication. Although any communication of the EC is not an imperative legal act, but this Communication could be considered as a starting point for drawing the boundaries of the preliminary legal concept. However, this dissertation also covers broader evaluation of such for this research significant definition as social dimension of law, business, enterprise and entrepreneurship, social innovation, legal technology etc. Therefore, a dedicated chapter in this research evaluates all mentioned definitions and looks for the connections between them.

Summarising the definition of social enterprise provided in the SBI, we could introduce – and suggest using in different contexts – so-called *operational definition (*which is partially based on the operational definition used in the SBI) of social enterprise that will be used for the purpose of the research throughout this dissertation. Moreover, further in this dissertation we research the multiplicity of the elements, contained in this definition, and it is one of the aspects of original contribution of this research in order to achieve one of the goals of the dissertation (please see sub-chapter "Problems of Definition"). We think that theoretically within this operational definition, three dimensions can be distinguished: an entrepreneurial dimension; a social dimension and a dimension related to governance structure. All three dimensions are not isolated but interact in various combinations. These combinations (which will be explained throughout this research) matters most when identifying the boundaries of the social enterprise. An entrepreneurial dimension represents engagement in economic activity. A social dimension represents explicit and primary social aim. A dimension

7 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative," COM (2011) 682 final, accessed 14 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-52011DC0682&from=EN

related to governance structure represents limits on distribution of profits and/or assets; organisational autonomy; and inclusive governance.

The *defensive statement* of this research argues that *there is a lack of legal certainty in the European Union and in particular countries in the field of regulation of social entrepreneurship, which could be tackled by the variety of legal (and possibly – not only legal) measures*. The defensive statement also argues that adapting of existing legal forms and exploiting different soft law measures, without necessarily introducing a dedicated legal form, could lead to effective development of social entrepreneurship as social phenomenon. Nowadays existing legal uncertainty causes additional difficulties for social enterprise development, which otherwise could be successfully exploited as an important and effective measure to address the social problems in society.

To verify the defensive statement this research deals with the investigation of the European Union and the EU Member States' legislation and national legislation of other countries and evaluates the insights of other researchers on the problems related with the subject of this research. Focusing on the defensive statement, subject of the research can be considered as the legislation of the EU and several particular countries on the social entrepreneurship, its legal forms and ways of expression. The research also looks for preconditions for the legal reasoning of social entrepreneurship concept since there is insufficient legal regulation in this area.

The scope of the research covers the examination of the EU legislation regulating this area. It also covers the comparative analysis of social business legal regulation in selected EU Member States and states of the EFTA. The following logic is applied by selecting particular countries for comparative analysis. Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) were chosen as countries that have a long tradition of the welfare state, which includes a considerably higher rate of different social initiatives, and active community of non-governmental organizations. German-speaking Western European states (Austria, Germany, and Switzerland) were chosen to evaluate their experience in the light of their strong economies and to look what models are used in highly economically developed countries to tackle social problems. Baltic States (Estonia, Latvia, and Lithuania) were chosen as relatively young democracies and market economies, to evaluate their level of development of such quite new concepts as social entrepreneurship, and to determine possible shortcomings in this area.

**Structure of dissertation and chapters' overview**

This dissertation can be described as having two main and parallel parts (although the content of dissertation holds in itself more detailed parts). These above-mentioned main parts are not strictly defined but have quite different approach to the topic. First of all, this research focuses on theoretical definition of different aspects (and not only in terms of legal sciences) of social entrepreneurship. This part of dissertation allows us to look at theoretical preconditions of different elements of the phenomenon that we call social entrepreneurship. Without the theoretical approach, this research could not cover thoroughly all aspects mentioned in the introduction, such as social innovation, CSR, legal technology etc.

The other large part of the dissertation covers the comparative analysis of the legal environment for social enterprises in particular countries (Austria, Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Sweden, and Switzerland). The quite large spectrum of countries from several European regions allows us to get a better view on the definition and legal framework of social enterprise and social entrepreneurship in countries and regions with different experience, social, and historical background.

We also evaluate legal framework of the EU and raise questions whether legal regulation on the EU level is adequate. Speaking in more detail, the comparative analysis covers such aspects of legal environment for social enterprises as existing legal framework, for social enterprises available legal forms of entities, legal status, and recognition of such business form etc.

Although both parts of research have slightly different approaches and use different sets of materials (and methods), they inevitably complement each other and are systematically related. Theoretical approach lets us discover main scientific problems regarding legal (and non-legal) definitions while practical approach lets us discover the depth of the application of the theoretical concepts in practice.

## SCIENTIFIC NOVELTY OF RESEARCH AND IMPUT OF OTHER AUTHORS

Review of the works of other authors that deal with different aspects (not only legal) of social entrepreneurship is important for several reasons. First, it gives a clearer view on aspects that are explored relatively good by other authors. On the other hand, it can show contradictions between different points of view. Therefore, by overviewing some main trends in research dealing with social entrepreneurship we seek in this research to show our original point of view, which may be different from that of other authors. In addition, in this way it is possible to highlight important elements of insights of different authors, which, by systematizing and adding our own insights, can qualitatively supplement the research in this field.

First, we have to stress that researchers usually deal with the problems of social entrepreneurship through the prism of economics. Individually we can mention such authors as J. Austin, J. Defourny, M. Nyssens, G. Lasprogata, M. Cotten, R. Martin, S. Osberg, and A. Nicholls etc., whose insights can be valuable for this research. Most of the above-mentioned authors consider that the definition of social entrepreneurship differs between different states and even continents (e.g., United States and the EU). However, the researchers agree that social entrepreneurship plays an important role in nowadays society and in the future, it will definitely become an important tool to tackle the social problems. Therefore, the justification of the concept of social entrepreneurship and definition of its legal framework and regulatory characteristics are also very important.

Although the research positions of some authors have been published several years ago, it should be borne in mind that an extensive search of the scientific literature was conducted during the study. We can state that there are relatively few literature positions on the research topic (especially – on the legal aspects). The above-mentioned, relatively older positions of literature are still very relevant. Therefore, this research, among other things, performs the function of systematizing the literature on the relevant topic, which contributes to a better dissemination of information about the researched problem.

J. Austin, H. Stevenson and J. Wei-Skillern underline that social entrepreneurship is not defined by legal form, as it can be pursued through various vehicles and examples of social entrepreneurship can be found within non-profit, business or even

governmental sector. The authors define social entrepreneurship as innovative, social value creating activity that can occur within or across the non-profit, business or government sectors.

The authors emphasize that although social entrepreneurship is distinguished by its social purpose and occurs through multiple organizational forms, there is still significant heterogeneity in its definition. In addition, it is to be mentioned that legal environment affects the ability of social business to function: taxation, access to finance and other regulations affect how intensive is development of social businesses in particular countries.[8]

Janelle A. Kerlin also underlines, that social enterprise may take several different organizational forms: non-profits, partnerships, foundations etc. However, for over two decades, social enterprise movements in the United States and Europe have taking a growing importance. Therefore, the scope of research on this topic supposed to be adequate. Author compares legal regulation of social entrepreneurship in the United States and Europe and comes to conclusion that both continent deal with the lack of clearly defined legal frameworks for social enterprise.[9]

It is worth to mention that Janelle A. Kerlin in one of the recent researches also presented another social enterprise typology interesting for this research. The researcher presented the typologies for economic development and civil society, which are combined to create models for social enterprise that incorporate how both contexts shape the organizational patterns for social enterprise. These typologies can be called as "Original Country Models of Social Enterprise", which are "factor-driven", "efficiency-driven", or "innovation-driven".[10]

G. Lasprogata and M. Cotten in their research draw the line between for-profit and social enterprises. They emphasize that both legal entities are created and governed under the state law, have organizational structure, governing rules and capital formed by shareholders. However, social enterprises can and often earn a profit, but they are not permitted to distribute those earnings to their shareholders. This restriction sup-

8 James Austin, Howard Stevenson, and Jane Wei-Skillern, "Social and Commercial Entrepreneurship: Same, Different, or Both?" *Entrepreneurship Theory & Practice* 30 (2006): 2–8, https://doi.org/10.1111/j.1540-6520.2006.00107.x

9 Janelle A. Kerlin, "Social Enterprise in the United States and Europe: Understanding and Learning from the Differences," *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations* 17(2006): 247, https://doi.org/10.1007/s11266-006-9016-2

10 Janelle A. Kerlin, *Shaping Social Enterprise: Understanding Institutional Context and Influence* (Bingley: Emerald Publishing Limited, 2017): 12-14.

posed to be included in the articles of incorporation of such social enterprise.[11]

T. Kelley researches the new hybrid forms of social enterprises in the United States. He refers social enterprises as "emerging fourth sector". In his paper, he critically examines various proposals for creating new types of hybrid for-profit/non-profit entities to provide a legal structure for so-called fourth sector ventures.[12]

In addition, A. Katz and A. Page investigate in their works legal forms and legal environment of social enterprises.[13] S. Estrin, T. Mickiewicz and U. Stephan research how social entrepreneurship functions within economic system and remains under theorized. In addition, they research how social entrepreneurship might interact with commercial entrepreneurship.[14]

S. Rana stresses that social entrepreneurship can be defined as the "for-profit" charity and points out that historically philanthropic activities and legal structures are largely unrecognized by the legal literature. The author also emphasizes that today's social changes influence development of the legal environment. It leads to development of new legal entities like above-mentioned for-profit charitable enterprises. The science must provide adequate attention to the investigation of this phenomenon.[15]

F. Santos analyses the growing phenomenon of social entrepreneurship and its role in the functioning of modern society. Author emphasizes the re-distributive functions of governments, through the legal system and governments agencies, to try to ensure to society an accepted level of individual welfare. Yet, governments often do not have the capabilities to perform this re-distribution function, particularly when action is needed at a local level. Here enter social enterprises, which create new forms of organizational entities and thereby need a new legal framework to function more effectively creating the social value for the society.[16]

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11 Gail A. Lasprogata and Marya N. Cotten, "Contemplating 'Enterprise': The Business and Legal Challenges of Social Entrepreneurship," *American Business Law Journal* 41 (2003): 74-77, DOI: 10.1111/j.1744-1714.2003.tb00002.x

12 Thomas Kelley, "Law and Choice of Entity on the Social Enterprise Frontier," *Tulane Law Review* 2 (2009): 337, https://doi.org/10.2139/ssrn.1372313

13 Robert A. Katz and Antony Page, "Sustainable Business," *Emory Law Journal* 4 (2013): 851.

14 Saul Estrin, Tomasz Mickiewicz, and Ute Stephan, "Entrepreneurship, Social Capital, and Institutions: Social and Commercial Entrepreneurship Across Nations," *Entrepreneurship Theory and Practice* 37 (2013): 479, doi:10.1111/etap.12019

15 Shruti Rana, "Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility," *Alabama Law Review* 5 (2013): 1121-1126.

16 Filipe M. Santos, "A Positive Theory of Social Entrepreneurship," *Journal of Business Ethics* 111 (2012): 336, https://doi.org/10.1007/s10551-012-1413-4

S. Bacq and F. Janssen also dig into examination of different forms of social entrepreneurship. They emphasize that the social entrepreneurship organization can adopt either a non-profit or a for-profit organizational form and should not be limited to any specific legal form. This perspective results in the emergence of various hybrid organizational forms: independent, they can generate profit, employ people, and hire volunteers. This new legal form represents a hybrid organizational type, partly non-profit and partly limited company. Authors emphasize, that many European countries have introduced such special legal entities. Belgium introduced the status of "social purpose company", Portugal – "social solidarity cooperatives", France – "collective interest co-operative societies", etc. In addition, authors pay attention to the fact that despite all these newly created legal forms across Europe still adopt legal forms that have existed for a long time, namely associations, co-operatives, or traditional business forms.[17]

A. Nicholls in his research looks for legitimacy of social entrepreneurship. The author shares insights on institutional theory, examines the patterns in legitimation process to explore the institutionalization process of social entrepreneurship. Finally, the author conceptualizes social entrepreneurship as a field of action in a pre-paradigmatic state that currently lacks an established epistemology.[18]

K. Sorensen and M. Neville investigate legal forms and legal statuses of social enterprise in several EU Member States and the USA. They emphasize that a new corporate form of the social enterprise can be introduced as an entirely new form, unconnected with existing company law, or as new category within the existing regulation with a few special rules or exemptions. [19]

Cafaggi and Iamiceli emphasize that legislators may, and probably have to promote the role of social enterprises by defining organizational models. These models, first of all should be set to maximize the effectiveness of enterprises. Legislation should be based on default rules for social enterprises, allowing a reasonable amount of self-regulation. Therefore, in this way we speak about the framing the main principles

17 Sophie Bacq and F. Janssen, "The Multiple Faces of Social Entrepreneurship: A Review of Definitional Issues Based on Geographical and Thematic Criteria," *Entrepreneurship & Regional Development* 23 (2011): 386–387, https://doi.org/10.1080/08985626.2011.577242

18 Alex Nicholls, "The Legitimacy of Social Entrepreneurship: Reflexive Isomorphism in a Pre-Paradigmatic Field," *Entrepreneurship Theory and Practice* 34 (2010): 616–625, https://doi.org/10.1111/j.1540-6520.2010.00397.x

19 Karsten Sorensen and Mette Neville, "Social Enterprises: How Should Company Law Balance Flexibility and Credibility?" *European Business Organization Law Review* 15 (2014): 268, https://doi.org/10.1017/S1566752914001128

of the governance of social enterprises.[20]

Lorne Sossin and Devon Kapoor emphasize that „a social enterprise must have a legal structure, including some aspect of governance, and must be an organization with some recognized legal capacity (whether as a public, private, or hybrid organization). This element is essential as the pursuit of revenue through economic activity, in any capacity, requires a legal structure through which to channel the funds and pay taxes."[21] Moreover, they suggest particular elements, which are important for the operational definition of social enterprise in the context of this research. According to them, a social enterprise must engage in some form of economic risk-taking to generate profit. This element separates social enterprise from charitable and non-profit organizations. Authors think that social purpose to which revenues from a social enterprise are directed should also inform the way in which those revenues are obtained. It means that e.g., if "a business that contaminates water supplies in order to generate revenues to invest in conservation, in other words, would not meet <…> definition of social enterprise."[22] We see that authors suggest a very strict relation of social mission with how profit is generated. Here we have to emphasize that in the sense of this dissertation this relation is not that strict. We mean that social mission not necessarily has to be related with how profit is generated.

Despite it is not a legal aspect, some authors properly summarize that social enterprise concept fulfils an important function as an "engine for innovation" in the social sector. At the same time, it helps to question established and often-inefficient bureaucratic practices of providing social services. Also because of the lack of competition in the field of providing social services, social enterprises may influence traditional organizations' working modes in a positive way. However, we do not have to seek that social business could replace government or non-profit measures.[23] Nevertheless, it can be assumed that all players in this field can benefit and learn from each other.

Carol Liao stresses, "Lawmakers around the world are attempting to determine whether existing laws in their jurisdictions are sufficient to support certain forms of

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20 Fabrizio Cafaggi and Paola Iamiceli, "New Frontiers in the Legal Structure and Legislation of Social Enterprises in Europe," *Local Economic and Employment Development* 16 (2009): 25, doi:10.1787/9789264055513-3-en.

21 Lorne Sossin and Devon Kapoor, "Social Enterprise, Law & Legal Education," *Osgoode Hall Law Journal* 54, no. 4 (2017): 1007, http://dx.doi.org/10.2139/ssrn.3058078

22 *Ibid*.

23 Andrea Grove and Gary A. Berg, *Social Business Theory, Practice, and Critical Perspectives 1st ed*. (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014): 229.

social enterprise, whether modifications are necessary, or whether new laws are desirable."[24] The author emphasizes that several countries in Europe have adopted social cooperatives and legal certifications. However, North America has gone slightly different path. Particularly in the United States, private actors are actively lobbying state governments to enact a new corporate legal form for businesses producing public benefits. The mostly known result of such lobbying is a form of entity called Benefit Corporation (which later will be discussed in this research in more detail). The author summarizes that "the purpose of a benefit corporation is to create a general public benefit, which is defined as a material positive impact on society and the environment, as measured by a third-party standard."[25]

In addition, author emphasizes (being a Canadian researcher) several problems related with social enterprise research. The most significantly, "social benchmarks are far more difficult to measure, and governmental policies and interventions make for significant market distortions on the supply side that need to be accounted for when postulating on the effectiveness of new social enterprise laws to social sustainability. <…> Lawmakers will need to proceed cautiously and question the motives behind the establishment of any new social enterprise laws, particularly if they are transplants from other jurisdictions." Despite that, the researcher thinks that the emerging field of social enterprise law is dynamic and complex, and in the context of reforming corporate and regulatory rules, it can help foster sustainability in all economic, social, and environmental dimensions.[26]

Philippe Eynaud emphasizes conceptual introduction to social enterprise research through broader political dimension. The author states that social enterprises can influence public policies and reconnect the political dimension and the economic. The author believes that institutions contradict all the time the common belief of a self-regulated market. Moreover, the existence of different institutions plays specific roles in relation with economic principles. Therefore, this aspect emphasises the plural aspect of the economy. It leads to the author's statement that "market is not alone in the shaping of the economy and different institutions have continuously re-embedded the

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24 Carol Liao, "Social Enterprise Law: Friend or Foe to Corporate Sustainability?" in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 6, 11. DOI: https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386.053

25 *Ibid*, 662.

26 *Ibid*, 668.

economy in the social and political orders, against the myth of market self-regulation. <…> Social enterprises still need to amplify their capacity of political embeddedness, by going beyond the capacity for social economy and third-sector institutions to reduce the impact of the market and influence the State." [27]

In this work, we speak quite a lot about stakeholder importance in the social enterprise environment. Lars Hulgård, Jacques Defourny (already mentioned), and Victor Alexis Pestoff stress that stakeholders are "any group or individual who can affect or is affected by the achievement of an organization's purpose, typically, the owners, the managers, the workers, the volunteers, the financing bodies, the partners, the suppliers, the customers / beneficiaries, etc."[28] The mentioned stakeholders can be involved in the governance structures such as general meeting, the board or other body. The authors argue that the configuration of stakeholder involvement in different non-governmental, or government's organizations differs from the involvement in for-profit businesses. Of course, we can agree on the opinion, "social enterprises seem to have a stronger tendency to give a voice to the actors with whom they interact – that is, to involve their beneficiaries, supporters, funders or partners within their governance structures."[29] However, it is not an exclusive case, because nowadays and business-, and public structures are much more influenced by different stakeholder groups.

Research network of university research centres and individual researchers on social enterprise "EMES"[30] emphasize that social enterprises can be identified by three kinds of criteria: "the first is a set of economic criteria, one being the production and sale of goods or services, while another is that the organization is not entirely run by volunteers, but also involves some paid employment. Secondly, there is a set of social criteria, such as a strong desire to be of benefit to the local community or to the particular users targeted by the enterprise, and the fact that local citizens, users or associations have initiated the enterprise. Thirdly, there is a set of governance criteria, which imply that the social enterprise has a high degree of autonomy and is therefore not directly subject to public authority, and also that it has a participatory nature that permeates its

27 Philippe Eynaud, *Theory of Social Enterprise and Pluralism* (New York: Routledge, 2019): 6-8. https://doi-org.ep.fjernadgang.kb.dk/10.4324/9780429291197

28 Lars Hulgård, Jacques Defourny, and Victor Alexis Pestoff, *Social Enterprise and the Third Sector : Changing European Landscapes in a Comparative Perspective* (Oxfordshire, England: Routledge, 2014): 157. https://doi-org.ep.fjernadgang.kb.dk/10.4324/9780203487747

29 *Ibid*, 158.

30 "EMES," Research network of university research centres and individual researchers on social enterprise, accessed 16 January 2021, https://emes.net/

management and the choices made concerning, for instance, work procedures."[31]

Speaking about Lithuanian authors, we can particularly distinguish the doctoral dissertation by Audronė Urmanavičienė on the "Implementation of the Social Impact Assessment of Work Integration Social Enterprises in Baltic States."[32] The author emphasizes the importance of social impact assessment in social enterprises (particularly, in WISEs) and analyses social enterprise internal and external environment for better understanding of obstacles and challenges for implementation of impact assessment.

Concentrated review on social enterprises as creators of sustainable innovations is provided by Andželika Rusteikienė and Raminta Pučėtaitė. The authors emphasize that due to the breadth of hybrid business methods and business models, social business has a huge potential to generate sustainable innovations, so its activities and environment are suitable for further (empirical) research.[33]

A couple of new works particularly review social entrepreneurship situation in the Western Europe[34] and in Central and Eastern Europe.[35] Both works present an updated point of view on conceptualization of social enterprise in vast diversity of social enterprise models and mostly deal with case studies in particular countries. Although updated studies also relate to the scope of this study, we believe that our study provides another angle of view linking social entrepreneurship first of all with its legal environment and capturing aspects that are important from the legal point of view and might be not fully captured by the authors in other fields of research (e.g., economics, management, public policy, etc.).

We already emphasized that most of this research focuses on the European Union legislation, legislation of the mentioned EU Member States and the States of the EFTA. However, speaking about valuable insights, we have to consider and some theoretical approaches that were not necessarily developed in the countries of the scope of this research. Therefore, in this work among others we share insights of the authors

31 Linda Lundgaard Andersen, Malin Gawell, and Roger Spear, *Social Entrepreneurship and Social Enterprises* (New York: Routledge): 27. https://doi-org.ep.fjernadgang.kb.dk/10.4324/9781315621982

32 Audronė Urmanavičienė, "Implementation of the Social Impact Assesment of Work Integration Social Enterprises in Baltic States" (doctoral dissertation, Mykolas Romeris University, 2019), https://repository.mruni.eu/handle/007/16066

33 Andželika Rusteikienė and Raminta Pučėtaitė, "Socialinis verslas kaip darniųjų inovacijų kūrimo laukas," in *Organizacijų etika, novatoriškumas ir darniosios inovacijos*, edited by Raminta Pučėtaitė, Aurelija Novelskaitė, and Rasa Pušinaitė (Vilnius: Akademinė leidyba, 2015), 148-163.

34 Jacques Defourny and Marthe Nyssens (Eds.), *Social Enterprise in Western Europe. Theory, Models and Practice* (Routledge, 2021).

35 Jacques Defourny and Marthe Nyssens (Eds.), *Social Enterprise in Central and Eastern Europe. Theory, Models and Practice* (Routledge, 2021).

from the United States of America, United Kingdom, and other countries.

In comparison with above-mentioned positions of other authors, we can stress that our original scientific point of view in this research concentrates on legal problematics of definition of social entrepreneurship (in legal terms) and other legal elements, which are not always directly visible. We see that most scholars agree that social entrepreneurship plays an important role in nowadays society, and in the future, it will definitely become an important tool to tackle the social problems. However, from the scientific point of view, the patterns in legitimation and institutionalization process of social entrepreneurship are yet to be explored, because authors stress (and we can definitely agree) that there is a vast heterogeneity in definition of social entrepreneurship. From our perspective, we can add that justification of the concept of social entrepreneurship and definition of its legal framework and regulatory characteristics are very important.

Provided typologies can be useful and can be further examined in this and other studies in order to provide best possible legal structure of social enterprise and distinguish the most important legal elements of social enterprise legal environment. Moreover, we believe that concepts and paradigms developed by the above-mentioned authors can be expanded further, and this research contributes to this goal.

Scientific structuration of definitions and other legal elements of social entrepreneurship is an important scientific added value of this research.

Consequently, this research raises legal questions (although not all discussed aspects are of a legal manner). It also approaches other areas of social science. By that we think that looking into legal preconditions of social entrepreneurship should include and such aspects as research on how legal regulation in the particular area correlates with the success, popularity, usefulness of that form of activity (in this case – social entrepreneurship). In addition, we think that this research could become more meaningful by looking for different angle of view in the field of legal preconditions for social entrepreneurship. Therefore, such novelties as legal technology are also considered. They are evaluated by trying to answer the questions such as how legal technology affects social business. On the other hand, we try to expand insights on the assumption that social business can become a good provider of legal tech services.

In developing this issue, it should be noted that from a legal point of view neither the definition of social entrepreneurship nor its special legal regulation is yet finally identified (or it can be stated that it varies greatly). Many countries still lack an enabling framework for encouraging the creation and development of social enterprises.

With respect to the novelty of the social entrepreneurship as the legal category and the lack of legal certainty, which is the main problem investigated in this research, this category requires a thorough scientific examination to define its legal preconditions. Considering the amount of such initiatives in the EU Member States, this research contributes to thorough scientific justification of the legal elements of phenomenon of social entrepreneurship. The research also unifies its categories, definitions, and concepts, analyses new legal institutes, which are emerging because of development of social entrepreneurship. The research analyses the legal preconditions of social entrepreneurship in the European Union, which are not always directly noticeable. It also contributes to better analysis of the EU legislation and legislation of the particular European states. As well as it contributes to deeper analysis of the elements of definition (not only in legal terms, positioning of social entrepreneurship in the legal system of the EU, considering the wider legal context then only the EU company law.

Among other things, this study performs the function of systematizing the literature on the relevant topic, which contributes to a better dissemination of information about the problem under study. The dissertation focuses on the theoretical issues of the phenomenon under study, including different theoretical approaches and definitions. This analysis is the author's original contribution to the theoretical formation (not just the definition) of understanding social business.

From the practical point of view, the results of the research could contribute to improvement of national legal framework on social entrepreneurship or social business, which is clearly insufficient in nowadays stage of rapid popularization of social entrepreneurship in Lithuania. Moreover, such areas as social innovations and social entrepreneurship come and develop hand in hand. We can assume that social innovation and hybridity of social enterprise are inseparable parts of the paradigm of social entrepreneurship. Therefore, this research looks for the legal preconditions of social entrepreneurship and social innovation to clarify these definitions in the way that could be useful for further research and practical application.

# METHODOLOGY

## (i) Research design and methodology

Methodologically this research focuses on the subject – legal preconditions of social entrepreneurship in the European Union and particular EU Member States, and States of EFTA. The research argues that there is a lack of legal certainty in the countries in the field of regulation of social entrepreneurship. Such legal uncertainty causes additional difficulties for the further development of social entrepreneurship as social phenomenon, which can be important and effective measure to tackle social problems in society.

Theoretically, the dissertation uses some views from philosophical doctrine of the realism. As the assumption of realism, we understand the idea that things in the world happen regardless of whether we observe them, or even know them. Objects have in the social world varying probabilities of coming into existence and causing new objects, which connect into identifiable structures. We investigate the social world in its context, which counts as evidence, concepts, measures, etc.[36] Bearing this in mind; the objectivity of this research depends on the context of the social life, which inevitably changes over time.

In addition to general philosophical doctrine of the realism, the research uses some ideas of the legal realism (more particularly – the new legal realism).[37] The starting point of the realist account of law is its critique of a purely doctrinal understanding of law. Law is going institution (or set of institutions) caused by the tensions: between power and reason, and tradition and progress and a social process is not something that can happen at a certain date. Legal realists insist that legislators should use social developments and new cases as triggers for rethinking the doctrine's conventional understanding. According to legal realism, the main roles of doctrinal categories are to consolidate people's expectations and to express ideas of law with respect to distinct

36 Gayle Letherby, John Scott, and Malcolm Williams, "Social Objects and Realism," in *Objectivity and Subjectivity in Social Research* (London: SAGE Publications Ltd., 2013), http://dx.doi.org./10.4135/9781473913929.n6.

37 Although the general ideas of legal realism from the first half of the 20th century are considered to be outdated, we believe that most of those ideas are also relevant nowadays. Moreover – the new legal realism is helping to return some of the philosophical values of legal realism.

types of human interaction.[38]

The legal problems that this research examines are closely related with the economic aspects. Therefore, it is important to emphasize the importance of interdisciplinary aspect of this research, which allows exploring the problematic of the issue across the boundaries of one particular sphere of social sciences.

Pioneer of political economy Adam Smith formed a well-known assertion that free market competition leads the public to better economic results and the general public welfare. However, he also pointed out that people's behaviour often leads to a feeling of sympathy for other people. In his work "Theory of Moral Sentiments", author formulates the idea that people often feel sorrow looking at the sorrow of others. According to Smith, we have no immediate experience of what other people feel we can form no idea of the way they are affected, but by conceiving what we ourselves should feel in the like situation.[39]

In the light of above-mentioned thoughts of Adam Smith, the legal perspective of the topic of this research methodologically falls into the interdisciplinary area of research of the behavioural law and economics. The task of behavioural law and economics is to explore the implications of human behaviour for the law. Because taking into account understanding of how people behave can cast a different light on how or whether a particular rule will achieve its intended goals. Sometimes it turns out that legal rules that would seem efficient or effective from a law and economics perspective (based on hypothetical assumptions on human behaviour) are inefficient when dealing with real people.[40]

In addition, the concepts of A. Smith, the pioneer of political economy, and other concepts mentioned and developed in the work were chosen deliberately and, in the author's opinion, were related to the research topic and problem, highlighting the interdisciplinary aspect of the research. The connection between the classical theories of both political economy (A. Smith) and law (legal realism) with the research topic shows the depth of the research problem (showing that the possible beginnings and assumptions of the topic were formed much earlier than the concept of social business itself). In addition, it provides opportunities to develop these interfaces in further research.

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38 Dagan Hanoch, "Doctrinal categories, legal realism, and the rule of Law," *University of Pennsylvania Law Review* 163 (2015): 1891, 1897.

39 Adam Smith, *The Theory of Moral Sentiments* (New York: Penguin Books, 2009): 13.

40 Julie De Coninck, "Behavioural Economics and Legal Research," in *Methodologies of Legal Research,* edited by Mark Van Hoecke (Oxford: Hart Publishing Ltd, 2011): 262-3.

**(ii) Research instruments, data, and analysis limitations**

This research mostly utilizes a set of qualitative research methods that are used interchangeably throughout the whole research. The *textual analysis method* is used to examine closely the content and meaning of legal texts and other documents, as well as they structure and disclosure.[41]

To define the place of the examined legal norms in the legal system, also to define the relationship between the legal norms and their relationship to the general principles of law a *comparative method* is used. This method also helps to define the relationship between the European Union and the EU Member States' and other countries legislation. This method also comes in hand while determining the possible regulatory shortcomings. Comparative method is probably the mostly useful for this research because this method allows isolating factors or variables that explain patterns. Separately can be mentioned *historical method*, which concentrates on the analysis of historical data to study the development of the EU legislation related to the subject of this research. Two basic strategies are usually distinguished in comparative research: (1) study events or groups that differ in many ways but have something in common; and (2) study events or groups that are similar but differ in one or several important respects.[42] This research tries to apply both of these strategies. The comparative method also allows the implementation of the research on different levels, starting from the comparison of different cultures, and going into the comparison of different aspects within the concrete case.[43] The comparative legal research contains in itself several types of methods, such as the functional method, the structural method, law-in-context method, etc.[44] All the above-mentioned methods constitute together the whole toolbox for comparative research.

Closely related to the comparative method in this study is the *case study method*. It is used for the in-depth analysis of particularly selected states with the advanced legal

41 Sharon Lockyer, "Textual Analysis," in *The Sage Encyclopedia of Qualitative Research Methods,* edited by Lisa M. Given (Thousand Oaks, CA: SAGE Publications, Inc., 2008): 865-67. http://dx.doi.org/10.4135/9781412963909.n449.

42 "Comparative Method," in *Dictionary of Statistics & Methodology*, 3rd ed., edited by W. Paul Vogt (Thousand Oaks, CA: SAGE Publications, Inc., 2005): 52-53. http://dx.doi.org/10.4135/9781412983907.n327.

43 Uwe Flick, *Designing Qualitative Research* (London: SAGE Publications, Ltd., 2007): 39-40. http://dx.doi.org./10.4135/9781849208826.

44 Mark Van Hoecke, "Methodology of Comparative Legal Research," *Law and Method 12* (2015): 8. http://dx.doi.org/10.5553/rem/.000010.

frameworks regarding the social entrepreneurship. Moreover, written documents may be searched for clues to understanding the culture of organizations, the values underlying policies, and the beliefs and attitudes to the issue.[45] With this regard, the case study method could really contribute to this research.

The *method of generalization* in qualitative research tends to be criticized, in this research, however it serves for exploring patterns in particular societies, because qualitative research might produce moderate generalizations, depending on levels of cultural consistency in the social environment, those things that are the basis of inductive reasoning in everyday life, such as rules, customs, and shared social constructions of the physical environment.[46]

In any way, the examination of legislature using the above-mentioned methods constitutes the core of this research. The research also examines the scientific literature: monographs and studies, analyses some other data.

Besides the core methods, mentioned above, six *expert interviews* (interviewees working in the field of business legal studies and in business regulation authorities) were performed. Typically, in legal studies, the interview-related methods are not so commonly used. However, considering the interdisciplinary aspects of the researched subject, the valuable information on the problematic aspects of the regulation, also broader context of the legal framework can be retrieved from expert interviews. In this regard, several interviewing methods were combined together. In correlation with the overall in-depth interview principles, more customised and adapted for legal studies interviewing methods were exploited. Generally, in-depth interviews are used to help researchers to understand their interviewees' views of processes, norms, decision making, belief systems, mental models, interpretations, motivations, etc., that provide richness of qualitative data.[47] In this context, the combination of active interviewing and key informant interview were used. In the typology of interview methods, these two techniques are tended to be less structured, on the one hand, and quite specific/narrow, on the other. In the spectrum of interviewing techniques, they can be displayed

45 Helen Simons, *Case Study Research in Practice* (London: SAGE Publications, Ltd., 2009): 63. http://dx.doi.org/10.4135/9781446268322.

46 Malcolm Williams, "Generalization/Generalizability in Qualitative Research," in *The SAGE Encyclopedia of Social Science Research Methods*, edited by Michael S. Lewis-Beck, Alan Bryman and Tim Futing Liao (Thousand Oaks, CA: Sage Publications, Inc., 2004): 421-22. http://dx.doi.org/10.4135/9781412950589.n367.

47 Greg Guest, Emily Namey, and Marilyn Mitchell, "In-depth interviews," in *Collecting qualitative data,* edited by Greg Guest, Emily Namey, and Marilyn Mitchell (London: SAGE Publications, Ltd): 17. http://dx.doi.org/10.4135/9781506374680

as follows:

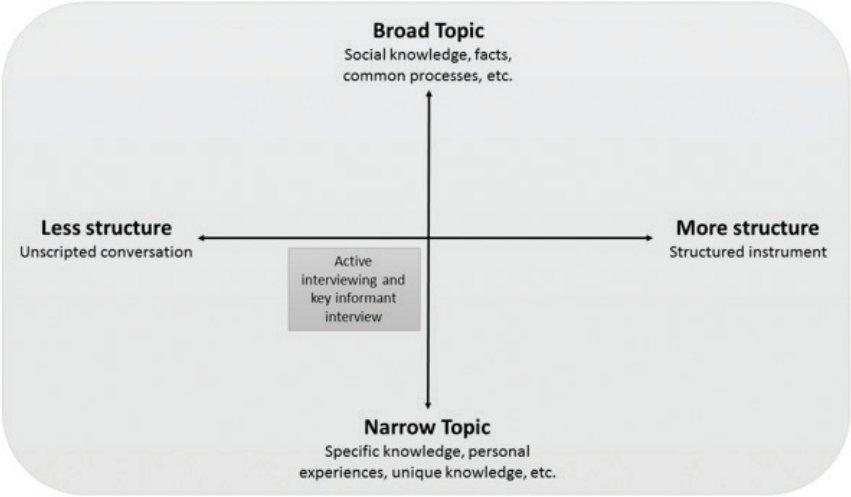


***Figure 1. Place of active interviewing and key informant interview techniques in the spectrum of interviewing techniques***[48]

Deriving from the place of used interview techniques in the whole spectrum of interviewing techniques we can detail that active interviewing is a qualitative research method that departs from standardized approaches in the sense of the level of engagement between interview participants. In standard interviewing, interviewers strive to be dispassionate and neutral. In the active interview, however, interviewer is encouraged to participate in narrative production. The active interviewer strives to stimulate respondents by introducing or suggesting competing narrative positions, different points of reference, and interpretive resources. In turn, the interviewee is encouraged to select from among the resources available a salient vocabulary for producing one's own narrative.[49] In parallel, very close to active interviewing is the key informant interview technique. Key informant interviews are in-depth interviews of a select group of

48 Based on Guest, Greg, Emily Namey, and Marilyn Mitchell, "In-depth interviews," in *Collecting qualitative data,* edited by Greg Guest, Emily Namey, and Marilyn Mitchell (London: SAGE Publications, Ltd): 16. http://dx.doi.org/10.4135/9781506374680

49 Andrew D. Hathaway, "Active Interview," in *SAGE Research Methods Foundations*, edited by P. Atkinson, S. Delamont, A. Cernat, J.W. Sakshaug, and R.A. Williams (2020). https://dx-doi-org.skaitykla.mruni.eu/10.4135/9781526421036754196.

experts who are most knowledgeable of the researched issue.[50]

Like in all in-depth interviews, questions were formulated in open-ended (semi-structured) manner. Such manner leads conversation more deeply into the topic of interest and maximizes the opportunity for discursive, detailed disclosure of understandings, experiences, and point-of-view of the interviewees. Moreover, this approach can be highly linked to the legal realism (already mentioned in this chapter) the doctrine that highly emphasizes the importance of social processes in the society.

While analysing data retrieved from in-depth (semi-structured) interviews, the main information was not coded in the specific manner and was interpreted quite freely to supplement the analysis of the material obtained by other qualitative research methods. However, some theoretical approaches while analysing from in-depth interviews retrieved data were used. Namely, classification can be mentioned as the important data-measuring device, together with the content analysis and the grounded theory.[51] Especially the last one of the mentioned theories holds interesting conceptual assumptions, which state that theoretical categories can be developed in the ongoing process of empirical research. According to this theory, categories must not be forced on the data; they should emerge instead in the ongoing process of data analysis.[52]

The whole research and writing process of this dissertation was divided into the following main steps:

1. Material collection and analysis;

2. Preparation of scientific publications on the subject of research. The scope of published articles was later expanded and updated in order to provide an up-to-date material for the concrete parts of the dissertation;

3. Preparation of the dissertation.

Material collection and analysis started with the building of the main "structural columns" of the research. Those main structural columns of the research in other words could be called as "theoretical" and "practical" parts of the research. The theoretical part of the research includes such elements as the history of the concept of social entrepreneurship, legal and economic links of social entrepreneurship. In addition, in this

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50 Paul J. Lavrakas, *Encyclopedia of Survey Research Methods* (Thousand Oaks, CA: Sage Publications, Inc., 2008). doi: 10.4135/9781412963947.

51 More on the mentioned qualitative data analysis methods see: David Byrne, "How do I analyze and interpret qualitative data?" *Project Planner* (2017) http://dx.doi.org/10.4135/9781526408570

52 Udo Kelle, „The Development of Categories: Different Approaches in Grounded Theory," in *The SAGE Handbook of Grounded Theory* (SAGE Publications Ltd, 2007): 191-213. doi: 10.4135/9781848607941

part, great amount of attention was paid to definitions (not only ones of the legal character but also economic, societal, etc.). Therefore, material for this part of the research was mainly collected while analysing scientific literature and not so often directly analysing the legal acts.

The practical part of the research, however, focuses more on the legal acts; therefore, the material collection in this part consisted mostly of the analysis of legal texts. Nevertheless, this part of the research also required some additional data (retrieved not only from the legal texts) to receive more universal set of data. This universal set of data includes such elements as studies, working papers and reports of different institutions. In addition, some valuable for this research pieces of information were retrieved from semi-structured in-depth interviews. The above-mentioned sets of data laid a foundation for the above-mentioned practical structural column of this research, which includes comparative analysis of legal preconditions of social entrepreneurship in particular countries as well as the legal regulation of social entrepreneurship on the EU-level.

The parallel work during the data collection and analysis steps was the preparation of the scientific articles. This exercise helped to systematically check the relevancy of the collected materials during the years of the conducted research and explore additional data sources. Finally, the stage of the preparation of dissertation included not only the thorough analysis of the data that was collected during the years of this research but also an exercise of the checking the relevance of collected data, which could possibly have changed over time.

This dissertation aims to look systematically into the social entrepreneurship-related legal institutes, relations between these institutes and their relationship with the primary EU law, the EU company law, and relationship between the EU and national regulation in the EU Member States and states of the EFTA.

# 1. PROBLEMS OF MULTITUDE OF THEORETICAL APPROACHES AND DEFINITIONS OF SOCIAL ENTREPRENEURSHIP

## 1.1. Connections with the legal philosophy

In terms of legal philosophy, we can speak about the social business concept in the wider context of the legal aspects of the societal relations. By finding of the origins of social business preconditions in the societal relations, we could more precisely define what standards (business law, social law, and other areas of law) we are currently most lacking at both the supra-national and national level.

In a practical way, we are interested in identifying and exploring the particular areas of societal life where the legal regulation of social business would be necessary and most effective. It might not be directly connected with legal philosophy, but it raises philosophy-driven questions what would be a legal good protected by social business law. Therefore, by examining the different examples from different countries, we can notice that social enterprises act in different areas: environment, social integration, education, social or public services, etc. In this societal context, we can evaluate the need for specific legal regulation (legal good) in the social entrepreneurship area. In the strict sense, this could help to solve the problem of legal uncertainty in social entrepreneurship legal area. In a broad sense (or a practical sense), this could contribute to more efficient solution of social problems in the society, through awareness of social business raising and utilizing its potential.

To use the opportunities of social entrepreneurship, particular countries in the European Union have created, and some are just developing, the legal frameworks for this form of economic activity. However, the existing legal forms of social enterprises in the EU member states vary in different states. The current EU legislation also does not form any mandatory legal regulation for social enterprises. The EU Member States have different institutional, legislative and administrative systems, and their tradition of social economy comes from different historical background. Probably one of the most useful exercises could be revision of the main trends in establishing legal frameworks for social enterprises, because there are many legal forms that a social enterprise can take.

From our previously conducted research, we know that there exist many models of social business. Those models can include legal forms that are inclusive and democratic, but also and more manager-controlled legal forms, where managers exercise strict control and seek independency while solving social problems.[53] We can add to this that different strategies emerge as (first of all) philosophy driven concepts. From the legal point of view, we should be able to see that legislators in different countries are able and ready to defend such approaches and recognize certain things as a legal good.

Philosophical approach is useful also by drawing differences between social entrepreneurship (and its definition) and other (quite related) concepts. One of such related concepts is the concept of CSR. This concept is mentioned and discussed throughout this research. In relation to this aspect, we can add that it is important not only to investigate the specific legal frameworks but also to evaluate the changes, ongoing in the general concept of company law. Because we see that in the context of social enterprises, the general principles of company law also are inevitably shifting. In the traditional company law concept such activity as CSR, should not be confused with social entrepreneurship as well. The European Commission defines that CSR refers to companies voluntarily going beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities.[54] It is a concise definition, but it shows that the subject of this research is wider and does meet much more aspects than only the CSR concept. Contrary to CSR, social entrepreneurship initiatives create new forms of business and society partnership. With help of business methods, social needs of society are met. During this process, traditional markets are modified, and new markets are opened. Therefore, we think that this process is far more complex.

It should be noticed here that nowadays there is an ongoing discussion (it is also discussed in several parts of this research) whether profit maximization could be considered as the only purpose of a traditional business company. In the context of social entrepreneurship, we say that social enterprises strive for a social purpose in contrary of the traditional business profit maximization. It does not mean that this research challenges the social approach within the traditional business organization. In

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53 Tomas Lavišius, Virginijus Bitė, and Mads Andenas, "Social entrepreneurship in the Baltic and Nordic countries. Would the variety of existing legal forms do more for the impact on sustainable development?" *Entrepreneurship and Sustainability Issues* 8(1), 2020: 276-290. https://doi.org/10.9770/jesi.2020.8.1(19)

54 "Corporate Social Responsibility & Responsible Business Conduct," European Commission, accessed 22 April 2020, https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility_en.

contrary, the general aspects of CSR in traditional corporations are very important for the awareness raising on the social aspects in traditional business sector. If this research emphasizes the opposites of a social business model to a traditional business model, it is meant only for the reasons of the research (to underline different characteristics of social business, which traditional business do not or may not have).

The general goal of business sustainability[55] first of all emerges in the context of large corporations' legal regulation. Experts notice that no jurisdiction's corporate law mandates the maximisation of returns for shareholders to the detriment of other economic, social, and environmental interests. However, one of the most misleading things in this area is the assumption of the maximization of shareholder wealth as an important contribution to societal welfare. Experts emphasize that instead of this we need to find ways to shape continuous improvement processes towards more sustainable business and finance. It should more actively involve such elements as social, cultural, economic, and environmental policies.[56] Moreover, view in business that corporations are to be managed for the exclusive benefit of shareholders contradict the idea of corporate sustainability, where the enterprise serves broader objectives: shareholder profits, but also and the environment, and larger society. It is simply explained by the fact that any entity cannot truly maximize shareholder returns while being more than minimally generous with employees, more than minimally compliant with environmental laws, or more than minimally kind to its neighbours.[57] All of these groups can be called "stakeholders". As we emphasize in several parts of this research, the "stakeholder involvement" is a very important aspect in the context of social enterprise.

55 Experts distinguish several dimensions of corporate sustainability. The economic dimension of sustainability involves pursuing corporate activities that generate sufficient economic wealth. The social dimension of sustainability is embedded in the recognition by companies of human rights as well as employee and other stakeholder considerations. The environmental dimension of sustainability involves ecofriendly production methods, waste handling and relevant liability methods. All these dimensions are equally important. They interconnect and stimulate the creation of corporate strategies. For more see: Blanaid Clarke and Linn Anker-Sørensen, "The EU as a Potential Norm Creator for Sustainable Corporate Groups," in The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability, eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 191, https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386

56 Beate Sjåfjell and Christopher M. Bruner, "Corporations and Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 6, 11. https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386

57 Judd F. Sneirson, "The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 73. https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386

We can stress again that different approaches are derived from different business- or societal philosophies. In a traditional democratic society, such concepts have developed naturally over many years. However, societies that experienced turbulences caused e.g., by totalitarian regimes may have additional challenges by accepting and implementing policies (including legal policies) derived from such philosophies. As one of the problems, emphasized in the introductory part of this research, is a lack of legal certainty. We can add to this that a lack of legal certainty comes from weak foundation of conceptual legal philosophy.

## 1.2. History of the concept of social entrepreneurship

Although different elements of social enterprise existed during different periods of history, in the post-War Western Europe dominated coexistence of the private capitalist business sector and state public sector that provided welfare system and addressed occasional market failures. The situation was different in Central and Eastern European countries. The centrally planned economies in these countries did not allow development of capitalist economy. The different initiatives of quasi-associations, voluntary organizations and cooperatives also were strictly controlled by the government. Any activity of non-governmental sector was banned and considered criminal.

In the capitalist Western Europe, however, it was also not the best time for development of the phenomenon of social entrepreneurship. The state occupied the central role as the provider of social welfare. Such situation did not help for development of social economy sector as such. The later development was influenced by the so-called crisis of the welfare state. For the sake of accuracy, we must stress that scientists argue if there was a crisis of the welfare state as such. Some researchers think that despite growth rates of social spending have declined radically since 1975, there was no signs of a general welfare crisis. All welfare states had growing difficulties balancing their budgets. The growing deficits showed problems of system integration which cannot be directly attributed to the system of the welfare state but should be seen as problems of adaptation to a new historical configuration of society which developed independently of the existence of the welfare state.[58]

In the final quarter of the 20th century, some European countries experienced

58 Jens Alber, "Is there a crisis of the welfare state? Crossnational evidence from Europe, North America, and Japan," *European Sociological Review* 4, Issue 3 (1988), https://doi.org/10.1093/oxfordjournals.esr.a036484

reawakening of interest in the typical organisations of the social economy as business alternatives to the models of the capitalist and public sectors, such as cooperatives, mutual societies, foundations, and associations.[59] Long-term massive unemployment, social exclusion and other problems of the market economies became social needs that were not sufficiently addressed neither by private capital, nor by the public sector agencies. In such context, identification of social entrepreneurship as we understand today began in France in the 1970s. At that time organizations that represented cooperatives, mutual societies, and associations built the National Liaison Committee for Mutual, Cooperative and Associative Activities (CNLAMCA). In June 1980, the CNLAMCA published a document, the *Charte de l´économie sociale* or Social Economy Charter. This document defined the social economy as the set of organisations that do not belong to the public sector, operate democratically with the members having equal rights and duties, and practise a particular regime of ownership and distribution of profits, employing the surpluses to expand the organisation and improve its services to its members and to society.[60] We can think that this definition became a background for the modern definition of the social enterprise (including the definition used by the European Commission) because it has practically all elements that make up a todays operational definition. In this sense, France became first country that institutionalized social enterprise policy. In 1981, the Inter-Ministerial Delegation to the Social Economy (*Délégation interministérielle à l´Économie Sociale – DIES)* was created.[61] Finally, in 1989 the European Commission published a Communication entitled "Businesses in the Economie Sociale sector: Europe's frontier-free market." In this document, the European Commission described the *Economie Sociale* sector and stressed, "The hallmark of belonging to the sector is the specific manner of organization of an enterprise's productive activity. The driving principles are the solidarity and participation of its members <…> informed by a proud independence and civic purpose. <…> the enterprises are generally in the legal form of a cooperative, a mutual society or a non-profit association. <…> Engagement in economic activity is the factor determining the inclusion of this sector in the field of enterprise policy. <…> Enterprises in this sector are types of organization that are legally recognized in all Member States, even though they

59 José Luis Monzón and Rafael Chaves, "The Social Economy in the European Union," European Economic and Social Committee, published 2012, accessed 17 January 2021: 17, https://www.eesc.europa.eu/resources/docs/qe-30-12-790-en-c.pdf

60 *Ibid*, 19.

61 *Ibid*, 20.

may take different legal forms."[62]

We have seen that the legal problems that this research examines are closely related with the economic aspects. Therefore, it is important to emphasize the importance of interdisciplinary aspect of this research, which allows exploring the problematic of the issue across the boundaries of one particular sphere of social sciences. We see that historically social enterprise phenomenon was born in the context of the crisis of the welfare state in the second half of the 20th century. However, already mentioned pioneer of political economy Adam Smith in the 18th century formed a well-known assertion that free market competition leads the public to better economic results and the general public welfare. However, he also pointed out that people's behaviour often leads to a feeling of sympathy for other people. We mentioned that he formulated the idea that people often feel sorrow looking at the sorrow of others. According to Smith, we have no immediate experience of what other people feel; we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation.[63] In the very first sentence of the "Theory of Moral Sentiments" Smith argues that: "how selfish so ever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."[64]

Smith also worried about the divisive effect that economic specialization would have on human personal relationships. He suggested the state expenditure on "public diversions" which, he thought, would help to unite wealthy people with those who were not so fortunate. Adam Smith thought that any civilized society should be able to afford philosophers as well as butchers, brewers, and bakers because all these people contribute to society in different ways – even if some of them are not economically productive. It is referred as Smith's "social division of labour". Scholars who researched Smith's work underline that Smith was not an anti-market-person. Nevertheless, his ideas are not suited to isolated quotation (about the famous "invisible hand" and so on), which generally leads to big distortions in what Smith really wanted to say.[65]

Speaking in more detail about Adam Smith's theory, his insights in the "Theo-

62 "Business in the „economie sociale" sector. Europe's frontier-free market. Communication from the Commission to the Council," SEC (89) 2187 final, 18 December 1989. Accessed 17 January 2021, http://aei.pitt.edu/4085/1/4085.pdf

63 Smith, *supra note*, 39: 13.

64 *Ibid*, 1.

65 "Economic history. Smith's word," *The Economist*, published 1 November 2013, accessed 25 October 2020, https://www.economist.com/free-exchange/2013/11/01/smiths-word

ry of moral sentiments" builds the psychological foundation on which his other ideas were developed. Basically, Smith described the principles of "human nature", which together with Hume (other leading philosopher of his time); he took as a universal and unchanging standing point from which social institutions, as well as social behaviour can be deducted. In this context, Smith saw humans as creatures driven by passion and at the same time self-regulated by their ability to reason and by their capacity for sympathy.[66]

The Smith's approach can be complimented with Hume's approach. Sentiments of moral approbation and disapprobation Hume calls "the sense of virtue" or "the moral sense."[67] Hume argues that the "sentiments of moral approbation and disapprobation are typically preceded by distinct sympathetic pleasures or pains; and (ii) aesthetic and moral sentiments alike often give rise to passions of pride or humility, love or hatred, and benevolence or anger in their train."[68] Probably one of the most famous Hume's arguments is that the moral sense approves morally of itself and its own operations. It logically compliments the Smith's view on the moral sentiments and humans' willingness to help the other.

In this context must be mentioned that from the point of view of the economists, none is more influential than the idea that inequality has risen in the rich world. Because the idea of rising inequality becomes an almost universally held belief, it deserves more scrutiny. However, the resent study of *the Economist* showed that e.g., in Britain or Denmark the share of income of the top 1% is no higher than in the mid-1990s. Moreover, the bigger part of corporate profits may flow to middle-class people than previously, because they own shares through pension funds.[69] Why those facts can be important for this research? First, it shows that goals of social entrepreneurship in wealthy countries reach far beyond the tackling of income inequality but still is significant dealing with other social problems (e.g., aging, health, education of youth, social exclusion, marginalization of certain social groups etc.).

The above-mentioned study emphasizes that many things have gone wrong with contemporary capitalism. In many countries, social mobility is falling; too many

66 "Adam Smith," in *The New Encyclopaedia Britannica. Volume 27* (Encyclopaedia Britanica Inc.: Chicago, 2002): 312-13.
67 Don Garrett, *Hume* (Oxfordshire, England: Routledge, 2015): 109. https://doi-org.ep.fjernadgang.kb.dk/10.4324/9780203118351
68 *Ibid*, 129.
69 "Inequality illusions," *The Economist* 433, No 9171, November 30th, 2019.

companies enjoy excessive market power. These and other factors help explain why economic growth in the rich world is weak. On the other hand, according to the data, such country as Sweden has one of the highest rates of billionaires in the world. Despite that, billionaires are quite popular in Swedish society. Such popularity is related with the assumption that they have made their money not by exploiting ordinary people, but by creating multinational and socially responsible businesses.[70]

This shows that on the one hand the problems of social inequality not necessarily are caused by the financial inequality but mostly by the lack of opportunities that society can provide for people. Bearing that in mind, social entrepreneurship can be a facilitator of such opportunities. Legal basis comes in handy if the opportunities are created. This assumption gives an additional socio-economical perspective for this primarily legal research.

Speaking about the future of welfare state, experts draw two possible although different alternatives. First, it could be an acceleration of the new public management with active privatization, or, second, it could be the growth of new public governance with greater welfare pluralism. The second option would allow pro-active involvement of non-governmental sector and the social economy as an intermediate alternative to public and private providers of welfare (or social) services.[71] In this context we can assume that role of social enterprise can become even more significant.

## 1.3. Legal and economic links of social entrepreneurship

Speaking about legal preconditions of social entrepreneurship the broader socio-economical context is inevitable. One of the main aspects of research is the transformation of traditional corporate law, introducing new hybrid legal forms of entities. Classical corporate law conception becomes more flexible and – in the case of social business legal regulation – falls into area of social law. This process leads to formation of new hybrid legal forms of business that are regulated by not only the principles of corporate but also public law, in such areas as welfare regulation or social (public) services.

All of it creates a *legal dimension of the research*. However, in some parts of the research legal dimension meets socio-economical dimension. Socio-economic aspects of social entrepreneurship are primary reasons why social entrepreneurship exists *per*

70 *Ibid*.
71 Hulgård, Defourny, and Pestoff, *supra note*, 28: 8.

*se*. Legal preconditions; however, support the existence of the phenomenon of social entrepreneurship. Therefore, – despite the general goal of this research to define legal preconditions for social entrepreneurship – the social aspects are also quite important. Before the creation of legal framework, society must identify what kind of socio-economic relationship has to be defined legally. In the case of social entrepreneurship, it is very important because part of social business identity is its social mission. We will not argue that "social mission" or "social good" are not legal definitions. However, only by identifying social mission we cannot speak about legal identity of social enterprise.

Therefore, it leads back to the legal area, raising questions what are those legal frameworks that accommodate hybrid identity of social enterprise. It can be called as the relationship between shareholder and stakeholder attitude. Usually, every business seeks maximization of profits for its shareholders. In social business, however, there exist an important element of stakeholder interest. Moreover, the stakeholder interest not necessarily consists of profit maximization. This and other aspects of hybridity are important while researching legal preconditions of social entrepreneurship.

Analysis of the concept and paradigm of social entrepreneurship consists of analysis of the origins of socio-economic relations; shifts in the paradigm of enterprise law; changes of legal framework; and practical implications of social business.

The figure below schematically shows relationship between legal and socio-economic components in research of social entrepreneurship. Looking in-depth, this kind of relation actually has more elements. However, so far, we look at the broad picture of the main elements and determine points where legal and non-legal elements meet. Later, we will be able to determine and discuss smaller element of this relation.

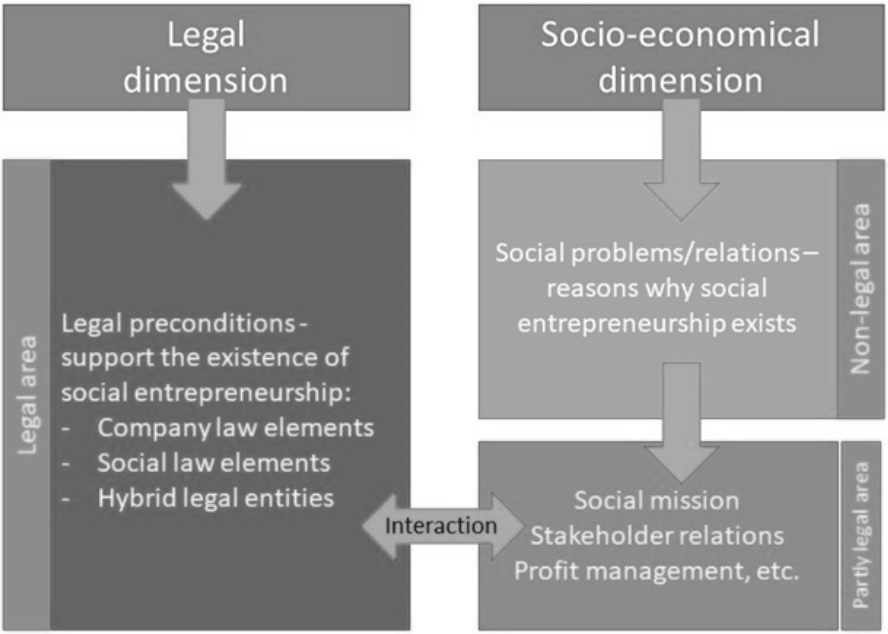


***Figure 2. Legal and socio-economic components in research of social entrepreneurship***[72]

Until now, we found out that there is a relationship between legal and socio-economic components in social entrepreneurship research, which are definitely important. Therefore, it is difficult to say whether legal preconditions of social entrepreneurship could be assessed separated from other factors. We think that not, because next to legal preconditions exist social, economic, cultural social entrepreneurship preconditions. Therefore, a particular legal status can be established only within (not separated) from specific social, economic, and cultural environment. While speaking about legal and economic links of social entrepreneurship it is important to stress that in the interdisciplinary context both elements are connected and interact one with another throughout this whole research.

From the theoretical point of view, the legal preconditions are not the only factor important for development of social entrepreneurship. The relevance of social enterprise depends on the economic characteristics and conditions in the individual

72 Based on personal observations.

countries. However, the legal, political, socio-cultural, technological, and ecological framework is also important. Essential elements of the social entrepreneurship framework are society, economy, politics, culture (including ethics, norms & values) and the regulatory framework. Furthermore, several types of stakeholders (e.g., employees, suppliers, media, investors, competitors, customers, non-governmental or non-profit organizations, state and public) are key elements of the system.[73]

The figure above illustrated the legal and socio-economic components in research of social entrepreneurship. To be more precise, the next figure shows us how different elements of the social entrepreneurship framework interact with regulatory framework.

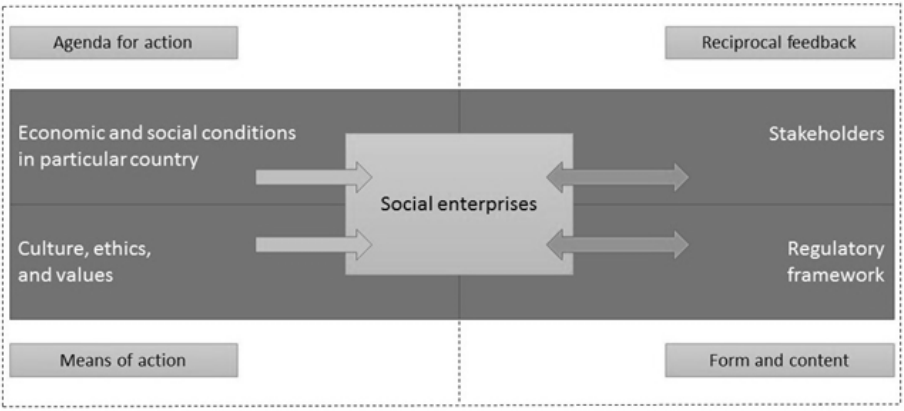


***Figure 3. Interaction of different elements of social enterprise framework***[74]

From the figure above we see that social enterprises are influenced by the economic and social conditions in particular country or region, stakeholders (e.g., employees, suppliers, media, investors, competitors, customers, etc.), culture, ethics and values in particular society and last but not least – the regulatory framework. We also can admit that economic and social conditions influence social enterprises by dictating the agenda for action – helping to decide, which social problems are most relevant and suitable for solving through the action of social enterprises. Culture, ethics, and

73 Christine K. Volkmann, Kim Oliver Tokarski, and Kati Ernst, *Social Entrepreneurship and Social Business An Introduction and Discussion with Case Studies* (Wiesbaden: Gabler Verlag, 2012): 6.
74 Based on personal observations and Volkmann, Oliver, Tokarski, and Ernst: 7.

values influence decision what particular means of action can be used or are available for social enterprise. Stakeholders, basically, give an inevitable feedback, which is very important reflection showing whether the enterprise is on the right way with its strategy, management, coping with challenges on the daily basis, etc. Finally, the regulatory framework is a condition within which social enterprise operates, starting from a legal form but not limiting by it (form and content). We can see that only two elements of this system (stakeholders and regulatory framework) have reciprocal response (feedback) channel. It means that other two elements (economic and social conditions; and culture, ethic, and values) can influence social enterprise. However, they cannot be influenced by social enterprise. The other two elements, on one hand can influence social enterprise, and on the other – can be influenced by social enterprise. It does not need a further explanation how social enterprise influence their stakeholders. However, we think that social enterprise is capable to influence and its regulatory framework. Especially, speaking about legal forms we can see that social enterprise sector shapes the primarily intended goals of different legal forms of entities. Historically such legal forms as associations and foundations were intended to serve for a quite narrow goal. Nowadays, with help of social innovation or an innovative attitude to solution of social problems, understanding of possibilities behind traditional legal forms expands thanks to social enterprise.

From different observations, so far, we see that stakeholder involvement factor is very important for social enterprise government. Historically it can be observed that different stakeholder groups did not have any direct or indirect legal power of influence over companies. In this context can be emphasized, "The stakeholder model promotes diverse interests in the organization, provided that the individuals or groups concerned influence or can be influenced by the organization. <…> Such efforts are intended to enhance the organization's accountability by leveraging the moral rights of marginalized groups."[75]

Additionally, stakeholder involvement model is closely related with accountability and transparency aspects. Accountability, generally speaking, means a duty to provide an account (not necessarily a financial account). There are several main aspects in accountability (as it was mentioned – financial, etc.). One of the main such aspects is an accountability in governance. Together with accountability in governance comes

75 Bob Doherty, *Management for Social Enterprise* (Los Angeles: SAGE, 2009): 217. http://dx.doi.org.ep.fjernadgang.kb.dk/10.4135/9781446269404

hand in hand an aspect of transparency. In this context, transparency must be understood as (legal) institutional environment. Such formal legal environment includes laws that regulate the organization and define the legal duties of its managers and directors. For example, 'locks' assets to protect them from misuse. On the other hand, an informal environment of transparency includes different kinds of cultural pressures[76] (already mentioned in our observations – see Figure 3). Formal and informal environment of transparency allow ensuring that governance of social enterprise is legitimate (in legal and moral sense).

Such authors as Doherty distinguish four main stakeholder groups: "primary beneficiaries, managers (together with staff), the board of directors and a stakeholder committee."[77] Without further investigation of these groups, we can add from our point of observation that it follows that legal governance structures for social businesses that create legal stakeholder involvement could be developed or adapted. For example, such exceptions could also be made in the legal framework of traditional companies. The current regulation of employee shares could be applied more or more flexibly in the case of a social enterprise - employee committees, representatives on boards, and so on. Of course, in some places there are employee representatives elected, but only in companies of a certain size. Perhaps this could also apply to smaller companies.

In addition, experts distinguish that "other stakeholder groups that can be typically involved with social enterprise boards include funding bodies, local (and in some cases national) government, the local community and trade or umbrella organizations. Similarly, the degree to which these groups are represented can vary depending on the nature of their involvement with the organization. <…> Such practices have yet to become formalized as legislation or policy, so remain implicit manifestations of the 'social contract' of the organization."[78]

Moreover, scientists emphasize that social entrepreneurship is important for fixing the so-called market fails. When markets fail, either businesses, or governments cannot fulfil existing needs. It is observed that such institutional gaps appear quite often. They are caused by the dynamic structures of the global market. Whether, in the context of a global market or a local market, social entrepreneurs have one thing in common – they create social value or value for society. Those kinds of values are creat-

76 *Ibid*, 221-223.
77 *Ibid*, 228.
78 *Ibid*, 225.

ed and delivered by particular organizational business model. It is offered by researchers that every business model needs to answer the following basic questions: What is the customer value provided by the company? How does the company create that value? How does the company generate revenues? The same questions need to be answered and by the social entrepreneurs.[79] We see that these aspects can be linked to the figure above, because such elements as customer value and revenue generation come from social enterprise framework.

However, in the figure shown social enterprise framework does not mean that other organizations cannot become central figures of such framework. We already mentioned that such actors as non-governmental organizations (hereinafter and – NGOs), governmental agencies, traditional business theoretically (and practically) can play similar role.

Volkmann, Oliver, Tokarski, and Ernst argue that just because a social entrepreneurship entity has a social purpose does not mean that it automatically has a stronger social impact than a comparable for-profit business. Moreover, just because a social enterprise generates revenues does not necessarily mean that it is a better solution to a problem than a charitable NGO financed by donations. None of the discussed options can be idealized. NGOs and charitable foundations are powerful tool in collecting donations and provide short-term relief. However, only long-term solutions can address systematic problems. Such problems can be addressed whether by for-profit markets, governments, or social enterprises. In addition, the latter are not necessary the best solution. Yet, the experts emphasize that in those areas where the first-best solutions (brought in by for-profit markets or governments) are absent or failing, this second-best choice (social enterprises) is highly important.[80]

Therefore, we can say (and it is easily observable) that every of the mentioned organizational approaches uses a different instrument (a kind of a specific tool) to address need of society. Basically, we can agree with the mentioned statements of researchers. What we would like to stress in addition, is that in this sense legal framework does not affect the effectiveness of social entrepreneurship sector. From the legal point of view, such factors as market or public policy failures not necessarily indicate a need for a legal solution. However, it does not have to be underestimated, because sometimes a certain legal framework may create or demolish barriers for implementation of public policy measures.

79 Volkmann, Oliver, Tokarski, and Ernst, *supra note*, 73: 8,106.
80 *Ibid*, 239, 251.

## 1.4. Problems of Definition

Scholars in a wide variety of fields, from philosophy to linguistics, have observed that categorizing something in the world is not just an act of reference, but also an act of meaning making – which includes identifying how the category fits into the bigger picture.[81] We speak about definitions of the social enterprise and social entrepreneurship throughout this dissertation. It is inevitable element of the whole research, because namely the definition of the social enterprise raises the most debates. However, in this part of the research it is important to discuss smaller elements not only of the social entrepreneurship definition, but also other concepts that are closely related to the main definition of this research and help to understand the bigger picture of the researched phenomenon.

We have to explain here why we have chosen *social entrepreneurship* as our core definition. First, we think that this definition contains in itself both, legal and not-legal aspects. Therefore, it is more versatile and flexible for investigation from different angles. Some authors argue that social entrepreneurship is a broader phenomenon than *social enterprise*.[82] They emphasize that both phenomena occur because of certain developmental processes in the welfare state and the third sector. They link social entrepreneurs with change processes (social innovation) and social enterprises - with social value creation through business processes. However, we think that these elements are interchangeable while speaking about non-legal aspects. On the other hand, while discussing legal aspects it comes to mind first of all legal forms of social enterprise. Nevertheless, we believe that from the point of view of legal philosophy definition of social entrepreneurship can contain and contains in itself elements that can be protected as legal good. Namely, therefore, it can be investigated from the legal point of view.

However, we cannot stay neutral here and have to admit that categorisation is almost never an "innocent" process. By categorizing things into certain categories, we create certain perspectives, priorities, and relationships between categorized items, and together – some kind of ideological structures that impact our everyday life and the legal systems.[83]

We already mentioned that for the goals of this research, first of all, we use an

81 Benjamin Means, and Joseph W. Yockey, *The Cambridge Handbook of Social Enterprise Law Cambridge* (Cambridge University Press, 2018): 11. https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781316890714

82 For more on that see: Lundgaard Andersen, Gawell, and Spear, *supra note,* 31: 26.

83 Means, and Yockey, *supra note,* 81.

*operational definition of social enterprise (social business), which consists of three dimensions: an entrepreneurial dimension; a social dimension and a dimension related to governance structure* (partially based on the operational definition used in the SBI).

To empower social entrepreneurship, some countries in the EU have established, and some are just creating, the legal frameworks for social enterprises. However, there is a multitude of existing legal forms of social enterprises in different countries. Moreover, there are multiple options within legislation of every particular country. Especially it is typical in countries where legal recognition of social entrepreneurship is low; therefore, typically social enterprises seek for possibilities to operate within the existing legal framework, which brings a lot of legal uncertainty.

We can state that justification of social entrepreneurship concept and its legal and regulatory characterization are individually important for every country. Lithuania is also starting to define social entrepreneurship in the national legal framework. Having in mind complexity of the concept of social entrepreneurship it is important to consider different legal approaches in order to define what legal forms could be mostly suitable for social entrepreneurship. It is still challenging because many countries still do not have developed functional legal framework, which could encourage creation and growth of social enterprises. In such circumstances, it is hard to imagine that there could an ideal single type of social enterprise.

We emphasize throughout this research that the *European Commission defines a social enterprise as a legal entity operating in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders.* This legal entity should operate by *providing goods and services for the market in an entrepreneurial and innovative way. It also should use its profits primarily to achieve social objectives.* The other element according to EC definition is the management of social enterprise. *It is supposed to be managed in an open and responsible manner and involving employees, consumers and stakeholders affected by its commercial activities.*[84] In this sense, the definition of a particular legal form of entity is not so important. From the examples of different countries, we will see that possibilities of the adaptation of different legal forms for the needs of social enterprise are very broad. Therefore, the SBI not speak about any specific form of legal entity as a social enterprise.

The researchers who concentrate on the investigation of social enterprises all over the Europe and beyond highlight that social enterprise may take several different

84 "Social Business Initiative," *supra note*, 7.

organizational forms: non-profits, partnerships, foundations and other, therefore some patterns can be found.[85] The question can be raised what kind of advantages or disadvantages have different models of social enterprise.

One of the goals of this research can be considered as the definition of the main legal approaches helping the creation of social enterprises. To approach this problem, we investigate some recent legal initiatives in the selected EU countries and the countries of the EFTA. Therefore, we investigate definitions (besides the definitions of social entrepreneurship) that are important for this research. In the very beginning of this research, we already introduced an operational definition of social entrepreneurship. We could suggest that it is quite universal and can be used in different contexts. However, from the scientific perspective, it is useful to use more in-depth theoretical investigation of the definition (and related definitions), which would serve for the wider context of the research.

We think that theoretically all these definitions can be divided in several categories. The first category consists of the social elements of the definition. The second category includes entrepreneurial elements of the definition. Finally, the third category covers the legal elements of the definition. It must be stressed in advance that some of definitions (or elements of definitions) can be quite interchangeable and may fit in several categories. This factor additionally confirms the interdisciplinary manner of this topic.

### 1.4.1. Social elements of definition

Speaking about the social element of the definition, we can discuss its meaning in the wider context. Most of these elements cannot be described in one sentence; however, their meaning unfolds in a broader context. "Social enterprise" is the term by which, usually (despite certain nuances that depend on the specific legislative and scholarly context), reference is made to an entity that seeks for objectives of general interest, community interest or social benefit through the entrepreneurial activity that they perform. It involves the use of business logics and methods. Firstly, a study on the legal forms of social enterprise today would not be sufficient without a comparative perspective. Social element of the definition in the most cases stands on the top. However, despite "social", the organizational forms are, in fact, "enterprises"—and, therefore, in the most cases are subjects and actors of commercial law, which, as known, has

85 Kerlin, *supra note,* 10.

a natural tendency towards trans-nationality, especially in times of socio-economic and legal globalization.[86]

The main goal of social economy is to provide specific tools, which could help to tackle various social challenges (including social divide, which is actual for many developed countries). It is a crucial attribute within the definition's social element. In addition, social economy and social enterprise can contribute to faster development of social innovation while implementing their main objective (i.e., providing particular service to society).

Here we should stress that from the point of view of social enterprise development, this phenomenon is not a new organizational form, rather consequence of evolution of non-profit or voluntary organizations. Non-profit and voluntary organizations share with social enterprise one common attribute in their activity, i.e., an element of social value. In order to develop social value, social enterprises create and use different innovative strategies, reconfigure traditional resources, and develop new governance structures. We have to stress in the context that in commercial enterprises innovation process consists of creation of new products and services. On the other hand, in social enterprises innovation consists of social value creation by reconfiguring existing products. Therefore, a social value, as a certain unit of measurement of performance of a social enterprise is also important social element of the definition. Experts admit that there is a growing awareness that they create sustainable and inclusive growth and stimulate social innovation[87]. By focusing on people as much as profit, they foster a sense of social cohesion and promote the common well-being.

It was mentioned that the European Commission defines a *social enterprise* as an operator in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involving employees, consumers and stakeholders affected by its commercial activities.[88] It should be noted that the Communication of the Commission does not emphasize any specific form of legal entity as a social enterprise. Every country can decide on its own whether the social enterprise is supposed to obtain special

86 Fici, *supra note*, 4: 3-5.
87 GECES, *supra note*, 1.
88 "Social Business Initiative," *supra note*, 7.

legal form or not.

Definition of social enterprise is also provided by several international organizations, which are involved in social enterprise policy sphere. Research network of university research centres and individual researchers on social enterprise "EMES"[89] proposes five criteria to capture the *social dimension* of social enterprises:

- an explicit aim to benefit the community or a specific group of people;
- An initiative launched by a group of citizens who share a well-defined need or aim (and maintained over time).[90]

Another organization – OECD – provides a quite broad definition of social enterprises. According to the Organization's Policy Brief: "social enterprise is any private activity conducted in the public interest, organised with an entrepreneurial strategy, but whose main purpose is not the maximisation of profit but the attainment of certain economic and social goals, and which has the capacity for bringing innovative solutions to the problems of social exclusion and unemployment."[91] Such enterprises have the following features:

- Are directly engaged in the provision of goods or services;
- Are voluntarily created by citizens and managed by groups of citizens (including stakeholders' participation), and have a certain number of paid employees;
- Involve a significant level of economic risk;
- Avoid profit maximization behaviour and involve the limited distribution of profits;
- Have an explicit aim to benefit a specific group of people.[92]

Defining the boundaries of what we mean by "*social*" (in the context of social entrepreneurship) can be very challenging. The term "social" *per se* has many meanings. However, it has to be evaluated in the light of this research. Speaking about different social aspects of law and legal regulation, first of all we have to mention the mission of comparative law itself, as a tool to be acquainted with law of different states. Different legal systems have some aspects that are common historically, geographically, etc. However even the jurisdictions in the same region or economic areal can have different

89 "EMES," *supra note*, 30.
90 Doherty, *supra note*, 75: 30.
91 *OECD Policy Brief on Social Entrepreneurship* (Luxembourg: Publications Office of the European Union, 2013): 3. https://www.oecd.org/cfe/leed/Social%20entrepreneurship%20policy%20brief%20EN_FINAL.pdf
92 Doherty, *supra note*, 75: 30.

approaches to same things.

Scholars notice that differences between the diverse systems are not always of the same order. Some differences are of bigger scale; others are so closely similar that are barely noticeable even for a specialist. For this reason, one can distinguish two types of research in comparative law – micro comparison and macro comparison. Generally speaking, micro comparison analyses laws belonging to the same legal family. Macro comparison, on the other hand, investigates those systems differing most widely from each other in order to gain insights into institutions and thought processes that are foreign for the observer.[93] In the context of this research both approaches are valuable, however, more insights can be received from micro comparison, because researched jurisdiction are not very distant and politically, and economically, and geographically.

The next aspect of definition of "social" that has to be mentioned separately is the context of social structure and its change. Social structure and its change are general concepts used by social scientists, particularly in the fields of sociology and social and cultural anthropology. However, in nowadays legal studies the interdisciplinary manner of the researched subject is inevitable.

In this context, we have to stress that scholars notice that features of a society, or any other social group, that are regarded as parts of its structure are always generated by dynamic processes. Although, many social processes show a cyclical pattern – the formation, dissolution, and reformation – social life never repeats itself completely. E.g., relations in one generation are never an exact replica of those in the previous one. Therefore, the same processes that serve to maintain the social structure, may also lead to social change and modification of the structure over a long period. Widely varying evaluations have influenced different theories concerning the nature of social structure and social change.[94]

Separately it has to be noticed that such factors as technological innovation can be regarded as the most important determinants of societal change. Moreover, technological changes are often considered in conjunction with economic processes, including the formation and extension of markets, modifications of property relations, and changes in the organization of labour.

Some evolutionary theories stress the essentially cumulative nature of human

93 „The Social sciences. Comparative Law," in *The New Encyclopaedia Britannica*. Volume 27 (Encyclopaedia Britanica Inc.: Chicago, 2002): 361.

94 "Social structure and change," in *The New Encyclopaedia Britannica*. Volume 27 (Encyclopaedia Britanica Inc.: Chicago, 2002): 365.

knowledge. Because human beings are innovative, they add to existing knowledge, replacing less adequate ideas and practices with more adequate ones. However, growth can lead to new problems that stimulate new innovations. In this context, some social changes are to be regarded as the result of the diffusion of innovations, such as technological inventions, new scientific knowledge or new beliefs. People only adopt an innovation if they are motivated to do so and if it is compatible with important aspects of their culture. Therefore, social structure and social change are central theoretical concepts for the social sciences that refer to basic and complimentary characteristics of social life in general.[95]

Another question is how social enterprise phenomenon correlates with the definition of "social welfare". Historically, different social charities and philanthropic societies formed the basis for many of today's welfare services. However, since the perceived needs and the ability to address them determine each society's range of welfare services, there exists no universal vocabulary of social welfare. Moreover, in some countries, distinction is made between social services, health care, education, and social welfare services. Other classification separates remedial services addressing the basic needs of individuals, preventive services seeking to reduce obstacles, and supportive services attempting to maintain and improve the functioning of individuals in society through educational, health, employment, and other programmes. It has to be noticed, that social services first of all originated as emergency measures, but now they are generally regarded as a necessary function in any society like a means of fostering a society's ongoing corporate well-being.[96]

Generally, the term "social" refers to initiatives, which aim to help people. Traditional entrepreneurship is commonly associated with profit motive, and social entrepreneurship, with an expression of altruism. Nevertheless, in reality, the motives for social entrepreneurship can also include less altruistic reasons (e.g., self-realization). The distinctive social domain of social entrepreneurship can be distinguished through creatively combination of resources that usually social entrepreneurs themselves do not possess, in order to address a social problem and thereby alter existing social structures.[97]

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95 *Ibid*, 369-70.

96 "Social welfare," in *The New Encyclopaedia Britannica*. Volume 27 (Encyclopaedia Britanica Inc.: Chicago, 2002): 372.

97 Johanna Mair, and Ignasi Marti Lanuza, "Social Entrepreneurship Reserach: a Source of Explanation, Prediction and Delight," *SSRN Electronic Journal* (n.d.). http://dx.doi.org/10.2139/ssrn.673446.

According to the pragmatic approach, what is "social" can be defined: "pragmatically in terms of an apparent empirical consensus as to what is socially desirable. If there is a widely accepted consensus that this goal is something "social" and if we commonly perceive a venture to work towards that goal as a "social" venture, then all ventures that aim to eradicate poverty would be defined as "social"".[98] Therefore, the formal criterion to define a clear social mission would be a strictly non-financial objective of the venture and use of economic resources exclusively for achieving a non-financial organizational goal (as it is common case with non-profit organizations). On the other side of the scales is a purely for-profit organization, which seeks to maximize financial profit, and it would be not qualified as a social venture.[99]

Researchers stress that "Theory development to explain and predict the conditions under which social enterprise dual mission can be achieved would enhance knowledge of how, why and where hybrid organizations are most effective. The dual mission also raises challenges for measuring performance and impact. There is also need for greater understanding of how organizations account for social and financial value"[100] Therefore, process of creation and management of social enterprise depend on institutional and organizational processes (whether they exist at all) on governmental level. The above-mentioned effectiveness depends not only on management of social enterprise itself, but also and on legal environment (more particularly – legal possibilities and operational options). The role of research in this area could also contribute to this factor – by building on research (theoretical development), which would help to distinguish organizational form of social enterprise best suitable to balance within the frame of its hybridity.

As a part of social dimension of social entrepreneurship can be mentioned a *social economy*, which in fact is a broader than a definition of social enterprise. The social economy is sometimes confused with an economy of the poor or "for the poor and other vulnerable categories," such as women, disabled persons, low-skilled workers, migrants, or young workers. This is certainly not a criterion for distinguishing the social economy from other forms of economy. The social economy is not, by definition, an economy of the poorest or most vulnerable. It is, in fact, a choice that is made. People can choose to combine (economic, social, environmental, or other) objectives, not

98 Grove, and Berg, *supra note*, 23: 26.
99 *Ibid*, 27.
100 Doherty, *supra note*, 75: 417–436.

maximize the financial return on investment and establish participatory governance. On the other hand, enterprises and organizations of social economy are often the only forms accessible to people who cannot mobilize sufficient capital or other resources to launch and develop economic activities[101]. The European Commission defines a social economy as the activity of cooperatives, mutual societies, non-profit associations, foundations and social enterprises that operate a very broad number of commercial activities and provide a wide range of products and services.[102] The association "Social Economy Europe" defines social economy as a "wide diversity of enterprises and organisations that share common values and features such as the primacy of the individual and the social objective over capital, a democratic governance, and the reinvestment of most of the profits (surpluses) to carry out sustainable development objectives and services of general interest."[103] From the legal point of view, the term social economy itself is not of a legal manner. However, looking into social entrepreneurship as a part of wider phenomenon (which we call here "social economy"), we can speak and about its legal aspects – legal good that is contained within this definition.

Historically the term social economy probably appeared in economics literature for the first time in 1830. In that year, the French liberal economist Charles Dunoyer released a tractate on social economy. This tractate advocated moral approach to economics. Different charitable organizations, like charity foundations, brotherhoods and hospitals existed and grew considerably already throughout the Middle Ages. However, in the 19th century popular associations, cooperatives and mutual organizations became very popular through initiatives launched by the working classes. The thinkers of that time did not try to promote alternative philosophy to capitalism. Instead, they developed a "theoretical approach to society and what is social, pursuing the reconciliation of morality and economics through the moralisation of individual behaviour."[104]

Some authors state that "social and solidarity economy include self-organization in civil society (unions, cooperatives, mutual insurance and non-profit organizations) and social protection by public rules." They also argue that "the social innovations of

101 Bénédicte Fonteneau et al., *Social and Solidarity Economy. The Reader* (Turin: International Training Centre of the International Labour Organization, 2011): 6.
102 "Social economy in the EU," European Commision, accessed 18 January 2021, https://ec.europa.eu/growth/sectors/social-economy_en
103 "The Future of EU policies for the Social Economy: towards a European Action Plan," Social Economy Europe, published November 2018, accessed 18 January 2021, http://www.socioeco.org/bdf_fiche-document-6381_en.html
104 Monzón, and Chaves, *supra note*, 59: 16.

the last part of <20th> century were categorized <…> under the term of "solidarity economy"".[105]

Such philosophers as John Stewart Mill paid a lot of attention to business associationism among workers. He spoke about cooperative and mutualist aspects of this process. He discussed advantages and disadvantages of these processes and distinguished "economic and moral benefits."[106] The French economist Leon Walras thought that with the help of cooperatives an important function in solving social conflicts could be implemented while "introducing democracy into the workings of the production process."[107]

Probably it does not have to be separately proved that market economy changes because of the global environment. Moreover, some researchers suggest that historically our society is in the transition from "marketism" towards solidarity. They claim that it is a kind of evolutionary development. E.g., in the eighteenth century, Adam Smith had to defend the market economy (although we know that he also expressed the definition of moral sentiments) because the restrictions of society in those days limited the free economic activities of individuals and was an obstacle to the Industrial Revolution. Later, at the end of the twentieth century, in the 1990s, the market economy reached a peak and at the same time its problems, which were caused by excessive individualism and "marketism", became obvious. Therefore, now we are at another turning point – towards the age of solidarity.[108]

Speaking about the definition of solidarity, the most important for this research is its relationship with economy. Nowadays, a large variety of activities can be included in the category of solidarity economy, which is very diverse, but they have a common feature in that they try to solve the problems that are caused by the market mechanism. They attempt to connect people in various forms and solve problems, which cannot be solved by the market mechanism, or are caused by the market mechanism itself (e.g., poverty or environmental destruction). Because of different aspects of its versatility, it is believed that the solidarity economy should be able to survive alongside the market economy;[109] therefore, it is very important in the context of the social entrepreneurship studies.

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105 Eynaud, *supra note*, 27: 39.
106 Monzón, and Chaves, *supra note*, 59: 14-16.
107 *Ibid*.
108 Noriatsu Matsui, and Yukio Ikemoto, *Solidarity Economy and Social Business New Models for a New Society* (Tokyo: Springer Japan, 2015): 2-3.
109 *Ibid*, 3.

### 1.4.2. Entrepreneurial elements of definition

Speaking about entrepreneurial elements of definition, we have to stress that first of all such elements consist of personality of social entrepreneurs, their behaviour in particular processes, and other aspects. Entrepreneurial processes and entrepreneurial behaviour usually are complex and heterogeneous. Moreover, entrepreneurial processes can be studied and outside of the business sector with the accent on the role of entrepreneurial movement in society. Several researchers, however, emphasize that entrepreneurial process itself is more important than "how" entrepreneurs act. It allows us to differentiate between social initiatives and social–entrepreneurial initiatives.[110]

Usually, the creation of social enterprise is influenced by social problems, which it addresses, resources, which it possesses, and its ability of capturing economic value. Therefore, we can stress one more time that, both, social and entrepreneurial elements of the definition are important.

In Europe, social entrepreneurship and social enterprises are very often seen as a "different way" of doing business and are usually located in the third sector. To show the complexity of the definition of social enterprise, the OECD developed a list of criteria that includes the continuity of the production of goods and services; autonomy; economic risk; an explicit aim to benefit the community; a decision-making power not based on capital ownership, and; a limited profit distribution. Attention to a broad or distributed democratic governance structure and multi-stakeholder participation is also important.[111] From our personal observations we can stress that most of the literature in the Europe researching entrepreneurial elements of social enterprise speak about foundations, associations, cooperatives, mutual organizations, and less frequently about non-profit or non-governmental organizations. In comparison, in the USA, social enterprise usually refers to non-profit organizations and new hybrid corporation forms as "B-corp" (will be briefly explained later) which develop strategies to generate revenue to finance their social mission. Moreover, because most of the mentioned organizations have dedicated forms of legal entities, later we can discuss legal elements of definition.

We already mentioned that for the purpose of this research, the definitions of social business and social entrepreneurship are used interchangeable as different forms

110 Mair, and Marti Lanuza, *supra note*, 97.

111 Antonella Noya (ed.), *The Changing Boundaries of Social Enterprises*, *Local Economic and Employment Development* (OECD Publishing, Paris, 2009): 14. https://doi.org/10.1787/9789264055513-en

of legal entities that could meet the operational definition within the scope of this research. However, for the sake of clearness it can be noticed that some authors distinguish differences between the definitions of social business and social entrepreneurship.

In the most cases, social businesses operate in the sphere of the private sector. Therefore, we know they need to be financed through self-generated income. In an ideal case, they must not accept donations or grants, or such financial source should not be significant. On the other hand, social business or social enterprise may operate in a financially self-sustainable way but it does not have to. Experts emphasize that: "the ideal type of a social business then weds a pure social mission (non-financial objectives) with pure business financing (financially self-sustainable through market income only). <…> the ideal type of "social entrepreneurship" then weds a pure social mission (non-financial objectives) with a high degree of innovation in its pursuit of this mission. Other ventures that follow a social mission but simply do more of the same in a non-innovative, repetitive, static way would thus not qualify as (pure) social entrepreneurship."[112]

To be clearer, we have to stress again that definitions of social entrepreneurship, social enterprise, and social business can be used interchangeably in a wider context. However, some distinctions may occur when investigating those definitions in more concrete context. We have mentioned that legally we can speak first of all about legal forms of social enterprise or certain rules that apply for such legal forms of entities. This context one more time emphasizes the problem of legal uncertainty as the core problem investigated in this research. We already noted that from a legal point of view neither the definition of social entrepreneurship nor its special legal regulation is yet finally identified. Therefore, when lacking legal elements of the above-mentioned definitions, other elements (particularly economic and social) come in hand.

We must stress that such definitions as social economy – which was already partially defined in the sub chapter speaking about social elements of definition – can be considered and as economic part of definition. The dividing line in this case is very thin. Therefore, we speak about the definition of social economy here as well. Of course, evolution of the social economy definition underwent many changes, but significant foundation was laid down back in 2002 when the First European Social Economy Conference in Central and Eastern Europe, under the auspices of several European govern-

112 Grove, and Berg, *supra note*, 23: 29-30.

ments and the European Commission defined social economy as co-operatives, mutual societies, associations, and foundations, which activities fall into neither the public sector nor the for-profit market economy sector.[113]

We would not necessarily agree with this definition. On one hand, we think that this definition evolved a lot since the beginning of 2000's. On the other, we think that an important element of social economy and social enterprise is the activity (at least, partially) in the market economy (this was later also emphasized by the European Commission in the SBI).

It also must be stressed that within the concept of social economy exists WISE – exceptional and for Europe inherent enterprise form – which have earned special attention in the beginning of the 21st century. Here also is very difficult to draw a distinctive line between social economy and social enterprise. Here we would like to make a clear separation between the elements, which fall within the scope of this research, and which do not. The emphasis here is on the social economy, but in terms of content and meaning, it is difficult to distinguish it from social enterprise. The concept of social economy is not the one we would emphasize in the context of this research. In the context of this work, it should be emphasized that the social economy can be a sphere as a platform, an aggregate of service providers and recipients, in which social business, non-governmental organizations, and governmental actors operate.

### 1.4.3. Legal elements of definition

Legal elements of the definition of social entrepreneurship (as we already stressed) are closely related with other – non-legal elements. As in the other parts of this research, overall context is very important. E.g., some of the countries that fall within the scope of this research have developed and functioning welfare state systems. Another definition, relevant to this research is the definition of "Enabling state", which emerged in the USA in the late 1980s. This definition suggests that "what went before it was in some way less than enabling, possibly even disabling or disempowering, whereas the emerging, enabling state was the opposite — vibrant, liberating, empowering etc. <…> To enable is to empower and to provide the actual ability to choose between options, extending freedom for both providers and users of services. The "providing

113 Hulgård, Defourny, and Pestoff, *supra note*, 28: 68.

state" which it would replace represented compulsion and dependency."[114] It basically means that this definition suggested another option of creating welfare. In addition, it emphasized stronger relation of welfare with social responsibilities.

We see that the law can be directed to legitimize a social phenomenon, developing a legal concept, such as "*enterprise*". Therefore, legislators may foster the role of social enterprises by defining organizational models, which may clarify the identity of enterprises. OECD thinks that in this case, legislation should firstly be based on default rules concerning, for example, the role of directors or the elements of internal monitoring. Similarly, self–regulation (*soft-law* area), possibly promoted by the legislator itself, could also be an effective tool for framing the governance of social enterprises.[115]

Researchers think that indeed, the legal framework of social enterprise that enables individual businesses to specify the nature, identity, rules of operation, and duration of their commitments to objectives other than profit maximization – provides a big amount of flexibility. Therefore, the concept of social enterprise is not limited to a specific entity form (this approach is also stressed by the European Commission and the OECD) created to serve the needs of social entrepreneurs. It can be said that this process "traces social enterprise from the borderlines of charitable ventures to the heartland of corporate law."[116]

In this research, we already several times noted that social, legal, and economic aspects of social enterprise are closely connected. Considering features of the 21st century's market we should probably add to this list such definitions (or concepts) as sharing economy, Big Data, and circular economy. We think that these definitions cannot be directly attached neither to economic, nor to legal sphere. Nevertheless, often in the foreign literature and research, phenomena such as the "social economy" or the "sharing economy" are examined in parallel with the general phenomenon of social business, highlighting the complexity of this phenomenon, therefore it is worth to evaluate at least briefly.

Researchers of the digital economy notice that digital platforms enable the conceptualization and operationalization of digital business models. Together with that the socialization of the economy is affected in this aspect by "replacing traditional business models with digital business models, based on social factors stimulated by the concepts

114 Éidín Ní Shé, Lorelle J. Burton, and Patrick Alan Danaher, *Social Capital and Enterprise in the Modern State* (Cham: Springer International Publishing, 2018): 22.
115 Noya, *supra note*, 111: 26.
116 Means, and Yockey, *supra note*, 81: 2.

of the sharing economy and the circular economy, <…> hybrid business models are created on the boundaries of business and public services."[117]

The *sharing economy* is interesting for one more aspect, which is actually common and in the case of social entrepreneurship. Both are not top-down solution, meaning that they usually will not be imposed by a set of legislated policies. They also usually come not from a large organization or company, but from the small-scale entity. As experts notice: "the sharing economy is being built, from the ground up, by every individual and group that chooses to begin consuming, transacting, and/or making a livelihood in a new."[118]

Also, as the social enterprise, sharing economy entities can suggest alternative options of "ownership", e.g., employee ownership, cooperatives, credit unions, community land trusts, co-housing communities, community wind power plants, and other kinds of models. These models also include family-owned businesses or the foundation-owned companies that are common in Nordic Countries.[119] In addition, such structures usually are aimed not at extracting maximum financial wealth in the short term, but in contrary, they are aimed at long-term sustainable (including social) goals. This is also a common feature of social enterprise. This kind of ownership, also called as "generative" ownership, has mission-controlled governance focused on social mission: "instead of commodity networks, where goods are traded based solely on price, generative enterprises are supported by ethical networks, which provide collective support for social and ecological norms."[120]

We can add that this is an important aspect, moreover, in many cases social innovation comes hand in hand with other kind of innovations. The countries that have a higher level of digitalization create more possibilities to implement new social ideas faster. On one hand, it can be an overall tendency in developed economies, on the other – the niche for social enterprises to step in. New possibilities to connect economic, environmental and social issues offer a "chance to create social values where the priority of the company's operations is social value rather than profit. <…> Social demand innovations <…> respond to social demands that are traditionally not addressed by the

117 Adam Jablonski, and Marek Jablonski, *Social Business Models in the Digital Economy : New Concepts and Contemporary Challenges* (Cham, Switzerland: Palgrave Macmillan, 2020): vi.

118 Janelle Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies* (Lanham: American Bar Association, 2014): chapter one, part 2.

119 *Ibid*, chapter four, part 1.

120 *Ibid*.

market or existing institutions and are directed toward vulnerable groups in society."[121]

## 1.5. Hybridity and social innovation

In this part of the research, we distinguish the sub-topic of *hybridity* and *social innovation* as a significant part of the social entrepreneurship phenomenon and important additional definitions. We already briefly mentioned the context of hybridity and social innovation. However, the significance of these elements must be discussed in more detail. We mentioned that the European Commission defines a social enterprise as an operator in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders (without an emphasis on particular legal form of social enterprise). Such situation suggests that there are many variations of social entrepreneurship definitions suggested partially, by social enterprise hybridity, and by the level of social innovation.

Mair and Marti emphasize that the interaction of social enterprise and the context in which it operates is very important trying to understand the process of social entrepreneurship. In addition, it is also important to understand the structure of social capital (principles of its creation, increase, and maintenance),[122] because it also can be part of social innovation. Therefore, we think that social entrepreneurship can bring social change only when it uses the advantages of its hybridity and creates (or at least – actively exploits) social innovation. Such process can be encouraged if they are recognized (identified) on the legal level. Social enterprises play their particular role between conventional entrepreneurship and non-governmental sector. However, social entrepreneurship distinguishes itself from both sectors because it has the most favourable position (if legal environment is adequate) to create social innovation.

Researchers emphasize that social innovation tries to address the world's social challenges through innovative means. It can include such large-scale problems as global climate change or reducing poverty. On the other hand, it can concentrate on small-scale projects as creating a community garden. On that regard, social innovation can be a process, as well as technology, but also a principle, an idea, a piece of legislation, a social movement, an intervention, or some combination of these elements.[123]

We think that if a particular country seeks to establish a social entrepreneurship

121 Jablonski, and Marek Jablonski, *supra note*, 117: 89 and 108.
122 Mair, and Lanuza, *supra note*, 97.
123 Sossin, and Kapoor, *supra note*, 21: 1000-1001.

market, it has to start from building infrastructure. Such infrastructure should consist of both, tangible and intangible elements, such as legal basis and social innovation. Therefore, we have to think about hybrid organizational form as consisting of the organizational form as structure and as a whole of practice, which allows combination of values from two or even more categories. Hybrid organizational forms as social enterprises (which, we think, are hybrid organizations) balance between two different sectoral paradigms and value systems. They catalyse emergence of new institutional forms that, which transform traditional economic organizations concepts. Therefore, we think that namely those two elements (hybridity and social innovation) create the paradigm of social entrepreneurship. We can state that paradigm is born of new socio-economic relations but is also influenced by factors such as the legal environment.

Fedele and Depedri remark that in the consequences of the economic crisis, some organizations, such as social enterprises may help to restore people's confidence. First of all, such organizations are less willing to exploit their workers, customers, and other stakeholders. Social enterprises (or, as authors notice, socially oriented enterprises) may help increase both the well-being of individuals and economic efficiency. It means that welfare of customers (society) and producers (entrepreneurs) can be positively affected by the existence of different firm types in the same sector of production.[124]

However, here emerge and several problems, related with life cycle of hybrid organizations. Apart from the direct costs of the decision-making process, further costs can arise from influence activities in organizations[125]. Moreover, costs of collective decision making (which is typical for such social enterprises like cooperatives, etc.) usually increase in the heterogeneity of its members. Typically, in the most countries, the shares of public companies are traded on stock markets. Mikami[126] argues that shares of membership in cooperatives are rarely traded in an open market traditionally supposing that the trade of membership shares is inappropriate in terms of cooperative philosophy, which has been heavily influenced by ideology, and usually restricted by cooperative law. Therefore, we can state that it is quite difficult to distinguish here one

124 Alessandro Fedele, and Sara Depedri, "In Medio Stat Virtus: Does a Mixed Economy Increase Welfare," *Annals of Public and Cooperative Economics*, 87(3), 2016: 345–363. https://doi.org/10.1111/apce.12131

125 Patrick Herbst and Jens Prüfer, "Firms, Nonprofits, and Cooperatives: A Theory of Organizational Choice," *SSRN Electronic Journal*, 2001, http://dx.doi.org/10.2139/ssrn.734125

126 Kazuhiko Mikami, "Cooperatives, Transferable Shares, and a Unified Business Law," *Annals of Public and Cooperative Economics,* 87(3), 2016: 365–390. doi:10.1111/apce.12132.

tendency. However, the existing problems can be tackled whether within the existing legislation, or by creating clear legal options for social enterprise to manage their hybrid entities in best possible way (which also could be attractive and for investors). Moreover, an interest in possible alternative economic systems and economic justice, shifting opinion about philanthropic giving make social entrepreneurship even more attractive. Formerly on donors, dependent entities (as philanthropic organizations) can look for self-sustained models of operation without compromising on their philanthropic (social) mission. Here we can state that social innovation can become a solution to market failure in the environment of rising inequality.

In this context, we must admit that social entrepreneurship exists not only because of the market or/and public sector failure to solve particular social problems. Although market or public sector failure can become a context in which social entrepreneurship could gain its reputation, examples from wealthy welfare states show that social entrepreneurship can exist besides the conventional market or public sector measures. It would also be not appropriate to identify social business with social economy.[127] Despite the solidarity economy, agents usually have in themselves a social factor of operation (solving some kind of social problem or demand); the social economy is more "way of operation" by activating certain mechanisms (e.g., crowdfunding, car sharing, etc.).

European Commission scrutinized that many social innovators operate in mixed entrepreneurial models, which try to combine financial sustainability with social motivations. Therefore, social purpose collaborative economy cannot be associated with a single organizational model, and social purpose collaborative economy cannot be associated with specific sector or societal issue.[128]

Moreover, we should emphasize that unlike traditional business organizations, social enterprises increase their stakeholders' involvement in the governance. Therefore, such aspects as democratic and community-based (involvement-based) management systems of enterprise is inevitable part of social innovation. If such innovation is transferred into legal acts, it becomes a legal innovation. Two opinions of authors

127 More on relationship and possible correlation between social business and solidarity economy see: Matsui, and Ikemoto, *supra note,* 108.

128 "More than profit: a collaborative economy with a social purpose. Preliminary review of how collaborative economy models can help address social challenges in Europe and the characteristics of current activities," European Commission, published 2016, accessed 21 March 2021, http://ec.europa.eu/DocsRoom/documents/18443

can be emphasized regarding that matter. Doherty stresses that stakeholder-involving structures help with greater accountability; on the other hand, it can cause some tensions within management structures of social enterprises. Therefore, the impact of the respective values of different stakeholder groups (e.g. employees, volunteers, etc.) is really important, because different stakeholders could have different views on the justification of commercial and social mission.[129] On the other hand we have to stress that stakeholder theory states that involvement of different stakeholders into decision-making process makes organization to become more responsive to broader social interests, in contrary to the narrow interests of one group.[130] We think that both theories have solid ground because they show us one of the most complicated parts of social enterprise management, which is created by social enterprise hybridity. Therefore, innovative approaches regarding management of social enterprise and definite legal environment could help to solve this problem.

We think that active participation of employees in social innovation process is an important aspect of the overall social enterprise environment. The researchers support this idea arguing that employees not only produce, implement, provide or "sell" innovations: "they influence the innovation processes, <…> generate social, economic and other forms of value on behalf of their workplace. Active employee participation in formal and informal organizational change and decision-making processes. Furthermore, the employees experience a relatively high degree of work autonomy. <…> Many employees possess valuable knowledge and experience of the everyday practice, procedures and problems at their workplace, and of its users, customers and collaborators that can spur or improve innovative initiatives and create value."[131] Therefore, workers' involvement schemes are quite important for social enterprises.

Speaking about actions on the governmental level, we think that governments in particular countries could take action to introduce laws that encourage social enterprises to enter social services sectors. We know that outsourcing of social services from public bodies to private social enterprises is a quite common practice in different European countries. Therefore, it can be encouraged further (at least on the pilot-pro-

129 Bob Doherty, Helen Haugh, and Fergus Lyon, "Social Enterprises as Hybrid Organizations: A Review and Research Agenda," *International Journal of Management Reviews 16* (2014): 417–436. http://dx.doi.org/10.1111/ijmr.12028

130 Chris Cornforth, "The Governance of Cooperatives and Mutual Associations: a Paradox Perspective," *Annals of Public and Cooperative Economics,* 75(1), 2004: 11–32. doi:10.1111/j.1467-8292.2004.00241.x.

131 Lundgaard Andersen, Gawell, and Spear, *supra note*, 31: 113-114.

ject level in order to evaluate such practice in the countries, which did not have such tradition). We also think that countries should choose whether to make existing legal environment more favourable for social entrepreneurship or to choose way of new legal regulation. Countries (governmental bodies) could start with identification of what legal forms of businesses can be considered as social enterprises. Additionally, preparation detailed guidance on how to run a social business (having in mind different legal forms) also could be useful.

Already mentioned authors Fedele and Depedri found out that individuals are more likely to have access to social services within mixed economy. They also think that usually, general welfare is larger within mixed economy. Where public policies in support of social enterprises are better developed, the access to social services is improved further. They also emphasize that mixed economies are even more effective than market economies when the ideological costs are relatively high and individuals prefer various types of enterprises.[132] Therefore, existing variety of social innovation (driven by social enterprises or other actors) affects access to social services (education, healthcare, and others) and general welfare.

We can agree on such concept and add that behaviour of individuals can also depend on different economic cycles (during economic upturns or economic crises). During the economic upturns individuals are more likely to be more socially conscious and tend to pay more for e.g., socially oriented products or services. Ideological preferences are also more actual during economically stabile period.

Mentioned authors suggest that policies in support of social enterprises would help clients satisfy their ideological preferences (which – we mentioned – are more actual during economic upturn). Where social entrepreneurship is recognized, governments play an active role by guaranteeing tax exemption, subsidies, and public transfers to social enterprises. We can say that such behaviour is a part of redistributive mechanism. However, authors think that those subsidies distort market and decrease the efficiency of the economic system. Nevertheless, in the economic downturn, when the public funding shrinks due to crisis, efficiency becomes very important for governments. Public transfers from for-profit enterprises to social enterprises through government's social policy are not desirable from the part of traditional businesses since they harm market efficiency, so governments must find alternative solutions that encourage voluntary transfers to social enterprises rather than magnifying taxation on

132 Fedele, and Depedri, supra note, 124: 345–363.

for-profit enterprises. This way social economy could contribute without (or with minimal) market distortion and compromising efficiency.[133]

Another aspect of the importance of social innovation to be mentioned is the role, which plays the institutional support for social entrepreneurship. Authors notice that social entrepreneurship research lags behind practice.[134] Lack of information about innovation in this area and factors that may drive national differences of social innovation influence actual situation of social entrepreneurship is different across countries. We mentioned that social enterprises are often partly (or sometimes – severely) dependent on governmental grants, financial aid, or loans issued under favourable conditions by governments. Supply and demand of capital for social enterprises should be balanced in order to foster social entrepreneurship development. In summary, it can be said that the questions relating funding of social enterprises are not of a legal nature. However, demand for funding and the relationship between shareholders/stakeholders' interests and a social mission of social enterprise leads to legal consequences. The other challenge: balance of the interests usually is tackled by setting out according to rules in various corporate documents.[135] Therefore, we can ask if the institutional support for social innovations is really so important?

Stephan (*et al*) emphasize that the institutional configuration perspective recognizes that human behaviour is usually shaped by the constraints, incentives, and resources provided by formal and informal institutions.[136] Researchers, based on the results of their quantative research, think that assumption that government activism at the national level is negatively associated with the likelihood of individuals engaging in social entrepreneurship is wrong. In contrary, they found out that government activism by providing resource support for social entrepreneurs can foster social entrepreneurship. Such governmental resources can include grants, subsidies, and other means of direct funding, also assistance, endorsements, networking, etc. In this way, we see that governments and social enterprises can act like partners, which try to achieve particular social goals. In general, sense key role of government is to provide public goods

133 *Ibid*.

134 Ute Stephan, Lorraine M Uhlaner, and Christopher Stride, "Institutions and Social Entrepreneurship: The Role of Institutional Voids, Institutional Support, and Institutional Configurations," *Journal of International Business Studies* 46 (2015): 308–331. http://dx.doi.org/10.1057/jibs.2014.38

135 Levinus Timmerman, et. al., "The Rise of the Social Enterprise: How Social Enterprises are Changing Company Law Worldwide," *SSRN Electronic Journal*, published 24 March 2011, accessed 19 January 2021, https://ssrn.com/abstract=1795042

136 Stephan, Uhlaner and Stride, *op.cit*.

and create welfare of citizens. In such situation the role of social entrepreneurship can add to implementation of this this general goal – help to address social needs of society. Researchers' findings suggest that national context drives individual engagement in social entrepreneurship mainly through resource-based mechanisms and supply side motivational influences and less through incentives arising from demands.[137]

Of course, we can agree that different kinds of support for social enterprises can help development of social entrepreneurship. Nevertheless, we do not have to forget that according to the European Commission, social enterprise operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. Therefore, we think support to social entrepreneurship should be only limited in order to activate innovative abilities of social enterprise.

It can be illustrated by the example, which is actual for Lithuania and several other countries. Because of lack of legal recognition (or because of the partial recognition), most of examples of social entrepreneurship can be distinguished as *de facto* social businesses. They are exposed to economic risk operating on the market besides traditional businesses, but they belong to social economy market sub-sector, because they trying to achieve their social goals.

Having in mind what was discussed above, we can draw scheme of correlation of social innovation with ability to solve social problems. Here we can use the terms of the business world – ideation and validation. The stage of ideation includes such elements as idea (problem), users (target group), value created, and solutions. The stage includes elements of prototype and field test. Despite both stages have concrete separate elements, they interact one with another. The interaction between both stages and their elements we can depict as follows:

137 *Ibid*.

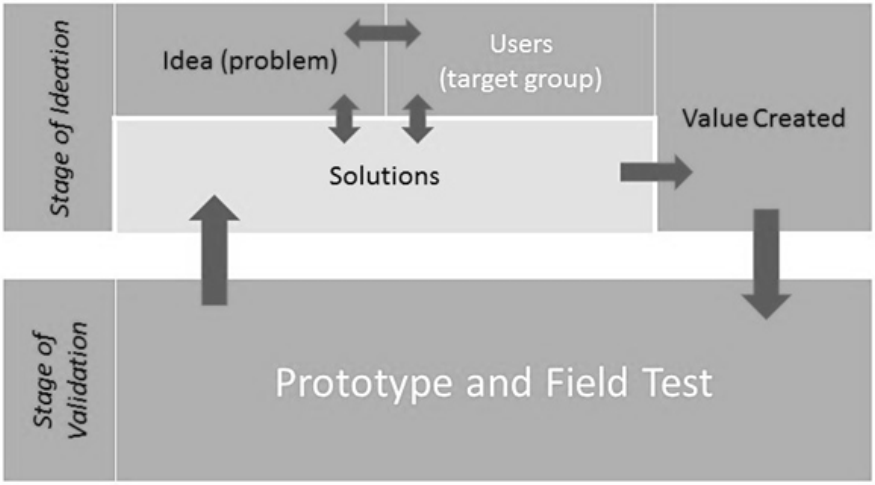


***Figure 4. Process of social innovation***[138]

Nevertheless, for this particular research it is important to identify the correlation between the above-mentioned elements of the process of social innovation and the legal preconditions of social innovation. We see that in the process of social innovation such elements as idea (problem), users (target group), and solutions correlate bilaterally. Basically, it means that users (target group) give a feedback of the effectiveness of the solution, which (in case of dissatisfaction) leads to new (or at least updated) idea and solution.

In addition, interviewed experts notice that innovations affect the inclusion of the social values in the business organizations, and, on the other hand, innovation affects the government as well. Namely, we can say that business regulation changes because of the innovations. Many of the new start-ups apply either new technology or processes, which then (in some extent) reflect on the SDGs. For instance, many of the financial technology (Fintech) companies talk about the financial inclusion – limiting discrimination in the area of the access to capital. Therefore, we can say that there is this recognition of the mentioned principles, which those companies try to implement

138 Based on personal observations and Julia Kylliäinen, "Idea Validation: Steps and Tools for Testing Your Idea," Viima.com, published 21 February 2019, accessed 17 March 2021, https://www.viima.com/blog/idea-validation

already in their processes or the strategy of the company. Companies that provide services for certain groups that are underserviced, or have no access to services, use certain innovation. Behind such innovation, exist often a certain goal that the company tries to achieve. It can be an environmental goal, some kind of a social goal (e.g., to limit discrimination, support certain groups in the society – women, immigrants, elderly, etc.). Namely, that is where innovations are coming in.[139]

Moreover, from the expert interviews, we found out that start-ups and other innovative businesses are more socially responsible than the mainstream businesses because it is their starting point. Certain principles how those companies were built at the very beginning are different in comparison with older companies, especially with large companies. The companies are more socially responsible because they want to, not because there are obliged to. In addition, there is an economic rationale behind this. E.g., in public funding for start-ups often is some kind of reference to social responsibility (gender equality clause in the formation of the board, environmental consciousness, etc.). It also is something what new generation of entrepreneurs has been working on. They are young; they think that climate change will affect them directly. Returning to the question how it relates to governments, mostly it connects through the different incentives. Speaking not about shareholders but about stakeholders, so far it is difficult to say whether there is a noticeable interaction of the companies with their stakeholders. However, one can believe that stakeholders' feedback becoming also more important comparing to how it was in the traditional business model.[140]

In this sense, we can speak about the correlation of legal framework with actual circumstances in order to create (or to amend, or adopt) legal basis for actual social relationship, in this case – social entrepreneurship. In any case, this scheme shows that social problem goes in front of the social innovation. More precisely, aspiration to solve a social problem leads to social innovation, which then can be implemented with or without help of special legal framework. It means that not in all cases there is a need of legal framework in order to solve a social problem with help of social innovation. On the other hand, in some cases a new legal framework as such can serve like social innovation itself. In such case, boundaries between social and legal aspect of social entrepreneurship are even more blurred.

Here we can basically conclude that definition of social entrepreneurship is

139 Alexandra Andhov, interviewed by Tomas Lavišius, Copenhagen, September 15, 2020.
140 *Ibid*.

closely related with definition of innovation (social innovation) because social entrepreneurship creates most of its value through social innovation, often involving a high degree of participation, civil society, and having some degree of economic importance: "in social entrepreneurship, the innovations are often blurring the boundaries between the three sectors: state, market and civil society. Social value and innovation are present in most definitions."[141] Additionally, researchers emphasize the aim and the organizational "anchorage" of social innovation. The main aim of social innovation is to meet new or known social needs through the organizations (social enterprises) whose primary aim is to create social value. In this context "social innovation refers to innovative activities and services that are motivated by the goal of meeting a social need and that are predominantly diffused through organizations whose primary purpose are social."[142] It should be noted that this type of innovation could be carried out by organizations in the public, third and private sectors, or in collaboration between these. We know that different collaborations and stakeholder involvement is very typical behaviour of social enterprises. Moreover, we could state that social innovation in the most cases is namely possible because of the active collaboration in the sector.[143]

Other important attribute of social innovation is its "people-centrism". There are several assumptions, based on this aspect. First, social innovation is a blueprint for serving the needs of people. On the other hand, it is closely related and to the conventional market model. Therefore, the market-centred approach to social innovation is not very rare.[144]

However, it must be implemented with the aim of social value. The term social value itself is an inclusive term, covering a wide range of activities at different societal levels. It can include initiatives of the non-profit sector, local communities, or even conventional businesses. All these (and other) organizations generate social value: "by improving services, expanding social services to embrace previously neglected groups of citizens and by improving the living conditions in a local community through inclusive, empowering change processes. Social value creation is often combined with the generation of economic value."[145] We can agree that the possibilities here are very wide

141 Lundgaard Andersen, and Spear, *supra note*, 31: 23.
142 *Ibid*, 115.
143 *Ibid*.
144 Swati Banerjee, Stephen Carney, and Lars Hulgard (Eds.), *People-Centered Social Innovation* (New York: Routledge, 2020): 4. https://doi-org.ep.fjernadgang.kb.dk/10.4324/9781351121026
145 Lundgaard Andersen, and Spear, *op.cit.*: 115.

(especially for the social enterprise sector) and can be extended even further, e.g., for creation aesthetic, cultural, democratic values, etc.

## 1.6. Role and importance of the academic research

One of the aspects of the phenomenon of social entrepreneurship is its relevance for academic research. The practice shows that academics' interest in particular topic correlates with relevance of it in the general society and the public policy attention to it. Experts notice that research context changes constantly. It is quite important to observe how it changes, and what those new challenges in the context of mainstream research of the company law are: "the context changes. We have the waves where CSR is discussed actively for some time and then it is pushed down when the new financial crisis comes. And again, later the same topics return on the agenda. The number of articles on the CSR comes up when the economic development is up. However, overall, there is more recognition of the relevance of CSR. The opinion changes in favour of the stakeholder theory (in spite of the shareholder theory)."[146]

However, the experts emphasize, that legal researchers are not good at all aspects; therefore, the input from the economy researchers or business researchers could come also in hand. "The legal people are good at looking into law and saying what works and what does not (when can we make something obligatory, when can we make a default rule, when can we use a soft law, etc.). When it comes to deciding, which company form is better – the lawyers are not good at that – the economists would have a better input."[147]

When it comes to the notion of social companies, it can be said that it is an important research area. It is obvious that reality is much more nuanced than saying that only profit is important. Pursuing profit is a good idea, but it can be easily misunderstood as simply a question of always getting things done as cheaply as possible or to make as much money as possible. Other things, besides the profit, also play a role. Profit is about being efficient and being good at things.

Therefore, legal researchers should definitely be innovative and creative. Experts emphasize that: "what should be law in any country should be decided by the public, by democracy. The lawyers are good at understanding how law works, so they can help people how to implement their goals, purposes, and what is the best way to do it in a

146 Andhov, *supra note*, 139.
147 Jesper Lau Hansen, interviewed by Tomas Lavišius, Copenhagen, September 17, 2020.

legal sense."[148] Therefore, legal researchers should be innovative and suggest things if they feel it makes sense.

It is hard to generalize the situation in all researched countries, but some experts state, "this area is under-researched. On one hand, [in Denmark] you can hardly find an article researching social enterprise. On the other hand, it mirrors the situation that very few companies registered for the status of socio-economic enterprise. To go into a bigger discussion, to make an impact, there is still a lot of work to do."[149]

Moreover, it can be added that experts notice, "The attention of researchers nowadays is shifting more towards CSR reporting schemes and sustainable finance. Probably if the Commission makes a new initiative on social enterprises, the researchers will turn their attention to that area."[150] It is also noticed that reenergizing of the current initiatives, or the initiatives of several past years, would give the new focus and attention to them.

During the interviews experts noticed that the marketing on the EU level of in the Member States existing initiatives could help to raise researchers' awareness. Then the consumers could become more aware of such social companies and have better possibility to engage with such companies. Researchers notice that there are many factors deciding whether such companies are successful or not: "The entrepreneurs can achieve a lot if they act actively. In addition, the status of social enterprise could be used more if there are benefits attached to that (e.g., public procurement, tax benefits, etc.). If you look in the same sustainable finance package,[151] there are also initiatives encouraging banks to loan to companies, which are socially responsible. In addition, we know that there are investors who are very focused on social responsibility. If such investors grow in numbers, it will mean easier ways to get money for social companies."[152]

Another problem, underlined by the experts, is the misinterpretation of some

148 *Ibid*.
149 Troels Michael Lilja, interviewed by Tomas Lavišius, Copenhagen, September 23, 2020.
150 Karsten Engsig Sørensen, interviewed by Tomas Lavišius, Copenhagen – Aarhus, September 23, 2020.
151 Sustainable finance generally refers to the process of taking due account of environmental, social and governance (ESG) considerations when making investment decisions in the financial sector, leading to increased longer-term investments into sustainable economic activities and projects. More specifically, environmental considerations may refer to climate change mitigation and adaptation, as well as the environment more broadly, such as the preservation of biodiversity, pollution prevention and circular economy. Social considerations may refer to issues of inequality, inclusiveness, labour relations, investment in human capital and communities, as well as human rights issues. More on that: "Overview of Sustainable Finance," European Commission, accessed 19 January 2021, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en
152 Sørensen, *op.cit*.

concepts. It is important to research this field for one particular reason, namely, not to let marketing of various private interests (in the shape of social entrepreneurship) to dominate. The best-known example is the "B Lab" and the initiative of "B Corporation" certification.[153] Experts notice that: "Such kind of organizations marketing themselves very actively. Basically, a benefit corporation is the US invention, having its statutes in various states of the USA. "B Lab" in other countries, outside the USA promotes the idea that other countries should have their legislation on Benefit Corporation, because traditional companies only work for maximizing the returns for shareholders."[154] It can be added that this idea is not very correct, especially in the legal tradition of Continental Europe. "B Lab" already convinced the Canadian government to introduce a benefit corporation legislation. However, it is strictly criticized by some researchers.[155]

Experts think, "The people willing to do good (and already working in B-corps) do not need such label as provided by the "B Lab", which they have to pay for. Such practice is misleading and dangerous, because it is undermining the reform of the mainstream company law, and spreading this legal miss that companies have to maximize returns for shareholders."[156] Therefore, it can be said that the company law scholars have to be very aware of it and use their company law knowledge for broader discussion whether separate legal form is needed, whether some kind of label is needed, and if so, what it should look like.[157]

Although researchers criticize some approaches of promoting social enterprise in the way it does "B Lab" with it "B Corporation" certification initiative, the initiative (or we could say – a movement – already) gets a lot of attention. Recent study (2018) thoroughly presents the theoretical concept, values, and mostly prominent examples of "B Corp" movement.[158] In this research, we tend to support a critical attitude towards the multiplication of commercially distributed labelling (certification) system as the "B Lab" does it. However, evaluating the scale that this movement already managed to

153 „B Lab" is a non-profit organization that was founded in 2006 in the USA. The organization created a so called a „B Corps" or „B Corporation" certification system and provides such certificates (for a fee) for organizations first of all in the United States and in other countries. Beside this activity, the organization is active advocate of a „B Corp" company form and carries out a lobbying on that initiative in different countries. More on that: „B Lab," accessed 19 January 2021, https://bcorporation.net/about-b-lab

154 Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation," *Seattle U L Rev* (2017): 683-716, https://core.ac.uk/download/pdf/228422696.pdf

155 *Ibid*.

156 Beate Kristine Sjåfjell, interviewed by Tomas Lavišius, Oslo – Vilnius, October 20, 2020.

157 *Ibid*.

158 Florentine Mariele Sophie Roth, and Ingo Winkler, *B Corp Entrepreneurs Analysing the Motivations and Values Behind Running a Social Business* (Cham: Springer International Publishing, 2018).

reach, we should recognize it as an important player in the ecosystem. The above-mentioned study emphasizes that among new hybrid alternatives to traditional businesses are so-called blended value organizations, new profit companies, non-profit enterprises, among others – social businesses, and B Corporations. The authors of the study explain, "As a new type of hybrid organization, B Corps seem to exhibit a high social innovation potential and to be better equipped to productively address certain types of market failures than the public sector and civil society. <…> they have been identified as alternative economic actors with significant potential for the proposition and generation of concrete sustainable solutions for the most urgent social and environmental problems."[159]

Indeed, as we mentioned, it is very questionable whether the "B Corp" organization form is the ultimate way to tackle these challenges. Perhaps in the societies where alternatives are very meagre, such way of promoting social enterprise models is better than no social entrepreneurship at all. However, societies that have many legal alternatives for operation of social enterprises by exploiting different existing legal forms (and this is the case in most European countries) must be aware of these available alternatives and avoid seeking of the new "universal" alternative because such universal alternative simply does not exist.

Additionally, to what was stressed, researchers emphasize importance of interaction of social enterprise and law schools. It is an interesting observation, based on the assumption that law schools are part of universities that often share the goals of social enterprise (e.g., to develop environmentally sustainable practices or social inclusion). Moreover, law schools play an important role while influencing the legal community and together with that, legal culture and aspirations of future lawyers are shaped.[160] Therefore, we can assume that the more law schools engage in legal studies of social enterprise, the more this phenomenon become noticed and visible in the society.

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Here we can summarize that from the first part of our research we found out that theoretical and philosophical foundation is very important while defining foundation of legal good, which should be protected by the legislation in the field of social

159 *Ibid*, 4.
160 Sossin, and Kapoor, *supra note*, 21: 1010.

entrepreneurship. Different strategies that are used by different countries should assign meaning to particular legal categories only if the good that will be protected by such regulation is clear.

Some of quite well known concepts as CSR should not be confused with concept of social entrepreneurship, because the same legal regulation cannot (with some exemptions) be directly applied to both sectors. Social entrepreneurship not only meets the needs of society but also but also modifies traditional markets, which cannot be successfully implemented without having corresponding legal regulation.

Implementations of the above-mentioned tasks can be more challenging for some societies than for others because of the historical and socio-economical background. We can add to this that a lack of legal certainty comes from weak foundation of conceptual legal philosophy.

The legal dimension of the definition of social entrepreneurship inevitably involves and socio-economical dimension. Socio-economic aspects of social entrepreneurship are primary reasons why social entrepreneurship exists *per se*. Legal preconditions, however, derive from socio-economical preconditions and support the existence of the phenomenon of social entrepreneurship. Therefore, we can stress that before creating legal framework, society must identify what kind of socio-economical relationship has to be defined legally.

Different elements of the social entrepreneurship framework constantly interact with regulatory framework. Social enterprises are influenced by the economic and social conditions which may vary in particular country or region, stakeholders, culture, ethics and values in particular society and last but not least – the regulatory framework, which (in the possible best way) should provide legal certainty despite the intensity of legal regulation (because such intensity may vary – depending on concrete society – frim strict regulation to soft law or self-regulation measures).

# 2. SOCIAL ENTERPRISE LEGAL REGULATION DIFFICULTIES AND PRACTICAL APPROACHES IN PARTICULAR COUNTRIES

## 2.1. Features of legal systems

Every state has its own legal system. Some legal systems are quite unique and have their distinguished features. The others have more similarities than differences. In this research, we do not speak about cardinal exclusivity of some countries in terms of their legal systems. All researched countries generally belong to legal tradition of Continental Europe. However, some cultural, economic, and historical aspects form the basis for distinctive features. The comparative research of legal preconditions of social entrepreneurship is based on the comparison of three groups of countries: Nordic countries, Baltic countries, and German-speaking Western European countries. Therefore, some distinctive features of the legal systems in those groups of countries can be discussed as an introduction into more in-depth comparative analysis of the legal framework of social enterprise.

Although the title of this research speaks about the legal preconditions of social entrepreneurship in the European Union, the research itself basically was narrowed to comparative analysis of the mentioned groups of countries intentionally. First of all, comparison of the legal preconditions of social entrepreneurship in all EU countries would make this research less scientific and more of the statistical manner (although statistical methods are not used in this research because statistics of social enterprises is not homogeneous throughout Europe). Second, the chosen groups of countries represent slightly different legal approach, besides the economic, cultural, and historic environment, within the family of countries of continental legal tradition. It has to be mentioned in advance that within the scope of the study, the legal systems of the countries under review are briefly presented in order to enrich the context of the study by highlighting the main features of the legal systems of these countries. An in-depth study of the legal systems of these countries does not fall within the scope of this study.

The first group of countries – Nordic states. Speaking about distinguishing features of the corporate governance in the Nordic countries, it must be noted that the corporate governance debate in Europe is dominated by the distinction between the so-called one-tier model and two-tier model. The first one is known in English law (where

typically is only one company organ – the board of directors – below the general meeting of shareholders. The second one consists of two company organs below the general meeting (the management board and the supervisory board) known in German law.[161]

Speaking about the Nordic model, it has to be stressed that traditionally Nordic governance system is characterized as modified one-tier system, which contains a board structure with executive board and board of directors. The board of directors is considered as the superior executive body of the company. The executive board, on the other hand, is responsible for day-to-day management and is subject to instructions of the board of directors.[162] It is reasoned so because the system is considered of being strictly hierarchical. The general meeting of shareholders is the supreme company organ. However, the general meeting does not have executive powers and must thus rely on the two executive organs (the executive board and the board of directors) to carry out its instructions.[163]

Nordic company law experts also argue that another difference is that under the Nordic system, managers may serve as directors (have a dual capacity), which is unlawful in the German model. Nevertheless, in the Nordic model, managers may only constitute a minority on the board of directors and a manager cannot serve as a chairperson of the board of directors. The whole of these features distinguishes the Nordic model from the pure one-tier model. Most notable is the allocation of powers between the board of directors and the management board, because both of them are independent company organs with distinct powers and responsibilities.[164]

Speaking about specific features of the Nordic law, researchers emphasize that "only in the 19th century did the idea of a specific "Nordic law" become a current notion to substitute the old division between Danish-Norwegian law on the one hand and Swedish law (including Finland) on the other, and then especially as a tool to promote cooperation in the field of law."[165] Therefore, Nordic legal peculiarities often are described by using expressions: pragmatism, realism, absence of formality, an uncomplicated and understandable legal style, transparency, equality, and avoidance of extremes.

161 Jesper Lau Hansen, "The Nordic Corporate Governance Model – a European Model?" In *Perspectives in Company Law and Financial Regulation* (Cambridge University Press, 2009): 151. DOI: https://doi-org.ep.fjernadgang.kb.dk/10.1017/CBO9780511770456.009

162 Paul Krüger Andersen, Jan Bertil Andersson, et al., "European Model Company Act (EMCA)," *Nordic & European Company Law Working Paper* No. 16-26 (2017): 170, https://ssrn.com/abstract=2929348

163 Hansen, *supra note*, 161: 152.

164 *Ibid*, 153.

165 Pia Letto-Vanamo, Ditlev Tamm, and Bent Ole Gram Mortensen, *Nordic Law in European Context* (Cham: Springer International Publishing, 2019): 2.

We can state that the Nordic countries represent an interesting case of the history and development of social entrepreneurship and social enterprises. Some authors emphasize that so called "solidaristic" Nordic welfare state was influenced by the civil society and more specifically, so-called popular mass movements such as the labour movement and co-operatives.[166] However, later such kind of the welfare state was re-assessed and restructured, and, therefore, at the same time the concepts of social entrepreneurship and social enterprises have gained attention. In this context, it is noticeable that very active and successful public welfare structures and pro-active citizen-participation in public affairs might affect the emergence of social entrepreneurship and social enterprises slightly differently than countries with other types of social contracts. Therefore, experts notice that discourse of the Nordic societies also shape the narratives of social entrepreneurship and social enterprises.[167]

Moreover, Denmark, Finland, Iceland, Norway and Sweden are characterised by a strong sense of national identity and are grouped together as representing a particular Nordic Model of welfare states. All these countries "share a tradition of democracy mirrored by an ingrained respect for popular participation, respect for civil, political and social rights as well as the rule of law."[168]

Some information features about legal systems of particular countries and regions can be received and from the expert interviews. During the interviews, the experts in the field of company law were asked to describe the legal systems and company regulation features in particular countries and regions. Information retrieved from interviews let us say that expert opinions on that matter are quite similar.

Interviewed experts emphasize that it is difficult to see substantial differences in the Nordics legal systems. It might be stressed that Finnish law is a little bit different, Icelandic law is also a little bit different, but there are many similar traits. If you look into differences between Nordic and German-speaking countries there are some differences in governance models of companies, namely, how the boards are constructed, companies governed; how the powers are divided to some extent between the board members. In addition, there are distinctive types of boards – one tier board, two tier boards, and the involvement of the employees. In Iceland, for instance, there is a lot of socio-cultural circumstances that affect such situation. In the terms of legal regulation,

166 Lundgaard Andersen, Gawell, and Spear, *supra note*, 31: 2.
167 *Ibid*.
168 Letto-Vanamo, Tamm, and Gram Mortensen, *supra note*, 165: 22.

it is heavily influenced by the Danish. However, it is not the case in Finland, which regulation is more influenced by Sweden. In Finland, the procedures might be slightly easier, to attract the foreign investors.[169]

It is significant that Danish company law is very alike with the law of other Nordic countries. It can be spoken even about separate Nordic legal family, especially when it comes to governance, in the field of company law. The reason of that is not only the fact that legislation was made in cooperation in the Nordic countries, but also because of the wealthy, established society of those countries. That leads to the system where shareholders are in control of the company. The legal regime views shareholder control as beneficial and that is quite different from other jurisdictions, where in reality shareholders are not very visible (or influential). General opinion among legal scholars is that if you have influential shareholders, they may abuse the rights of minority shareholders. The opinion on this aspect is completely different in the Nordic countries because it is believed that active major shareholders will discipline the management, and in such way, they will help minority investors. Of course, it is known that majority shareholders can abuse minority shareholders, but in Nordic countries, there exists very elaborate company law legislation that has been developed over more than a century.[170]

Norway, generally speaking, is one of the Scandinavian Countries with long-lasting ties with its neighbour countries. Therefore, for the complexity of this research, it is useful to look into legal framework of social entrepreneurship in Norway. There are lot of similarities between Norwegian company law and company law in other European countries, especially in the Nordics. What we may see that distinguishes Norwegian company law is the strict hierarchy in the company regulation. Based on that, the shareholders have the overarching authority through the general meeting. The shareholders in the general meeting also can instruct the board on the way of doing the business. That is basically something that we do not find in other countries. Moreover, in the companies with more than 30 employees, the employees have a right to elect members to the board among themselves. In addition, there is a pluralistic system, which means that there is no shareholder value legal norm. There is a strong influence of stakeholder primacy social norm. Therefore, the board has the duty to pay attention to the interests

169 Andhov, *supra note*, 139.
170 Hansen, supra note, 147.

of shareholders, creditors, employees, local community, environmental aspects, etc.[171]

Speaking more about the Nordic governance model, several additional features can be mentioned. Some experts think that "Nordic corporations and their controlling shareholders <…> first consider how the corporation can best meet stakeholders needs, based on the values shared by the corporation and its stakeholders (including the employees and the state)."[172] Therefore, the authors state that there is "a societal agenda within the Western Scandinavian corporate governance codes."[173] In this context, Norwegian and Swedish corporate governance codes have clearly expressed social causes and emphasized general shareholder responsibility "defining appropriate guidelines to govern the company's conduct in society and ensuring its long-term value creation capability."[174] Generally speaking, we see that long tradition of corporate governance closely linked with the social welfare state is a distinguishing element of a legal system in the Nordic countries, which definitely influences understanding as well (among others – and legal preconditions of social entrepreneurship).

We already mentioned that legal system of the Baltic States undergone a great transformation, because there was not much of a legal heritage that could be taken over from the legal system of former Soviet Union. Therefore, the similar scenario of legal transformation was appropriate for all Baltic States. One of the most important aspects of political and cultural development in these three states was to overcome the Soviet heritage by developing national, independent legal systems.[175]

Because of the different legal regime, the old laws could not be followed, especially for example in the field of business law, contract law and obligations. The inspiration for legal reforms was drawn from Germany, the Netherlands, and other Western countries. However, the national specifics of the structure of society were considered. Finally, in the beginning of 2000's all Baltic States adopted modern civil codes and business legislation. The next big step in the legal transition was the accession to the EU. The modernization of legal systems in Baltic States is an ongoing process, and discussions about possibilities to adopt new social enterprise legislation are if not on the

171 Sjåfjell, *supra note*, 156.

172 Jukka Mähönen, and Guðrún Johnsen, "Law, Culture and Sustainability: Corporate Governance in The Nordic Countries," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* edited by Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020): 219, https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386

173 *Ibid*, 222.

174 *Ibid*.

175 Tanel Kerikmäe, Kristi Joamets, Jānis Pleps, Anita Rodiņa, Tomas Berkmanas, and Edita Gruodytė, *The Law of the Baltic States* (Cham: Springer International Publishing, 2017): 9-10.

top of legal agenda, but always in the scope of legislators' attention.

According to the above-mentioned circumstances, the Baltic States have relatively short tradition of corporate governance, which changes rapidly, although it is still not undergoing an active phase of the advocacy of corporate responsibility (like in Nordic countries). Such situation as well influences and development of legal preconditions for social entrepreneurship.

The next group of countries has a long tradition of cultural and economic ties, although some differences exist and between German-speaking countries. E.g., Switzerland has close ties with other German-speaking countries Austria and Germany. The situation in Switzerland, however, could be slightly different because of its isolationist policy (only in 2002 Switzerland became a member state of the United Nations)[176]. Nevertheless, both countries – Norway and Switzerland – are members of the European Free Trade Association (EFTA)[177] since 1994. The member states of EFTA participate in the European Single Market[178] and, therefore, relate with main economic trends, including social economy, of the EU Member States.

Three German-speaking countries in the Western Europe had a little different evolution in the sense of legal tradition. They also were influenced by different historical factors. E.g., the French Code Civil of 1804 was used as a model for the (French and Italian speaking) cantons in western and southern Switzerland. Several other cantons based their legislation on the Austrian Civil Law Code. A third group of German-speaking cantons in central and eastern Switzerland remained uninfluenced by foreign legislators. In the beginning of 20th century, a Swiss Civil Code was adopted.[179]

It is worth mentioning that unlike Swiss contract law, the provisions of Swiss company law do not provide for the freedom to create any kind of company. Most types of business associations are regulated in the Code of Obligations, while more variations can be found in the Civil Code and in the Federal Act on Collective Investment Schemes. Therefore, which type is chosen in the circumstances depends on the intentions and interests of the people creating the company.[180]

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176 "Switzerland. General information," Member States of the United Nations, accessed 20 January 2021, http://data.un.org/en/iso/ch.html

177 "The European Free Trade Association," accessed 20 January 2021, https://www.efta.int/about-efta/european-free-trade-association

178 "The European single market," European Commission, accessed 20 January 2021, https://ec.europa.eu/growth/single-market_en

179 Marc Thommen, *Introduction to Swiss Law* (Berlin; Bern: Carl Grossmann Verlag, 2018): 273-275.

180 *Ibid*, 325.

Speaking in more detail about features of Germany's legal system, it can be admitted that it is stable and smooth working. It is widely known that it is based on the Continental European legal tradition as opposed to Anglo-Saxon law. We know that the primary difference between the two systems is that the Continental European legal system is based on "code law' as opposed to "case law". In accordance with the Continental tradition, the German legal system consists essentially of written laws. All the standard practices and regulations governing a business's conduct are codified in the German Civil Code (*BGB*, or *Bürgerliches Gesetzbuch*). Therefore, if no special terms would be agreed upon between the parties, the terms, and provisions of the BGB would automatically apply. One of the most important features in legal regulation of business relations is quite liberal Commercial Code, which makes relatively easy for people to start a business.[181]

Austrian legal system is quite similar to German and has a long tradition of legal regulation of business conduct. In conclusion, it can be said that the legal systems in Germany and Austria are precisely structured. When looking at business operations, the clearly structured German and Austrian systems encourage fair, free trade and the minimization of conflicts.[182] Therefore, the interpretation of social enterprise legal environment in these countries can significantly contribute to this research.

In addition, it has to be stressed that uniqueness of German-speaking countries in the field of corporate governance is the long tradition of the so-called social market economy where the aspects of free capitalist market (entrepreneurship) are very closely related with creation and constant maintenance of the welfare system, which is well developed. In this context, relations between social market economy and social entrepreneurship can be spotted, although such connection might not seem so obvious.

Different legal systems correlate with the legal preconditions of social entrepreneurship. We already stressed that from the theoretical point of view even different legal approaches are derived from different business- or societal philosophies. In a traditional democratic society, such concepts have developed naturally over many years. In other societies, there is a lack of legal certainty, which comes from weak foundation of conceptual legal philosophy.

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181 Bernd Tremml, and Bernard Buecker, *Key Aspects of German Business Law : A Practical Manual* (Berlin: Springer, 2006): 4.
182 *Ibid*, 6.

## 2.2. Legal status of social enterprise: general situation in the continent

Nowadays, most European governments are looking for new ways to include citizens and the non-governmental sector in the provision and management of publicly financed welfare services. It is noticeable that the reasons for that are similar throughout Europe. The continent faces the challenge of an aging population and semi-permanent austerity in public finances. There are also several trends of the ways to response these problems. The most popular trends among European countries are the growth of new and different ways to involve users of welfare services as co-producers of their own services, the spread of new techniques of co-management and co-governance of social services and encouragement of volunteering, and other initiatives.[183] Therefore, in this context the general situation of the legal status of social enterprise in the continent can be discussed.

We have to stress here that in terms of empirical data, considerably big number of empirical studies was conducted during last decade on the EU and the OECD level, describing actual situation of social enterprise in many European countries (including countries that are within the scope of our research).[184] It has to be stressed in advance that from the practical and empirical point of view these studies are good sources of factual information. Therefore, they are used in this research to some extent as a source providing systematic empirical information. It has to be emphasized, however, that these studies not fully provide insights regarding solution of concrete problems. They are not of a scientific level, and scientific conclusions can only be drawn from the totality of information. Thus, what this research gives in comparison with empirical studies (reports) is another, scientific one - it helps to answer primarily the complex scientific questions raised in the introductory part of the work.

We already emphasized that in the study the parts dealing with the theoretical and practical aspects of the problem are clearly defined. They also complement one another. In this part of the study, the sources of the European Commission are quite actively used, which, in addition to theoretical insights, help to strengthen the empirical

183 Hulgård, Defourny, and Pestoff, supra note, 28: 5-6.

184 Archive of such studies and reports can be found on the Publications Office of the EU website browsing by subject "Economics/economic structure/social economy." For more please see: https://op.europa.eu/en/browse-by-subject . For concrete studies that were used in this research please see References at the end of this dissertation.

part of the study. This constitutes a set of research sources that must be considered in the overall context of research, especially given that the research topic is very specific, interdisciplinary, and systematically little explored. In addition, the factual and scientific aspects of the dissertation are clearly defined, and scientific conclusions are drawn from the totality of the research material.

We already emphasized that there exists a wide context in which legal environment of social entrepreneurship can be evaluated. However, one the main problems emphasized in this research is lack of legal certainty, whether we speak about concrete legal forms of social enterprises, or wider legal environment. We know that such legal forms as foundations, associations, or limited companies have developed in different directions over time influenced by different contexts of particular states. In addition to range of legal forms available for social enterprises, there is significant variation within each legal form. We know that legal frameworks bring clarity by defining the nature, mission, and activities of social enterprises. In addition, we can state that without sufficient legal identity enterprises cannot fully use their potential. Different organizations and researchers support the idea that "granting recognition and visibility to social enterprises through the creation of framework laws, or the implementation of national strategies helps policymakers to target their support more effectively."[185]

The European Commission does not prioritise any particular legal form of social enterprise. Particular countries, on the other hand, have chosen to adopt the legislation defining specific legal form of the social enterprise. We have to emphasize that here we speak about social enterprises in the sense of our operational definition. Contrary to our operational definition, as social enterprises in some countries are legally recognized only social enterprises, which link their activity to employment of disadvantaged people or people from specific socially vulnerable groups (WISEs). E.g., the Law on Social Enterprises of the Republic of Lithuania defines such social enterprises.[186]

Lithuanian model of the legal framework for the social enterprises is not finally defined, despite legal recognition of WISE (later in this research we discuss and new Draft Law on Social Business of the Republic of Lithuania). European Commission

185 E.g., Noya, *supra note*, 111.

186 The Law on Social Enterprises of the Republic of Lithuania links social enterprises only with the employment of persons from specific social groups who have lost their professional and general capacity for work, are economically inactive and are unable to compete in the labor market under equal conditions, to promote the return of these persons to the labor market, their social integration as well as to reduce social exclusion. See: „Lietuvos Respublikos socialinių įmonių įstatymas," *supra note*, 6.

defined main models of legal recognition of social enterprises can be defined within two categories: Some other countries have more advanced legal frameworks that can be divided in the two broad categories:

Adaptation of existing legal forms or creation of new legal forms taking into account the specific features of social enterprises;

Creation of a social enterprise legal status (certificate, qualification, etc.).[187]

In the first category fit states, which developed new legal forms for social enterprise, whether by adapting very new legal concepts, or by modifying actual legal forms. Several Member States of the EU adapted for the needs of social entrepreneurship legal form of cooperative (e.g., France, Greece, Italy, and Poland). The other countries recognized social cooperatives in their existing legal form as social enterprises (e.g., Portugal, Spain). The United Kingdom (despite the country is no longer an EU Member State) developed a legal form for use by social enterprises – Community Interest Company.[188]

The second category – creation of a social enterprise legal status – is implemented by several countries. The concept of social enterprise status consists of idea that social enterprises can obtain such status without any further change in their legal form. Such enterprises, however, have to comply with certain criteria. The general rule in the most countries, which apply such system, is that legal status of social enterprise can be obtained by the most of traditional legal forms: cooperatives (traditional and social), limited (share) companies, associations, and foundations.

In comparison, we can mention some cases outside Europe. Recently many states of the USA introduced three new legal forms: the low-income limited liability company, the benefit corporation (which, as we already mentioned, is criticized by some researchers)[189] and the flexible purpose corporation. The low-income limited liability company is created as an alternative to traditional limited liability company format with the goal to create small business interested in social good. The Benefit

187 "A map of social enterprises and their eco-systems in Europe. Synthesis report," European Commission, published 2015, accessed 15 January 2021, https://ec.europa.eu/social/BlobServlet?docId=12987&langId=en

188 "Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27)," accessed 14 January 2021, https://www.legislation.gov.uk/ukpga/2004/27/contents

189 Basically, the benefit corporation (a legal form available in the US) repurposes the traditional for- profit corporate form for social enterprises by altering statutory language relating to four aspects of corporations: corporate purpose, fiduciary conduct, shareholder voting, and disclosure. Many states in the US have now adopted benefit corporation statutes. The development of benefit corporation legal form is discussed in this research only briefly. For more, see:, Steven A. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (New York: Oxford University Press, 2017), DOI: 10.1093/oso/9780190249786.001.0001

Corporation and flexible purpose corporation basically change primarily purpose of corporate business legal enabling business corporations to seek for social and environmental objectives without offer changes to corporate law shifting the primary purpose of the business to serve the needs of shareholders without prejudice to the interests of shareholders.[190]

In addition, we can mention that some authors stress that social entrepreneurship can be defined as the so-called for-profit charity and point out that "historically philanthropic activities and legal structures are largely unrecognized by the legal literature. Today's social changes influence development of the legal environment. It leads to development of new legal entities like for-profit charitable enterprises."[191]

On the other hand, Bacq and Janssen emphasize that the social entrepreneurship organization can choose a non-profit or a for-profit form and should not be limited to any specific legal form. We think that this point of view is rather unusual. However, authors argue that this perspective results in the emergence of various hybrid organizational forms, which are independent, which can generate profit, employ people, and hire volunteers. This new legal form represents a hybrid organizational type, which is partly non-profit and partly limited company.[192] From the perspective of countries that are investigated in our research, we can say that such radical concept would be rather difficult to implement from the legal point of view. We emphasized that many European countries have introduced special legal entities that only act as WISEs, and do not constitute a wider definition of social enterprise. We also have to understand the context of legal forms, which were developed in many countries over the years. Associations, co-operatives, or traditional business forms existed across Europe for a long time. Their regulation should be respected for the interests of the part of society, which needs such legal forms. Therefore, creation of legal framework for social entrepreneurship should not compromise existing legal forms that are still widely used in some countries. We think that clear identity for social enterprises can be given whether by adopting a dedicated form of legal entity or by granting a legal status of social enterprise. Both scenarios could function well according to circumstances in particular countries.

Moreover, the definition, which could help identify social enterprise, could allow policy makers to design and implement specific public policies for social enterpris-

190 T. F. Urich, "Business Organizations in the 21st Century: A Look at New Legal Forms for Business that Enhance Social Enterprise," *Southern Law Journal*, 23(2), 2013: 329-343.
191 Rana, *supra note*, 15: 1121-1126.
192 Bacq, and Janssen, *supra note*, 17.

es. Usually, such public policies can be implemented as measures under tax and public procurement law. It could also help to prevent misuse of the social enterprise status and allow investors to identify the potential investees.[193] Here we can add our personal observation, that from the legal point of view such identification can be linked either to new legislation or to the definition of other identifiers.

It cannot be one universal answer which strategy, whether introduction of new legal form, or legal status, is best. In the legal sense, we could state that any solution would suit, as long as it is clear and nor burdensome for social enterprises, and convenient to implement and control for governmental bodies. Experts state that if the new corporate form is launched, it will be question of additional costs for companies that would like to switch to new legal form. Such situation could be avoided or minimized by introducing a new category of existing corporate forms without launching a new legal form.[194]

We think that in countries where legal framework for social entrepreneurship is underdeveloped, new regulation would be beneficial for entrepreneurs who are only starting the enterprise and can freely choose legal form, which suits the best entrepreneurs' needs. However, introduction of entirely new legal form can cause other problems, as lack of practice (and case law) how to professionally work with regulatory aspects of such legal form.

Moreover, new legal form can be introduced within the frame of the existing regulation with particular set of exemptions. This strategy was used in the United States for the benefit corporations,[195] and in the United Kingdom by the community interest companies.[196] Urich emphasizes that "as the society modifies its values, the legal system must adapt and accommodate the new perspectives and the American legal system responds to these changes."[197] If this option is chosen, in both countries undertakings of an existing legal form can be re-registered as a social enterprise without incurring significant costs.

In France in 2014 was adopted a combined model, which allows traditional

193 "A map of social enterprises and their eco-systems in Europe. Synthesis Report," *supra note*, 187.
194 Sorensen, and Neville, supra note, 19.
195 Benefit corporation in the United States is a class of corporation which legally requires companies to provide a general benefit to society and stakeholders (e.g., employees, communities, and the environment). A benefit corporation is a for-profit company, which aims to create a material positive impact on society and the environment.
196 The community interest company in the United Kingdom is a limited company, which activities are aimed at the benefit of the community.
197 Urich, *supra note*, 190.

business entities and newly established enterprises to become social enterprises. The French Law on Social and Solidarity Economy (2014) acknowledges cooperatives, associations, mutual organizations and newly established enterprises with a social goal as social enterprises.[198]

We already mentioned that company could obtain a social enterprise status through a dedicated certification scheme. It was mentioned that such scheme is used (and is examined in more detail in this research later) in Denmark. Belgian social enterprise framework provides quite similar example. In 1995, the Belgian Parliament adopted a law on "social purpose company," which creates legal status of social enterprises. The Law defines conditions that an organization must meet in order to obtain status of social enterprise. However, it has to be stressed that in 2019 Belgium reformed cooperatives and abolished social purpose companies. According to regulation in the new code, social purpose companies should take a legal form of cooperative, which is strictly defined as "meeting the needs and developing the economic and social activities of shareholders or third parties."[199] Detailed analysis of the social enterprises legal framework in particular countries is provided in the following sub-chapter of this research.

We have to stress that from the point of view of the legal realism,[200] above-discussed situation shows that objects of the social world have varying probabilities of coming into existence and causing the emergence of new objects. We understand the idea (and this is the assumption of realism) that things in the world happen regardless of whether they are observed by us, or even known. Realistic account of law criticizes a purely doctrinal understanding of law. Therefore, in the above-mentioned examples, we see law as an ongoing institution (set of institutions) caused by the tensions of power, reason, and tradition. Progress and social processes cannot be attributed to certain

198 "Qu'est-ce que l'économie sociale et solidaire?" Le Centre de documentation Économie Finances: un service ouvert à tous, accessed 20 January 2021, https://www.economie.gouv.fr/cedef/economie-sociale-et-solidaire

199 "C.M.S. Law/tax: Belgium passes code that reforms cooperatives and abolishes social purpose companies," published 4 April 2019, accessed 20 January 2021, https://www.cms-lawnow.com/ealerts/2019/04/belgium-passes-code-that-reforms-cooperatives-and-abolishes-social-purpose-companies?cc_lang=en

200 For example, it is known that movement called as Scandinavian Legal Realism was founded by the Swedish philosopher Axel Hägerström (1868–1939) and the Danish philosopher and jurist Alf Ross. They shared the common view that "it is vital to destroy the distorting influences of metaphysics upon scientific thinking in general and legal thinking in particular in order to pave the way for the scientific understanding of the importance of law and legal science for the life of human beings within a state." For more, see: Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," Ratio Juris 18(1), March 2005: 1–15, doi:10.1111/j.1467-9337.2005.00282.x.

date.[201]

In practical way, legal frameworks of social entrepreneurship develop in many countries responding to the needs of society and implementing social entrepreneurship ideas and innovations. Historically, such legal forms as associations, foundations, non-profit corporations, and charities have legal regulation in different countries, which provides limited or no possibility to carry out business activities, because such legal forms were originally dedicated for the development of donative or redistributive activities and not for commercial activities. On the other hand, company law provides entities possibility to carry out commercial activity and maximize shareholder value. Therefore, the "pure legal forms of the non-profit sector and the pure forms of the for-profit sector are inadequate to accommodate the phenomenon of a social enterprise."[202]

It has to be stressed that social entrepreneurship has an influence on "the theoretical concept of enterprise in general: the conception of enterprises as organizations promoting the exclusive interests of their owners is questioned by the emergence of enterprises supplying general-interest services and goods in which profit maximization is no longer an essential condition."[203] These ideas are based and on the statements of other researchers, and personal observations, which are detailed in the following sub-chapters.

Therefore, we can stress that legislators can (and probably should) promote the role of social enterprises by defining their organizational models. These models should be oriented in order to maximize the effectiveness of such enterprises. The basic rules for social entrepreneurship should be laid down in the legislation, besides reasonable amount of self-regulation. Such way we can speak about the "framing the main principles of the governance of social enterprises."[204]

Whether it is for-profit or social enterprise, it is created and governed under the state law, has an organizational structure, governing rules and capital (formed whether by shareholders or other structures). What is specific for social enterprises in this regard is that depending on their legal form, they do not distribute their earnings to the shareholders. Such restrictions can be whether included in the articles of association or defined in the legislation – if the special legislation for social enterprises exists. These

201 Dagan, *supra note*, 38.
202 Fici, *supra note*, 4.
203 Galera, and Borzaga, *supra note*, 5.
204 Cafaggi, and Iamiceli, *supra note*, 20.

ideas also are defined by different authors and can be observed from practice.[205] We can assume that this is the basic point of view, which does not change a lot. Nevertheless, by comparing concrete legal forms in different countries we can add some new insights.

Summarizing already discussed international research of social enterprise legal forms; we can distinguish three main models of legislation (which varies slightly in particular countries): the cooperative/association model, the company model, and a model based on several options (allowing freedom to choose legal form).[206] In the last-mentioned case, we usually speak about different certification schemes. Now it can be noticed that we can distinguish some advantages of certification schemes. Probably the most important advantage is that companies of different forms can use them if the companies' legislation allows the pursuit of social goals. By its idea, certification does not require any amendments (reincorporation) in the articles of association, if the social clause is already included in the articles. Moreover, if it is not included, it is not difficult (having in mind legal and financial means) to include it.

Certification schemes usually would be administered and supervised by some governmental authorities. However, they also can be administered and purely based on self-governance of the sector (e.g., by democratically elected organ, which represents interests of social enterprises – an umbrella organization, etc.). Both scenarios are possible and can be effective if social entrepreneurship sector in particular country is quite developed. However, if it is underdeveloped – there is few social enterprise initiatives, legislation is not clear or restrictive concerning social entrepreneurship, etc. – first measures necessarily should be taken on the legislation level.

It is important and speaking about control of existing certification schemes. A public authority, which supervises, controls misuse and applies sanctions can revoke certificate in the case of fraud. If it would be the case whit dedicated legal form, then it would have more strict consequences (sanctions) in the case of fraud, possibly obligation of the company to convert into other form, or even a liquidation.

In the context of different legal forms available for social entrepreneurship, we have to admit that one of the most flexible forms (although primarily used for the for-profit purposes) is a limited liability company. The researchers admit that law as a legal person on par with natural persons recognises this legal form. It also enjoys legal

205 Lasprogata, and Cotten, *supra note*, 11.

206 Practically there can be other legal forms, like partnerships, mutuals, etc., which are popular and spread only in some countries.

capacity to enter into contracts, appear in courts, face liability, etc. From the historic perspective we knew that people were much more ready to invest in commercial enterprise if they were protected against impoverishment or bankruptcy by limited liability and this readiness to invest has led Western societies towards ever greater prosperity ever since.[207]

We already emphasized that the concept of limited liability is attractive because of the safety (with some exemptions) that it provides for the company owners. However, it can be stressed that limited liability means also limited moral liability. In addition, in contrary, the case of unincorporated businesses means also unlimited moral liability. It is worth to mention, "No distinction can be made by the business and the person(s) conducting it because the reputation of the one is the same as the reputation of the other."[208] This statement illustrates approach that reflects the idea of distinction between traditional and social business (probably, CSR also can be mentioned here).

Together with the above-mentioned aspects, we can return to the shareholder value aspect. The experts of this area simply stress that there are compelling neither legal, nor economic arguments to support the shareholder myth.[209] This idea suits well within the concept that (especially in the case of social enterprise) it is the discretion of shareholders to decide what values will be emphasized in the strategy of a company. From the experts' point of view, we can summarize that even in the traditional for-profit companies exists some set of values besides the bold profit maximization goal.

In the same context, an overconfidence in the promotion of CSR in traditional-business sector can be harmful because experts notice "companies have been reluctant to make genuine ethical progress. <…> the dominant business model has made mainstream companies largely resistant to CSR efforts. <…> it can be argued that the currently followed CSR has actually distracted from genuinely responsible behaviour."[210] We will not argue much on this idea, because it is separate and rather wide topic.

Bearing in mind the above-mentioned factors, we must think about legal regulation of social entrepreneurship as a desirable minimum of protection of interests

207 Jesper Lau Hansen, "Editors' Note: Companies Without Legal Capital and the Strange Case of Denmark," *European company and financial law review* 16 (6), December 2019: 677, DOI: https://doi-org.ep.fjernadgang.kb.dk/10.1515/ecfr-2019-0028

208 Eleanor O'Higgins, and László Zsolnai, *Progressive Business Models Creating Sustainable and Pro-Social Enterprise* (Cham: Springer International Publishing, 2018): 5.

209 *Ibid*.

210 *Ibid*, 11.

of stakeholders who represent the core of social problem that social enterprise tries to solve. On the other hand, we must think about protection of people willing to invest in social enterprise. Even in the field of traditional business regulation, the legal minimum is an agreed choice set by legislators without any knowledge of the business conducted by the individual companies, but we must consider it as necessary.

However, the experts admit that relying on the legal minimum may be insufficient for the business conducted by the company, especially if the minimum is set low.[211] Such situation may simply lead to personal liability for running the company without the necessary minimal funding. Here steps in a long-running discourse on the amount of initial capital needed to start a business. In the absence of a statutory provision on capital, the founders of a company may be forced to think for themselves what would be the necessary capital. In such situations, some sort of companies' act sets the standard requirement. However, a company's need of capital is a very diverse thing that it is not possible to provide as a default solution that could reasonably help the average user.[212]

Moreover, it is sometimes argued that the legal capital requirement serves to show the commitment and honesty of its owners and putting it simply it keeps different opportunists away. However, in the context of current times, the wealth is not necessarily associated with honesty. On the other hand – the lack of funds is not necessarily seen as dishonourable. In addition, most of societies want more of their members to empower their citizen to engage in business activities regardless of their financial status. It leads in many jurisdictions to decrease over the last decades of the legal minimum of initial capital.[213] Definitely, such situation shows change of the global legal environment for social enterprises, at least in many of the European countries.

One of the common attributes of the above-mentioned cases is that in one or another form, above-mentioned countries create legal framework for social entrepreneurship. In such way, they acknowledge that legal certainty in the field of social entrepreneurship is important. We can emphasize one more time that mostly social entrepreneurship is recognized not by its particular legal form (at least where such legal form does not exist) but by its social mission, which is carried by such enterprises, but also can be carried and by non-profit organizations or even by the governmental sector.

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211 Hansen, *supra note*, 207: 678-679
212 *Ibid*.
213 *Ibid*, 685.

However, there is still a significant heterogeneity in its definition and distinguishing of social entrepreneurship by its social purpose and through multiple organizational forms, which we see by the in-depth analysis of social enterprise legal preconditions in particular countries.

As one of the biggest challenges while seeking further development of the social entrepreneurship is to find way to transform (or adjust) company law rules allowing to ensure that social enterprises actually pursue their social purposes. We also already emphasized that the control (or self-control) of the misuse of social enterprise status should be ensured. However, sufficient amount of flexibility in the regulation is also important (therefore, we mentioned self-control, or self-regulation based on mutuality of social enterprise community), which would eliminate obstacles in further development of social entrepreneurship sector in general. "Legal frameworks play a fundamental part in any ecosystem for social entrepreneurship. They can help to make it relatively straight forward to start-up and grow a social enterprise and raise the visibility of this way of doing business. On the other hand, they can hold people back, forcing entrepreneurs to spend time and effort looking for ways around barriers imposed by the legal system."[214]

OECD notices (and we can agree on that based on the above-mentioned arguments) hat legal and institutional frameworks bring clarity by defining the nature, mission, and activities of social enterprises. Moreover, sufficient legal frameworks, elaborated national (or even local) strategies help policy makers to target their support more effectively.[215] We see that such opinion correlates with the opinion of the European Commission. However, the complex research shows us that it is not necessarily the only possible way to recognize social enterprises and alternatives should be brought to the light, especially for the politicians, legislators and other decision makers.

Antonio Fici quite categorically stresses that the law (particularly, organizational law) is "necessary to establish, preserve, convey and disseminate the distinct identity of an organizational model that is primarily, though not exclusively, based on a specific purpose. In essence, in this instance, organizational law performs a necessary and oth-

214 "Social Enterprise in Europe. Developing Legal Systems which Support Social Enterprise Growth," ESELA, published November 2015: 6, accessed 20 January 2021, https://esela.eu/wp-content/uploads/2015/11/legal_mapping_publication_051015_web.pdf.

215 *Boosting Social Enterprise Development: Good Practice Compendium* (OECD Publishing, Paris, 2017): 17, https://doi.org/10.1787/9789264268500-en.

erwise non-replaceable identifying function." [216] We see that this can be the case and with social enterprises. However, we already emphasized that there always exists possibility (or at least an option to consider possibility) of self-regulation.

We will see from the examples below that all researched countries have such legal forms as foundation, association, or limited company. Despite different historical, socio-economical, and cultural development of countries, the mentioned range of legal forms can be adapted (or already are adapted) to serve for the purpose of social entrepreneurship. Every single legal form also can have some variations. Therefore, some of such variations can be particularly dedicated for social enterprises. It could be one of the most suitable scenarios (besides above-mentioned certification) for social enterprises to obtain a concrete – in a legal act defined – status (form). In most countries, it is already "possible to 'adapt' or 'tailor' a legal form specifically for use by a social enterprise, for example, by specifying a social purpose, limiting the means by which profits, and surplus assets may be distributed and by specifying other 'social' characteristics."[217] Such aspects as stakeholder involvement, decision-making process, governance, profit distribution can be attributed to some 'variation' of already existing legal form.

The European Social Enterprise Law Association (ESELA)[218] have noticed and some additional challenges, such as overlapping legal and quasi-legal concepts which are used in relation to social enterprise, which complicate and confuse discussions about social enterprise, particularly where discussions are taking place internationally between people with different disciplines (not among only legal practioners).[219]

It was mentioned that the concept of social enterprise is interpreted differently in different Member States. Different Member States make available different legal forms for social enterprises. Moreover, the legal forms most used by social enterprises differ greatly. The study of ESELA showed that some social enterprises would benefit from some other legal status, such as a non-profit tax status or a WISE.[220] However, we think that only a relatively small number of social enterprises will currently use a social enterprise form or benefit from a social enterprise legal status. We could argue so, having in mind that a WISE status is dedicated for only a certain type of social enterprise,

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216 Fici, *supra note*, 4: 12.
217 "Social Enterprise in Europe," *op.cit.*: 33.
218 In November 2018, the European Social Enterprise Law Association (ESELA) changed its name to 'Esela -The Legal Network for Social Impact' to more closely reflect the expertise of its network.
219 "Social Enterprise in Europe," *supra note*, 214: 11-29.
220 *Ibid*, 32.

which deals only with work integration. Although overall potential of social enterprise sector is much bigger.

Many different models of social enterprise, which include democratic business approaches (defined legally or not), or more manager-controlled approaches forms a set of models, which can be slightly different in particular countries. Experts and academic researchers think that legal recognition of social enterprises is an essential condition for the sector development. They argue, "Legal forms or statuses recognize the specificity of social enterprise and contribute to giving them a clear, precise, and easy understandable identity. Together it sets clearly the boundaries between social enterprise and other concepts." [221] We think, that as one of such "other concepts" can be already discussed concept of CSR. We already stressed our opinion that legal recognition of the social enterprise status is not the only way. However, we can state from our observations, that legal recognition of social enterprises in particular countries is also required if the country want to incentivize social entrepreneurship sector by granting some tax exemptions (e.g., corporation tax relief, relief from local or municipal taxes, etc.) or other incentives (loans, guarantees, consultations, etc.). However, no common agreement is found on the EU level, and regulation in different countries is various. Taking it into account different examples of legal regulation in different countries can be analysed to distinguish best practices. Moreover, we also can raise the question whether some other factors (like the legal technology) could foster development of legal preconditions of social entrepreneurship.

Further, we make a comparative analysis of legal forms used by social enterprise in particular EU Member States (Finland, Sweden, Denmark, Estonia, Latvia, Lithuania, Germany, and Austria) and states of the EFTA (Norway, Iceland, and Switzerland). We stressed in the introductory part of this research that the main problem in this context is lack of legal certainty. We can see this problem whether in legal non-recognition of social enterprise as such, or unclear rules and general legal environment for social entrepreneurship. Therefore, we try to find out whether the legal regulation of social entrepreneurship is adequate and identify potential weaknesses, differences, and contradictions of this legal regulation in the EU, the EU and EFTA Member States.

All countries that we will discuss further have developed some legal framework for social entrepreneurship. However, not all countries have dedicated special legal form for social enterprises. Most of the countries have the range of legal forms that can

221 "A map of social enterprises and their eco-systems in Europe. Synthesis Report," *supra note*, 187: 61.

be (and are) used by *de facto* social enterprises. Moreover, all mentioned countries have chosen not to create a dedicated legal form for social enterprise but to establish legal status, which can be used by different legal entities. Therefore, there are and similarities, and significant differences in the researched countries in this regard.

This can be illustrated by examples Finland and Lithuania (which later are discussed in more detail). In the mentioned countries, legal status is restricted to WISEs, which are organizations that promote the employment of people who are disadvantaged or disabled. WISEs have a social enterprise-related legal status, which can be obtained by organizations established for such social purposes. Nevertheless, social enterprises under operational definition of this research undertake activities wider than only work integration. A WISEs' concept may be understood in different countries as a legal status or a legal form. Therefore, we can stress that WISEs operate whether with dedicated legal status or legal form. In theory, any legal form could be defined as an integration enterprise (provided it meets the criteria set out in the law for meeting that status).

Moreover, the experts who work with different aspects of company law encounter phenomenon of social enterprise in different circumstances. However, the field of research of the company law meets the direct regulation of social companies not very often. Usually only some (direct or indirect) aspects of social enterprise legal framework fall into scope of research of the mainstream company law.

Researchers often encounter it from the angle of the CSR. We know that Milton Friedman stated that the purpose of the corporation is profit. Milton Friedman, as a notable American economist in its work "Capitalism and Freedom" wrote that „there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it <…> engages in open and free competition, without deception or fraud." [222]

On the other hand, stakeholder theory claims that managers have a duty to both the corporation's shareholders and people who contribute to a company's wealth-creating capacity and activities. Mostly is acknowledged that these stakeholders are shareholders, customers, employees, suppliers, and the local community. According to the above-mentioned stakeholder theory, managers are agents of all stakeholders and generally have two main responsibilities. The first is to ensure that the ethical rights of no stakeholder are violated. The second is to balance the legitimate interests of the stake-

222 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962): 133.

holders when making decisions.[223]

In addition, there is an antagonist perspective that we must have social enterprises in which the purpose is not the profit but rather something else – whether it is support of the social eco systems, minorities, or some kind of other social values that company aims to support and push forward. Therefore, there is a dichotomy what is the purpose of the company. It is a recent development. It occurs because we talk about it more, in the sense the CSR, whether we talk about the climate change, or SDGs, or other reasons.

In addition, there is an overall tendency to push more CSR on corporations. Whether it is the environmental perspective, or the perspective of CO2 emissions, we will see more and more pressure towards corporations – in the form of new reporting obligations – we already see this kind of movement (increased responsibility for environmental-, social-, human protection). Generally, majority of business community, including scholars agree that SDGs are applicable to the life of the corporations as well as the life of the governments. It is happening already – it is not only a theoretical think. In many (especially large) companies exists acknowledgement of the SDGs. The fact whether they implement it (and to what extent) in their procedures is another question. However, understanding and acceptance show that this policy is relevant for them. [224]

Speaking about evolution of the welfare state in the context of social entrepreneurship, we have to agree with the observation that "the Welfare State extended the previous forms of social state with social security and the generalization of social protection systems. The state framed and supported the market as much as it corrected market inequalities."[225] In this context, we have to draw a clear line of development disparities between Western states and Baltic States (Estonia, Latvia, and Lithuania), which were for a roughly 50-year period occupied by Soviet Union. Speaking about that 50-year period, we cannot discuss any kind of a welfare state in the non-democratic totalitarian state. The "equalization" of the planned economy did not create any preconditions for an improvement in the economic situation. In contrary, such circumstances pushed society as a whole into a state of global economic and social deprivation in which, in the absence of any democratic environment, no socio-economic processes

223 H. Jeff Smith, „The Shareholders vs. Stakeholders Debate," *MIT Sloan Management Review*, published 15 July 2003, accessed 21 January 2021, https://sloanreview.mit.edu/article/the-shareholders-vs-stakeholders-debate/

224 Andhov, *supra note*, 139.

225 Eynaud, *supra note*, 27: 30.

(including democratic solidarity, mutual economic assistance or other forms of social entrepreneurship) that had developed in the West at that time could take shape. At the same time, there were no movements of non-state democratic philanthropy (no kind of grassroots movements).

The above-mentioned statement is an author's (insider's) point of view. However, the same aspects are underlined and by the Western researchers. They emphasize that: "here the withdrawal of the state was much more dramatic and was compounded by an already weak civil society undercut by communist rule. In addition, the transition to a market economy brought large increases in unemployment. A small but growing number of East-Central European social reformers seized upon social enterprise (borrowing mostly from the West European model) as a viable solution and received support for its development from international sources."[226]

The ecosystems of support for social entrepreneurship and social enterprises that are developed or can be potentially developed in different countries can be based on different dimensions. The experts emphasize that such dimensions can be practice, policy, education, and research. All four dimensions could help stimulate and consolidate social entrepreneurship.[227] However, this area is more political then legal: "Both in supra-national organizations such as the European Union and in national and local contexts, policies and other significant measures are being formulated with the aim of promoting social enterprises, social entrepreneurship and the social economy."[228] However, this phenomenon balances between the dynamics of individualism and collectivism that are traceable in national and international developments in the welfare sector in different countries.

One additional common attribute is that in the most of European countries social enterprises are closely linked to the "budgetary pressure on the welfare state". Moreover, it was emphasized that there is highly emphasized need for innovation, especially in social services (e.g., by creating service provision and employment aimed at socially vulnerable citizens).[229]

With respect to a variety of social purposes, which might be pursued, other aspects also might diverge (which stakeholders have an influence with respect to gov-

226 Janelle A. Kerlin, *Social Enterprise. A Global Comparison* (Medford, Mass: Tufts University Press, 2009): chapter 9.
227 Lundgaard Andersen, Gawell, and Spear, *supra note,* 31: 10.
228 *Ibid*, 22.
229 *Ibid*, 27.

ernance and decision-making and the way that profits are distributed, etc.). ESELA also emphasizes that it is quite common in most countries to use different legal forms by adapting them specifically for use by a social enterprise (which we stressed already, and we think that it is one of the simplest ways to define a legal status of social enterprise). The most occurring situation is to specify a social purpose for the enterprise and limit possibilities to distribute profits and surplus assets.[230] On the other hand, we can argue that this is not always possible, however, and, even where possible, it is also often feasible to remove or change such alteration.

Moreover, we already mentioned that ESELA has identified three main types of legal forms used by social enterprises, namely: non-profit organizations; co-operatives; and share companies.[231] From the research of concrete countries, we see that this categorization can be slightly different, depending on the national legislation of particular countries. Practically, there can be other legal forms (e.g., partnership, mutual organization, or mutual society, etc.), which are quite widespread, but only in certain countries. Moreover, not all countries identify non-profit organization as a separate legal form. All mentioned companies have the main feature of hybridity, which balances between social mission and traditional profit-driven business approach. We also have to mention that one of the main aspects of research in this area is the research of transformations in conventional corporate law. Such transformations introduce new hybrid legal forms of entities. In such sense, traditional corporate law conception becomes more flexible. Moreover, in the case of social entrepreneurship, it includes legal types of entities that traditionally were not considered as types "suitable" for business. In such way this process leads to formation of new hybrid legal forms of enterprises (where such new legal regulations are applied), which are regulated not only by the principles of corporate but also other branches of law.

From the theoretical point of view, we see a major impact of welfare state policies on the development of legal preconditions of social entrepreneurship. Researchers emphasize that in the area of the further development of welfare state it could be an acceleration of the new public management with active privatization, or, second, it could be the growth of new public governance with greater welfare pluralism. Namely, the second scenario would allow greater involvement of non-governmental sector and the social economy as an intermediate alternative to public and private providers of welfare

230 "Social enterprise in Europe," *supra note,* 214.
231 *Ibid*.

(or social) services.[232] Therefore, the role of social enterprise could become even more significant.

In the next sub-chapters, we investigate in the comparative manner several aspects of social enterprise legal framework in particular countries. Namely, speaking about main problem investigated in this research – lack of legal certainty – we can investigate existing legal forms, and explore how they respond our operational definition of social entrepreneurship. Speaking in more detail, we can investigate existing for social entrepreneurship dedicated legislation together with situation of *de facto* social enterprises and WISEs in particular countries.

## 2.3. Dedicated social enterprise legislation as an option for successful sector development

We already emphasized that many countries lack an enabling framework for stimulating creation and development of social enterprises. Despite that, some countries are more advanced in this process. Therefore, we can ask whether some form of dedicated legislation is necessary for successful development of social entrepreneurship. In this sub-chapter, we evaluate existing social enterprise legal forms (statuses) in countries, where social enterprise legal framework is more advanced. The below-provided detailed information is interpreted as cases, which are important for possible search for best practices that could be applied in other countries and developed further.

*In Denmark,* a Law on Registered Social Enterprises (Dan. *L 148 Forslag til lov om registrerede socialøkonomiske virksomheder*)[233] was adopted by the Danish Government in June 2014. The Law aims to introduce a registration system for social enterprises that can provide the basis for a common identity. The registration system allows enterprises that meet certain standards for their operation and transparency to demonstrate their social characteristics to authorities, business partners and customers through an exclusive right to use the term "registered social enterprise" (RSV). To qualify, the undertaking must have a social purpose beyond the important element of operating a business. All undertakings that want to register as RSVs will be subject to several special requirements for their management as well as to restrictions on the dis-

232 Hulgård, Defourny, and Pestoff, *supra note*, 28: 8.

233 "L 148 Forslag til lov om registrerede socialøkonomiske virksomheder," Folketinget, published June 2014, accessed, 12 September 2020, https://www.ft.dk/samling/20131/lovforslag/l148/20131_l148_som_vedtaget.htm.

tribution of their profits. If an undertaking does not comply with the requirements of the Law, the Danish Business Authority is able to remove it from the register.[234] Some additional information on this topic we receive from expert interviews further in this work.

We can distinguish three main legal forms of undertaking that can obtain status of RSV: association (*forening*), foundation (*fonden*), and company limited by shares – CLS *(aktieselskab*).

In Denmark, there is no written legislation for association except for tax regulation. The status of association can be used not exclusively for social enterprise. Neither here is a requirement for the legal form to hold a minimum level of capital or assets. The distribution of dividends on share capital is not applicable to legal form. The objects set out in the association's articles of association may include a reference to a social enterprise social aim(s). If this is the case then the association should only pursue economic activity, which is consistent with the stated social aim. Generally, there are no legal requirements for associations to file reports or accounts. Many set out in the articles of association that the annual accounts of the association must be public available at the office or website of the association. Associations are not required to, but often have employees also as members of the association and as members of board.[235]

Another legal form – foundation - does not have any members and is "self-owning" meaning that surpluses and assets of the foundation cannot be distributed or refunded but only used for other objectives specifically stated in the articles of association. The Danish Act on Commercial Foundations[236] and Danish Act on Foundations and Certain Associations[237] regulate the legal form of foundation. Both legal forms (foundation and association) are not exclusively dedicated for social enterprise. Distribution of dividends on share capital is not applicable to this legal form.

As well as in the case of association, the purpose of foundation has to be set in articles of association, which also may include a reference to a social enterprise social aim(s).[238] Naturally, if it includes social clauses in its articles of association, its eco-

234 "A map of social enterprises and their eco-systems in Europe. Synthesis Report," *supra note*, 187: 58.
235 "A map of social enterprises and their eco-systems in Europe. Country Report: Denmark," European Commission, published October 2014, accessed 23 September 2020: 33-44, https://ec.europa.eu/social/BlobServlet?docId=13027&langId=en.
236 "Lov om erhvervsdrivende fonde," Retsinformation, published June 2014, accessed 20 September 2020, https://www.retsinformation.dk/forms/r0710.aspx?id=163656.
237 "Bekendtgørelse af lov om fonde og visse foreninger," Retsinformation, published September 2012, accessed 21 September 2020, https://www.retsinformation.dk/forms/r0710.aspx?id=138731.
238 *Ibid*.

nomic activities should be restricted to those included in a respective social clause. We already mentioned that the Danish Business Authority played an important role here to which foundations are obliged to submit annual returns. Additionally, participation of employees in board might be required in commercial foundations. We see that such regulation is linked more to the one, which regulates companies limited by shares. In non-commercial foundations, however, participation of employees in board is voluntary.

The third and most common legal form – CLS – is a form of company commonly used by for-profit organisations. The Danish Act on Public and Private Limited Companies[239] regulates this legal form. A CLS is typically established with commercial aims, to distribute profits to its shareholders. A company established with solely commercial aims would not be considered a social enterprise. However, a social enterprise can still use a CLS (whether public or private) as its legal form. The articles of association of a CLS can be drafted in a manner that provides the features of a social enterprise. A social enterprise that uses the CLS legal form is able to entrench certain features of its articles of association so they cannot be amended by a simple special resolution of the members. It is possible that the articles of association of a social enterprise could include a restriction or prohibition on paying dividends. Alternatively, the articles of association (or a shareholders' agreement) could contain a mechanism requiring the payment of dividends only in certain circumstances. Therefore, we could say that such asset lock mechanism could be suitable for social enterprises. It could be implemented based on a percentage of distributable profits. Social clause is the other aspect, which is important and which could be incorporated in the articles of association. If this is the case then the company should only pursue economic activity, which is consistent with the stated social aim. According to respective regulation, the CLS must file an annual return (the same as the foundation) at the Danish Business Authority. Moreover, speaking about the employee involvement system, we should mention that according to relevant regulation, paid members of staff of the company could be the members of the company's board.[240]

In conclusion, here we can say that in Denmark, a social enterprise can be defined as a company that has a social aim, sales products or services, reinvests any profits

239 "Bekendtgørelse af lov om aktie- og anpartsselskaber (selskabsloven)," Retsinformation, published July 2019, accessed 21 September, https://www.retsinformation.dk/Forms/R0710.aspx?id=209846.
240 *Ibid*.

back in the company, and is democratic and citizen oriented. Despite that, legislation of Denmark does not foresee any fiscal incentives attached to the legal status of social enterprise.

The purpose of the above-mentioned Law on registered social enterprises was to create the basis for a common identity for social economy enterprises. It does not give any immediate financial or legal benefits after registering as a social economy company. The advantage currently is that it becomes easier to communicate to the customers and other stakeholders that company works from social economy principles.[241] In Denmark, the role of social enterprise has so far been more or less disconnected from the issue of gaps in public sector service. Instead, social enterprises have almost entirely been used as means of including people with some form of disadvantage or disability into the ordinary labour market – in businesses or projects with no attachment to public service delivery.[242] Researchers note that the role of social enterprise in Denmark has so far been more or less disconnected from the issue of gaps in public sector service. Instead, social enterprises have almost entirely been used as means of including people with some form of disadvantage or disability into the ordinary labour market – in businesses or projects with no attachment to public service delivery.[243]

A social enterprise, speaking more simplified in Denmark must be defined as a company, which has a social aim, sales products, or services, reinvests any profits back in the company, and is citizen-oriented and democratic in relation to its surroundings.[244]

From the expert point of view (derived from interviews), we have to stress that what is more significant in Denmark, then in other Nordic countries, is the prevalence of the institutional foundations. Other countries also have this, but it is more dominant in Denmark. That is a good combination, because an industrial foundation often has a special mind set (although it is not a legal term, but in this context, it is important). Industrial foundations in Denmark operate for long years; therefore, they are very long-term-thinking owners. Having such industrial foundations and at the same

241 "Registreret socialøkonomisk virksomhed – RSV," Startupsvar.dk, accessed 20 January 2021, https://www.startupsvar.dk/registreret-social-virksomhed.

242 Mathias Bruhn Lohmann, "What's the future of social enterprise in Denmark and the UK?" published 22 October 2015, accessed 21 January 2021, https://socialinnovationexchange.org/insights/unusual-suspects-festival-whats-future-social-enterprise-denmark-and-uk

243 *Ibid*.

244 "What is a social enterprise," Startupsvar.dk, accessed 21 January 2021, https://www.startupsvar.dk/social-enterprise

time companies that are owned by industrial foundations is a very good combination. In such situation, there is an industrial foundation as a very long-term majority shareholder, and on the other hand – there is a stock market with many short-term investors. In addition to that, historically, Denmark (besides Sweden) has had very few serious crises and constantly growing economy. However, experts think that the concept of the social enterprise is not inherent in the Danish company law. "We become familiar with it because of the EU. However, at the same time, what is also often referred as asocial company is something that we knew very well, and we had for a long time."[245]

Moreover, the interviewed experts stressed that the idea of social company in Denmark has traditionally been covered in two different ways. "The first case is already-mentioned industrial foundation. We can say that it has the similar reason as a social company, because it is a business entity (or it can run a business entity), but at the same time it does not have a profit motive. The motive basically is to keep the enterprise running for eternity. Sometimes it is even more specific – such company seeks not to prosper, but to give best products and be good for society. Therefore, and industrial foundation can be considered as an entity used instead of social company in Danish law."[246] In addition, we can see that some aspects are (although indirectly) related with social enterprise very closely. "In Danish company law the profit motive has never been that clearly expressed. In this point, it can be considered as a difference from other Nordic countries. Other Nordic countries have provision in their company legal regulation saying that companies must pursue profit. In the Danish companies' regulation, the profit motive was never that important. The profit motive is desirable but not mandatory. Therefore, serving society without necessarily striving for profit is possible within the confines of the Companies Act."[247] Therefore, we can say that is why Denmark is a bit sceptical why other jurisdictions need a special social company form. We see that from special attitude in specific country depends and general opinion on necessity of some specific legal forms or legal regulation.

We already mentioned that such novelties as legal technology might also be considered as important factors for development of social entrepreneurship. From technological point of view, Denmark provides great conditions for starting businesses to register online (new company in Denmark can be set up online within a day,

245 Hansen, *supra note*, 147.
246 *Ibid.*
247 *Ibid*.

and at a very low price of 670 DKK / 90EUR). By registering a venture online, person instantly receives a company registration number and must choose concrete form of company. However, companies are not defined as a social enterprise unless they follow the above-mentioned characteristics.[248] However, interviewed experts emphasize that a wide operational autonomy for companies may have potential risk of abuse.[249]

We know that concrete rules are defined in the legal acts of every particular country that are analysed in this research. E.g., speaking about Danish legislation it can be stressed that already briefly mentioned Law on Registered Social Economy Companies defines that the registration scheme enables companies that meet certain standards for their business operations and transparency to document this to authorities, partners, and customers through an exclusive right to the term registered social economy enterprise. It means that companies that meet certain requirements may obtain registration under the mentioned Act. The registration is performed in the IT system established for that purpose. We have to stress one more time that the exclusive right to use the term registered social economy enterprise in the company's name and marketing is actually the only benefit that is provided for the social enterprise in this Act.

According to Article 4, legal persons who have their own registration number and are resident in this country or in another EU / EFTA country may be registered as a social economy enterprise under this Act. However, individuals and joint ventures established cannot be registered as a social economy enterprise under this Act. In this part, we meet a debatable issue whether natural persons are justly excluded from the possibility to become social entrepreneurs. On one hand, we might think that conditions have to be equal. On the other, looking into some of concrete preconditions to obtain status of social economy enterprise, some of the conditions are difficult to implement for natural persons.

One of the most important criteria for this research is how social aim of enterprise is legally defined. E.g., in Denmark concrete preconditions to obtain status of a social economy enterprise are defined in Article 5 of the above-mentioned Act. For a company to be registered, it must have a social purpose, be a trader; be independent of the public; be involved and responsible in its work and have a social management of its profits by applying its after-tax profit to reinvestment in own business; investment in or donations to other registered social economy enterprises; donations to non-profit or-

248 "What is a social enterprise," *supra note*, 244.
249 Hansen, *supra note*, 207: 685.

ganizations; or a limited payment of dividends or other forms of profit sharing between the owners of the enterprise.

Second part of the same Article clarifies some of the aspects mentioned in the first part. Precisely, owners of capital or a group of owners of companies registered under the Act shall be entitled to receive only a total distribution in the time they have owned the company, corresponding to the initial contributed capital plus a reasonable annual return on the initial contributed capital. What can be considered a reasonable return is based on a concrete assessment. In any case, an interest rate is not reasonable if the annual interest rate exceeds the official discount set at any time plus 15 per cent or more than 35 per cent is paid out of the company's profit after tax in dividends. Any dividend payments must be made within the framework of the dividend rules that the company is subject to under other law or agreement. Therefore, we can see that Danish legal regulation of the above-mentioned social enterprise aspects are quite clear and distinguishing moments that respond our operational definition.

We see that profit distribution of the social economy enterprise is quite limited and implemented under the strict rules. We can think that it is one of the complex reasons why the status of a social entrepreneur cannot be granted for a natural person who in the most cases is a single owner of the whole complex of its business, and its capital is not limited by shares.

There are several other rules related with the strict distribution of profits, namely, rules regarding management body commitments and reporting. The company's central management body is responsible for the fact that the factual information provided at registration or later reporting is correct. If there is a subsequent change in these conditions, the change must be registered no later than 2 weeks after it has occurred. The central management body of the registered undertaking is obliged to deregister an undertaking, which no longer meets the conditions of the social economy enterprise (Article 7). Therefore, it is important to admit that legal certainty in this area is quite clear, covering main aspects of the functioning of social enterprise.

Legal environment also covers and other aspects from the practical point of view. As one of such practical aspects can be distinguished reporting obligation. The rules regarding reporting set the obligation for a social economy enterprise to present an annual report in accordance with the Danish Financial Statements Act.[250] In

250 „Bekendtgørelse af årsregnskabsloven. LBK nr 838 af 08/08/2019," Retsinformation.dk, published August 2019, accessed 24 September 2020, https://www.retsinformation.dk/eli/lta/2019/838

addition to the requirements for the annual report provided by the Danish Financial Statements Act, a registered social economy company must report annually on the submission of the annual report the specifications of the total remuneration to current and former members of management for their function distributed to each management body as well as any remuneration to the company's founders and owners. It also must report on the agreements concluded with related parties; cash and other assets distributed or distributed by the enterprise's assets. It also needs to be emphasized that a social economy company must report how fulfils its social purpose, how it is independent of the public sector, and how the company is involved and responsible in its activities (Article 8). The same Article 8 obliges a registered social economy company to report on dividends paid and a calculation showing the return on the invested capital.

It means that a social economy enterprise besides the ordinary obligation set for all enterprises has additional reporting duties. From one side we can consider it as an administrative burden. However, it seems that a strong determination to fulfil a social purpose overcomes these and other kinds of obstacles.

To control fulfilment of the above-mentioned requirements the Act sets the rules on penalties. An enterprise's unlawful use of the term registered social economy enterprise may be fined. In addition, violations regarding handling of the company's after-tax profits and violations regarding social handling of the profits and handling of surplus on dissolution or distributions on capital reduction can be penalized with a fine (Article 17). This and all other above-mentioned rules show that in Denmark, companies registered as social enterprises can be quite certain about their duties, rights, and obligations. However, expert from the Danish Business Authority explained that particularly, there is no control when the company register as a socio-economic enterprise. The registration is made by using and IT system where companies type in their relevant information. The status of a socio-economic enterprise is granted automatically after the registration. After the registration, the Danish Business Authority performs random checks how companies comply with the requirements set in the Act. The most important part of the control is the annual report control. According to the Act, the socio-economic enterprises have so fill in specific information in their annual reports, regarding their activity as a social enterprise. The Danish Business Authority checks this information. However, the checks are performed randomly. There is no systemic check of the information provided by all socio-economic enterprises. There are also companies that fail to send in their annual reports. Then the mark of socio-economic

enterprise for these companies is revoked.[251] It means that regulatory situation of social enterprise balances between strict regulation and self-regulation. Whether this practice is good or should it be applied (multiplied) in other countries is difficult to say. Nevertheless, when considering some concrete model as an example, legislators should have in mind socio-economic and cultural environment in particular country.

We mentioned that not only companies limited by shares could be registered as a social enterprise. In Denmark, association and foundation are also quite common legal forms used by social enterprises. Beside the mentioned aspects of regulation, association in Denmark can be considered as a voluntary association, which is not registered. Another common form is a non-commercial association, which can engage in commercial activities to support their purposes and are required to register with the Danish Central Business Register if they either engage in commercial activities, have employees or receive support from public bodies. These are also called "Self-owning" institutions (associations that are comparable with foundations but exempt from the legislation on foundations).

On the other hand, commercial associations with limited liability carry out business for the promotion of the personal financial interests of its participants. They are required to be approved and registered by the Danish Business Authority. These commercial associations are not used by social enterprises in Denmark.

Here we can add that according to some expert opinion,[252] there are not so many differences between social enterprises and other CLS, since social enterprise in Denmark can have any of company forms. It means that company can register as a private limited company or a public limited company; then it only additionally needs to register as a social enterprise. The reason for registration as social enterprise is company's willingness to show to its customers that it is active in this social area and strives to reach more customers because they associate such company with its interest in social mission. Actually, there is very little focus on this area among academics in Denmark.

In 2014, an entrepreneur company was introduced in Denmark; however, it was abolished in 2019. It was invented based on the German company law model. "The official reason was that there was too much fraud, but in reality, it was very hard to come to such conclusions. Therefore, as the main reason could be considered a pressure from auditors because entrepreneur companies were not obliged to perform annual au-

251 Emil Bach Worsøe, interviewed by Tomas Lavišius, Copenhagen, September 25, 2020.
252 Lilja, *supra note*, 149.

dits."[253] This example shows how the wrong opinion can change the will of the legislator. In result, now it is comparatively difficult to start a business for a beginner entrepreneur because of high minimum capital requirement. There is an ongoing discussion whether there must be a lower capital demand, but on the other hand, more control on the fulfilling the criteria foreseen in the Danish Companies Act. Moreover, in Denmark 90 percent of private limited companies can get the exempt from auditing, based on the annual turnover. On the top of that, Article 99 of the Danish Financial Statements Act[254] sets the requirement for bigger companies (public limited companies) to have a CSR agenda statement in their annual report. If we talk about private limited companies, there are no demands in that regard.

Experts admit that by the time when the Act on Registered Socio-economic Enterprises was invented, it was not usual to include the information on social activities in the annual reports. Therefore, the Act had this good intention. However, nowadays it partially loses its general purpose, because lot of companies becoming more and more socially- or ecologically conscious (with or without the status of socio-economic enterprise). Nevertheless, we could say that the Act on Registered Socio-economic Enterprises was a stairway to a higher level of awareness and information: "No benefits are applied for social enterprises. Of course, they have a right to use a name of socio-economic enterprise. Moreover, other types of companies, even if they do not register for the status of socio-economic enterprise, they voluntarily include in their annual reports information on social activities."[255] It can be added that Denmark was one of the front-runners in this area. About 10 years ago, Denmark started introducing the reporting requirement, and later on introduced registration of socio-economic enterprises. At that time, Denmark was trying to do many new things. However, not much is happening now as it used to be in this area. One of the newest initiatives that can be mentioned is that in the new so called Corporate Governance Code (Recommendations for Corporate Governance)[256] listed companies are encouraged to adopt a corporate purpose where they have to admit how they will manage not only shareholders interest but also and other stakeholder interest. That could be a quite interesting new development. It was the initiative of the Government, together with the initiative on the CSR reporting.

253 *Ibid*.
254 "Bekendtgørelse af årsregnskabsloven," *supra note*, 250.
255 Lilja, *supra note*, 149.
256 "Recommendations for Corporate Governance," Committee on Corporate Governance Denmark, accessed 22 January 2021, https://corporategovernance.dk/recommendations-corporate-governance

It was a general step to encourage Danish companies to be more socially responsible. It was an opportunity for the companies who really wanted to show that they were really committed. In this way, they could show that by adopting this registration regime.[257] Denmark chooses to adopt a flexible instrument – registration, allowing different types of companies to make use of this legal regulation. The solution was rather well thought out and quite innovative. The reason why it was not very popular probably is that it was not really promoted enough: "The lack of promoting the new regulation was the main reason why it was not so attractive for companies. However, the number of socio-economic enterprises increases slowly. They have gained their reputation. Especially the municipalities in Denmark quite actively engage with these companies. Municipalities set the social purpose requirements in public procurement, and this regime of registered socio-economic enterprises seems to be very helpful because it is a very easy way to check whether the company has a social purpose."[258] Therefore, the municipalities are the main actors that encourage companies to register as socio-economic companies. Therefore, we can say that it is kind of benefit for companies, because otherwise it would be only an extra reporting requirement with no benefits at all.

Speaking about the results of such projects as the idea of socio-economic enterprises in Denmark, we can add that the main idea was to create some kind of mark, so the society knows that this enterprise is a social enterprise. It is a voluntary scheme; therefore, any enterprise can choose to register to get this mark, as long as they do line-up with the criteria. In 2018, the Danish Business authority performed a survey and interviewed socio-economic companies and some of the government agencies that dealt with these enterprises. At that time, the conclusion was that the introduction of the registration scheme had less impact than it was expected when it was created. The main reason for that is that the legislation provided only a mark (label) system and no additional benefits beside it.[259]

From expert interview we found out that the project did not have an impact as expected, the numbers of socio-economic enterprises are constantly growing slowly. Speaking about the legal form – most of those enterprises are societies. Back in 2018, the conclusion was made that there was no need for any amendments: "We think, however, that more awareness on socio-economic enterprises was needed. So, as the main

257 Sørensen, *supra note*, 150.
258 Sørensen, *supra note*, 150.
259 Worsøe, *supra note*, 251.

problems could be distinguished the lack of information and no real (or at least no direct) benefits for socio-economic enterprises."[260]

Looking into regulatory environment of social entrepreneurship, one of inevitable aspects is the consideration of concrete legal forms suitable for social enterprise. It can be important because of several reasons. First, as we emphasize throughout this research an importance of legal certainty, the question of legal forms is directly related with question of legal certainty. Second, in addition we have to consider whether existing legal forms are suitable for legal enterprises. Here we can stress in advance that there are several possibilities (which are going to be evaluated during this research). First, whether countries adopt special legal regulation for social or allow to use existing legal forms of entities. Second, there is a possibility to have a registration status of social enterprises regardless legal form of entity. Third, the situation may occur when social enterprise is legally not defined at all and operate only as regular company (entity), which socio-entrepreneurial identity cannot be spotted looking into its legal form. In addition, we can state in advance that all above-mentioned possibilities exist in different societies. However, which one is best suitable for social enterprises, is a question of systematic evaluation.

The other example of dedicated legal regulation of social entrepreneurship is recent Latvian legislation. Latvia adopted its Social Enterprise Law[261] in 2017. Therefore, Latvia was the first Baltic country, which introduced social entrepreneurship regulation in a sense of our operational definition. The Law provides that a social enterprise is a limited liability company which in accordance with the procedures laid down in this Law has been granted the status of a social enterprise, and which conducts an economic activity that creates a positive social impact. It can be provision of social services, formation of an inclusive civil society, promotion of education, support for science, protection and preservation of the environment, animal protection, or ensuring of cultural diversity, etc.

The Law grants a social enterprise status to a limited liability company if the objectives defined in its articles of association conform to the purpose of the Law and the meeting of its shareholders has taken a decision to acquire the status of a social enterprise. The profit of a social enterprise cannot be divided between the members but

260 *Ibid*.

261 "Social Enterprise Law," Likumi.lv, published October 2017, accessed 23 January 2021, https://likumi.lv/ta/en/en/id/294484-social-enterprise-law.

has to be invested to achieve the objectives defined in the articles of association. Moreover, to acquire the status of a social enterprise, the enterprise shall ensure conformity with one of the following requirements. Whether representative of the target group is involved in the executive body or supervisory body of the enterprise, a representative of the target group or a representative of an association or foundation representing the target group, or an expert of the specific field is involved in the advisory body of the enterprise (if such is established).

However, we must mention that this new legislation has left other legal forms that could be potentially treated as social enterprises behind the newly established status. Associations and foundations established to perform public benefit activities cannot obtain the status of the social enterprise. To be allowed to use benefit of the social enterprise associations and foundations have to register or obtain a majority of shares in a limited company, which has a social enterprise status. It is obvious that in some cases it can be rather costly. On the other hand, the benefits of a social enterprise can pay off. Section 8 of the Law defines types of benefits available to social enterprises. E.g., social enterprise should not include some expenses in the base taxable with the enterprise income tax (purchase of such assets that serve for attaining the objectives defined in the articles of association of the social enterprise; ensuring of social integration measures to persons belonging to the target group, etc.). Moreover, amendments and changes in other laws followed the Social Enterprise Law. E.g., changes in Latvian Public Procurement Law[262] granted social enterprises the status of reserved contract subjects.

Speaking more detailed about legal forms suitable for social enterprise in Latvia, it has to be stressed that despite new legal regulation social enterprise is still quite new concept in Latvia. However, most of this kind of organisations are developing fast, raising interest from stakeholders in different sectors. As in the most of other countries, different social movements existed in Latvia in the middle of the 19th century. However, modern social enterprises began to develop in the last decade of the 20th century when activities of associations and foundations became widespread. Although with some shortcomings, the Social Enterprise Law introduced generally new approach to legal status of social enterprise.

According to new Social Enterprise Law, any limited liability company can get

262 "Publisko iepirkumu likums," Likumi.lv, published December 2016, accessed 23 January 2021, https://likumi.lv/doc.php?id=287760.

the status of social enterprise if it performs operations with a positive social impact. This can be providing of social services, creation of an inclusive civic society, promotion of education, support of science, environmental protection and conservation, animal protection, or safeguarding of cultural diversity and work integration. The legal form is regulated by the Commercial Law[263], and by above-mentioned Social Enterprise Law. The social goal has to be set in accordance with the Law and integrated into articles of association of the social enterprise. In this case, large part of social enterprises in Latvia would be considered as WISEs.

Limited liability Company operating as social enterprise has no restrictions regarding ability to engage in economic activities. It employs staff, but additionally it has the right to attract volunteers to perform tasks other than its main operations, managerial duties, and accounting. Moreover, the Social Enterprise Law sets the rule that enterprise's employees or target group individuals must be involved in the enterprise's management. However, the Law does not specify the ways to do it, thereby allowing the enterprise's owners to decide on the best and most effective mechanism, which must form part of the statute. There can be situations when a target group may not always be involved in decision-making for objective reasons. In such situation, the involvement of the target group could be ensured by, e.g., involving a non-governmental organization representing the target group or experts of the particular field in the management of the social enterprise. In any case, the company's profits are reinvested in the pursuit goals defined in its articles of association.[264]

Because after the Social Enterprise Law came into effect the relationship between de facto and de jure social enterprises became quite complicated, it has to be stressed one more time that the Social Enterprise Law does not oblige the existing associations and foundations to establish a new limited liability company and/or stop economic activity. It is left to decide by the company itself, which way to choose and how to continue operating strategically. Therefore, it should be noticed that in such case associations and foundations have two potential directions within the scope of social enterprise.

The first option is to establish a new limited liability company. Then the current

263 "Komerclikums," Likumi.lv, published January 2002, accessed 23 January 2021, https://likumi.lv/ta/en/en/id/5490

264 "A map of social enterprises and their eco-systems in Europe. Updated Country Report: Latvia," European Commission, published September 2018, accessed 23 January 2021: 28-29, https://ec.europa.eu/social/BlobServlet?docId=20564&langId=en.

social enterprise activities of an association or foundation are transferred to the new limited liability company. The second option is to perform economic activities as separate projects. If the economic activity does not reach a significant proportion or is transitory (based on specific non-permanent projects), there is no need to establish a limited liability company. Since the economic activity is one of the most essential criteria for identifying a social enterprise, according to new Social Enterprise Law associations and foundations are not considered appropriate for obtaining social enterprise status because of the economic activity restrictions set for these legal forms.[265]

Several next examples could be partially considered as social enterprise-related legislation. We distinguish it as social enterprise-related legislation because it was not created having in mind our operational (or similar) definition of social enterprise. However, the existing legislation distinguishes social entrepreneurship legislation in furtherly-discussed countries in comparison with those countries, which have only legally recognized form of social enterprise – WISE.

For example, Austria has a variation of traditional legal form of limited company – a public-benefit limited company (*gemeinnützige GmbH or gGmbH*) is the one that is the mostly close to general understanding of social enterprise. A public-benefit limited company is basically regulated by the Law on Limited Liability Company (*GmbH-Gesetz*)[266] and it is by law a conventional enterprise. Therefore, the economic activity is a core goal of the company. What has to be stressed additionally is that the law on limited liability companies does not rule the public-benefit purpose. Instead, the possibility for GmbH to be granted the public-benefit status has been developed in Tax law (*Bundesabgabenordnung*).[267] Moreover, such possibility is also offered to initiatives operating under other legal forms, such as foundations.

The above-mentioned Tax law declares that public-benefit purposes are those whose fulfilment promotes the general public. Promotion for the general public only exists if the activity is of benefit to the common good in an intellectual, cultural, moral or material field. This applies in particular to the promotion of art and science, health care, child, youth and family welfare, care for old, sick or physically handicapped peo-

265 *Ibid*, 32-33.

266 "Gesamte Rechtsvorschrift für GmbH-Gesetz," Fassung vom 12.09.2020, accessed 25 January 2021. https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001720

267 "Bundesgesetz über allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes, der Länder und Gemeinden verwalteten Abgaben (Bundesabgabenordnung – BAO)," Fassung vom 12.09.2020, accessed 25 January 2021, https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003940

ple, physical exercise, popular housing, school education, upbringing, popular education, vocational training, monument preservation, nature, animal and cave protection, local history, homeland care and the fight against natural hazards. (Article 35). From this, we see that companies, fulfilling these purposes can be treated as social enterprises in operational sense.

Article 39 of the same law states that Exclusive funding (i.e., social enterprise) exists if the concrete conditions are met, such as company is completely independent from subordination; it does not pursue any other than charitable or church purposes; it does not seek profit (members may not receive any profit from shares), etc.

Moreover, the articles of association of company must expressly provide for an exclusive and direct activity for a charitable, benevolent, or church purpose and precisely describe this activity. In addition, Article 45 sets that if a company that otherwise fulfils the requirements for tax relief maintains an economic business operation, it is only liable for tax regarding this business if it is a means of achieving charitable, charitable, or church purposes. This prerequisite is given if the commercial business does not deviate from the purposes specified in the law; the articles of association, the foundation letter or any other legal basis of the company and the surpluses generated by the commercial business are benevolent for the benefit of the general public or serve church purposes. Assets belonging to the commercial business are, depending on the type of business, classified as business assets or as agricultural and forestry assets. Income generated from commercial business is to be treated like income from a similar business run with the intention of making a profit. From this regulation, we see that every case should be treated individually to treat company as a public-benefit company (i.e., social company) or not. In this sense, it is quite complicated. On the other hand, the government chooses such legislative tools to avoid possible abuse of the status of a public-benefit company.

One more exemption is applied regarding the pursuit of economic activities. The duty to pay for commercial business operations does not apply if it is an indispensable auxiliary business for achieving the beneficiary purpose. It can be achieved only if the economic business operations are shifted towards the fulfilment of non-profit goals, and it cannot be achievable other than through commercial business operations.[268]

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268 "A map of social enterprises and their eco-systems in Europe. Country Report: Austria," European Commission, published 2018, accessed 25 January 2021: 31-32, https://ec.europa.eu/social/BlobServlet?docId=20562&langId=en.

Normally several shareholders own a gGmbH, which could be public entities or other social enterprises. Therefore, an association can be the owner of one or more gGmbH. Shareholders of a gGmbH are involved in decision-making, especially in the general assembly. Additional supervisory boards, which represent other stakeholders' interests, are usually not needed. Therefore, democratic and participatory governance is limited in this legal form, making it less suitable for community or citizen-based social enterprises. In the last case, more suitable legal form could be an association.[269] Here we see that despite of the limitation of the possibilities of participatory governance, we think, that gGmbH is an example of the modification of existing legal regulation, which at least allows recognition of some sort of social enterprises, despite of this regulation shortcomings.

Quite similar situation is in Germany. In Germany share companies can qualify for tax-privileged status (*gGmbH*), if they pursue a social purpose (such as an aim related to culture, science education, health care) and do not distribute profit. In Germany, trading by a tax-privileged company is limited to directly furthering its social purpose, although this can be overcome by establishing a separate for-profit company to undertake trade and donate its profits to a tax privileged company. Therefore, gGmbH is a limited liability company, which is established to pursue public benefit (not-for-profit) goals. In Germany (and Austria), a private limited liability company (as well as associations) can be granted preferential treatment by the competent tax authorities if they are recognized as public benefit organisation (*gemeinnützig*). To obtain the status of a public benefit organisation, a company (GmbH) must pursue public benefit and use its assets for such tax-privileged purposes only. Profits may not be distributed to the shareholders of the GmbH. As understood by tax authorities, a public benefit purpose is directed towards the general public (not members of the organisation). Examples of eligible activities include the promotion of art and science, health care services, welfare services, services for the elderly or the disabled, social housing projects, education, nature conservation, disaster relief, development aid, consumer protection, sports. Such provisions are foreseen in the GmbH law.[270]

The other option could be the so-called *Unternehmergesellschaft* (*haftungsbeschränkt*) (Entrepreneur Company). We think that the obvious advantage in this sit-

269 *Ibid*.

270 "Gesetz betreffend die Gesellschaften mit beschränkter Haftung," accessed 25 January 2021, https://www.gesetze-im-internet.de/gmbhg/.

uation is that an entrepreneur company can be founded with a minimum capital of one euro and has generally the same features as a limited liability company (GmbH). However, it has to form assets reserve until it reaches minimal required capital level as a GmbH. An entrepreneur company can have tax-privileged status, just like a gGmbH. In this case, often the abbreviation "gUG (haftungsbeschränkt)" is used.[271] Abovementioned shortcomings regarding Austria also apply in general to Germany (despite the recent amendments to the legal framework). Regarding the capital requirements, however, a social entrepreneur can opt for a limited liability company known as

Speaking in more detail, we can say that in Germany a gGmbH is a limited company created to serve the needs of the society. A company is always a gGmbH when it pursues a common good purpose. This can be the case, for example, in hospitals, kindergartens or museums, which are often run as gGmbH. The legal form gGmbH is bound to the GmbH law just like a "non-profit" GmbH. As with a "normal" GmbH, the gGmbH share capital amounts to at least 25,000 euros. Of this, at least EUR 12,500 must be paid in as a cash contribution; the remaining amount may also be deposited as a contribution in kind. At the time of foundation, at least EUR 12,500 must have been paid into the business account. According to the above-mentioned GmbH law, the shareholders of the gGmbH are only liable with their individually contributed capital contributions, but not with their private assets. According § 4 of the GmbH law, if the company exclusively and directly pursues tax-privileged purposes in accordance with sections 51 to 68 of the Tax Code,[272] the abbreviation "gGmbH" can be used.

In order for a gGmbH to be considered as a social enterprise, a gGmbH must pursue a charitable or church purpose, which must be selfless, immediate, and exclusive. Profits may not be distributed to the shareholders. They only may serve the business purpose. In addition, all salaries are related to the work performed. Moreover, a beneficiary must be specified in the articles of association, and a "beneficiary" must also be recognized as "non-profit" (they can also be foundations, non-profit associations or other non-profit entities).

The "purpose" of the gGmbH must be precisely formulated in the articles of association. The founders also must explain how this purpose is to be achieved. The tax office decides based on the statutes whether there is a non-profit status. The purpose

271 *Ibid*.

272 "Abgabenordnung," accessed 25 January 2021, https://www.gesetze-im-internet.de/ao_1977/index.html#BJNR006130976BJNE014505301

of the company must then be classified by the legislator as "non-profit", "charitable" or "churchly". Only then can the legal form gGmbH be assigned.[273] The above-mentioned articles of the Tax Code define that as promotion of general interest can be considered in quite great variety. Therefore, it can vary from promotion of public health, welfare care, sports, nature conservation, to education, culture, development cooperation, equality, democracy, and civic engagement.

We see that the Law provides variety of activities that gGmbH can take to fulfil requirements of the activity of general interest. From this we can conclude that despite gGmbH is not a separate legal form, it is really suitable for social enterprises. On the other hand, requirement of the minimal share capital can be considered as the main downside of this legal form.

The tax office recognizes the status of general interest. When the company is founded, it checks whether the purpose of general interest can be accepted in the statutes. Then the non-profit status is temporarily awarded to the gGmbH. This means that in a three-year cycle, the purpose of general interest and its implementation are checked with the tax return, then subsequently accepted and provisionally awarded again for three years.[274]

The other example is Norway, which has a special branch of non-profit limited company (*ideelt aksjeselskap*). The non-profit limited company is a legal form that is specific for Norwegian limited companies. Such companies include in their statutes a set of rules regulating the return on investments and a strict profit return regime. Speaking legally, however, the non-profit limited company is not a separate legal form. Like other common corporations, it is subject to the Norwegian legislation for limited companies.

The legal form is regulated by the Public Limited Companies Act (*Lov om aksjeselskaper*).[275] The share capital must be at least NOK 30,000. The only place in the Law that indirectly distinguishes a non-profit limited company from traditional limited company is Article 2-2, which defines that if the company's activities are not intended to provide the shareholders with a financial dividend, the articles of association shall contain provisions on the use of profits and of the assets in the event of dissolution. It

273 "Was ist eine gGmbH? Die Rechtsform gGmbH: Definition und Bedeutung," Firma.de, accessed 25 January 2021, https://www.firma.de/firmengruendung/was-ist-eine-ggmbh/

274 *Ibid*.

275 "Lov om aksjeselskaper," published 1997, accessed 14 November 2020, https://lovdata.no/dokument/NL/lov/1997-06-13-44

basically indirectly means that if the company wants to act like a non-profit limited company, it has to include such provision in its articles of association. We already mentioned that legally speaking, the non-profit limited company is not a separate organisational form. Like ordinary corporations, it is subject to the Norwegian legislation for limited companies.

Here we could also mention the case of Lithuanian regulation, which however is specific for several aspects. First, Lithuania has its legislation on WISEs, which has quite long tradition (discussed in detail in the following sub-chapter). Besides that, couple of years ago country's Government attempted to introduce brand new legislation on social entrepreneurship. We briefly mentioned that in 2015 Lithuanian Ministry of Economy adopted the Concept of the Social Entrepreneurship, which aims to define the main principles of the social entrepreneurship, identify the problematic areas, and determine general tasks to foster the development of the social entrepreneurship. The document does not define any specific legal form of the social enterprise yet, but it aims to evaluate the best practices of other European countries in legislation of the social entrepreneurship. According to the Concept, social business is a business model that, using the market mechanism, links profit making to social goals and priorities. It is based on the provisions of socially responsible business and public-private partnerships. It also applies social innovation. Social business encompasses three main aspects: entrepreneurship (continuous economic-commercial activity), social (pursuit of social goals) and management (limited profit distribution, transparent management). Derived from this definition, social business is directly related to permanent economic and commercial activities, whether providing services and / or goods for social purposes (housing, health care, assistance for the elderly or disabled, social inclusion of vulnerable groups, childcare, etc.) or producing goods or providing services in such a way as to pursue a social objective (social and occupational integration, enabling people who are disadvantaged due to low qualifications or social or occupational problems leading to exclusion and exclusion, etc.).

Moreover, the Concept states that social business must meet several main criteria. E.g., it has to carry out a permanent economic activity in accordance with its articles of association or other document; the resulting profits should be reinvested in accordance with pre-defined profit distribution procedures and rules in order to achieve the main objectives; it also should be managed by involving its stakeholders

with full independency from state and municipal institutions. [276]

We see that preconditions defined in the Concept are quite similar to those defined by the EC (and closely related with our operational definition). Therefore, we can think that it is a right direction of development. Moreover, the Concept of the Social Entrepreneurship can be evaluated as the firs soft law measure in Lithuania trying to define an operational definition of social enterprise. Although some provisions of the Concept are hardly applicable (i.e., involvement of stakeholders in the company's decision-making processes) to some legal forms. Therefore, whether it is not obligatory, it is quite important for development of the social enterprise legal framework in country, which could be easily applicable within the existing legal framework. Based on the definition in the Concept, Lithuanian Government prepared the Draft Law on the Development of Social Business (*Socialinio verslo plėtros įstatymas*).[277] With the introduction of this Draft Law Government attempted to define the criteria and forms of social business on the level of law. It also was dedicated to establishing support measures in order to encourage social economy.

Despite the Draft Law does not have a legal significance, it can become a base for further legal regulation of social enterprise in country, depending on the political will. Therefore, we can mention some aspects, defined in the Draft Law. As defined by the Draft Law, a social enterprise is a legal entity (small or medium-sized enterprise) which strives a social aim. The social enterprise should receive its income from the commercial activities on the market. A social enterprise could distribute only 20 percent of its profits to shareholders. Therefore, a major part of its profits should be reinvested in its social aim. As a social aim that has to be sought by the social enterprise, the Draft Law defines a variety of activities: integration and promoting the employment of the disabled, pregnant women, parents (adoptive parents), guardians of a child, caregivers who are alone raising a child (adopted) under 8 years and persons caring for patients or disabled family members with identified special ongoing care or ongoing care needs; persons of retirement age; persons serving and having served custodial sentences; the long-term unemployed, etc.

The social impact shall also be pursued through activities that address the social problems of society in at least one of the spectrum of areas, such as protection of biological diversity, promotion of culture, public health care, education, social services,

276 "Socialinio verslo koncepcija," *supra note*, 2.
277 "Lietuvos Respublikos socialinio verslo plėtros įstatymo projektas," *supra note*, 3.

working conditions for disabled, etc. We see that the vast spectrum of possible activities could really create a niche for social enterprises – from integration of disadvantaged until the cultural activities or protection of environment.

By the regulation of the Draft Law, it was meant to be defined that any small or medium-sized enterprise can apply for the status of social enterprise if it sets the above-mentioned goals in its articles of association. Therefore, it could be technically any limited liability company, regulated by the Law on Companies,[278] (regardless of if it already has a status of WISE or not). The other for social enterprise available forms (within the scope of the regulation of the Draft Law) could be association, regulated by the Law on Associations;[279] foundation, regulated by the Charity and Support Foundations Act;[280] or public establishment, regulated by the Law on Public Establishments[281]. However, the Draft Law limits the possibility for state government and municipal governments to establish a social enterprise. State and municipal institutions can own less than 50 percent of shares (or votes) in social enterprise.

It has to be noted that the same (above-mentioned) legal forms are suitable and for operation of WISE's (with exemption of associations, which are not allowed to obtain status of a WISE), and for *de facto* social enterprises. Therefore, they will note be discussed separately in more detail.

Despite the initiatives foreseen in the Draft Law, it might or might not be adopted by the Parliament. The question remains, what is the relationship between the existing legal regulation of WISE and the provisions foreseen in the Draft Law? Up to date it is difficult to say whether some legal innovations will be introduced in the process of establishing and maintaining social business entity. However, we can say that inaccurate, unclear, or excessively narrow legal frameworks can harm social enterprises, by causing confusion or failing to capture the array of entities that may qualify as social enterprises in a given context. Legislators can create a dedicated and appropriate legal

278 "Lietuvos Respublikos akcinių bendrovių įstatymas," TAR, published July 2020, accessed 24 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.E22116F1B0E0/asr

279 "Lietuvos Respublikos asociacijų įstatymas," TAR, published January 2004, accessed January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.FF00B0EA2F0E/asr

280 "Lietuvos Respublikos paramos ir labdaros fondų įstatymas," TAR, published March 1996, accessed 24 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.D2D24C160EB1/asr

281 Public establishment is an unusual legal form in the context of legal regulation of entities in other countries. According to the Law on public establishments, is a public legal entity with limited civil liability aiming to satisfy public interests by carrying out activities in the fields of education, science, culture, health care, environmental protection, sports or other activities useful to society: "Lietuvos Respublikos viešųjų įstaigų įstatymas," TAR, published July 1996, accessed 24 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.1E52802BE548/asr

framework by adapting existing legislation on specific legal forms or passing new laws. However, less rigid normative tools should also be considered, as they may be easier to adapt to new developments in the field[282].

However, it is important to stress that the Draft Law, even if it has not reached the step of the reading in the Parliament, derives logically from two aspects. First, this initiative was the first serious attempt to fix the already discussed failures in the regulation of WISEs in Lithuania. Second, this initiative logically derives from also already discussed Concept of the Social Entrepreneurship, which was the first document in country that spoke about social enterprise as it is defined in the SBI and, which complies with the operational definition of social enterprise in this research.

Speaking about fiscal incentives, on one hand, we can speak about the incentives foreseen in the draft law, on the other, the ones that are foreseen in the current law on WISEs. In the new draft law, there are several incentives extinguished, including the right to receive state assets based on lending; the right to receive public services in business incubators, business information centres and other institutions; different forms of promotion established by municipal authorities, including relief from local charges, etc.

Moreover, it has to be mentioned that Lithuanian Law on Public Procurement[283] already has provisions on reserved contracts. According to Articles 23 and 24 of the Law, the contracting authority may lay down in the procurement documents conditions allowing only suppliers with the concrete status to participate in the procurement. Such suppliers can be WISE's, or other entities that employ disadvantaged. Moreover, the right to participate in the procurement of certain services can be reserved for supplier that provides health, social and cultural services and it is main purpose of supplier activities. In such case, its profits may be used only for the purposes of the company's activities. Profits may be distributed or redistributed only according to the factors of participation in the management of the company. Its management or shareholder structure should be based on the principles of ownership or participation rights granted to employees in the management of the enterprise or requires the active participation of employees, service recipients or stakeholders in the management of the enterprise.

We have to emphasize that proposed draft legal framework is only hypothetical

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282 *Boosting Social Enterprise Development: Good Practice Compendium, supra note,* 215: 23.
283 "Lietuvos Respublikos viešųjų pirkimų įstatymas," TAR, published September 1996, accessed 24 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.C54AFFAA7622/asr

and so far, it does not have any legal consequences. However, analysing its contents we can state that this regulation (if it were adopted) could bring more clarity in the national legal framework for social entrepreneurship. The existing regulation of WISEs is inadequate and out-dated, and has certain flaws, which are discussed in the next sub-chapter.

Summarizing the sub-chapter, we see that there can be distinguished several patterns and (possible) problematic aspects. The above-mentioned countries, by providing dedicated legal status for social enterprises, first of all solved the problem of legal uncertainty. We can state that legal recognition of social entrepreneurship exists in mentioned countries whether thank the definition in dedicated laws, or thank the criteria, set in other (general) laws, as it is the case in Austria and Germany. All mentioned cases could be considered as a good practice, with only few shortcomings. One of the most obvious shortcomings is the criteria of the limitation, which legal form (usually – limited company) can obtain status of social enterprise and use its benefits to full extent. However, having in mind that in any case a form of limited company by its origin is the most versatile form suitable for commercial activity, we can think that it is the best form (with some possible modifications) having in mind that social enterprise has to perform an economic activity. Having in mind the aspect of social purpose, in such case, the social purpose we think cannot be presumed and has to be included in the articles of association of such companies. We have seen that laws provide such criteria by defining, which activities of such enterprises can be considered as their social mission. In some countries such activities are quite general, and in some (like Germany); they consist of a strictly defined list. The third aspect of an inclusive governance is probably the most problematic speaking about above-discussed legal forms. Generally speaking, traditional forms of limited companies do not foresee schemes of stakeholder involvement into company's governance. It is theoretically possible to use such legal instruments as employees' shares, etc. However, it is not the same what is meant to be defined in our operational definition. Therefore, we think that this aspect could be elaborated more precisely. One of the possible ways to do so, we think, is n introduction of additional codes of conduct (some sort of soft-law measures), which could help develop flexible/voluntary-based forms of stakeholders' involvement into companies' governance. Theoretically, it could become an important aspect of social innovation. We already noticed and agreed with other authors that social innovation allows and creates possibilities to connect economic, environmental and social issues to offer new

social values in the environments where the priority of the company's operations is social value instead the profit maximization. All of this can be called "social demand innovations" that address social demands traditionally not addressed by the market.[284]

From the theoretical perspective, we already know that the term social value covers range of activities at different societal levels (within the activities of non-governmental sector, traditional or social business) at the same time crating other values (e.g., aesthetic, cultural, democratic values, etc.).

In this context, we have to mention that several other countries have put the regulation accent on WISEs, which, we know, not necessarily meet the criteria of social enterprise as they are set in our operational definition. To some extent, it covers and use of traditional limited company form for the purpose of WISE. Those cases are discussed in the next sub-chapter.

## 2.4. WISE – the only unifying feature or obstacle for progress?

We have to stress one more time that distinction between a WISE and limited liability company, which operates as a social enterprise sometimes is very vague. First of all, the most of WISEs operate as limited companies. Second, some of them meet the operational criteria of social entrepreneurship and can be qualified as social enterprises based on legislation discussed in the previous sub-chapter. However, we think that in the most cases limiting of social entrepreneurship activity spectrum only to the spectrum of activity of the WISE limits possibilities, which the sector of social entrepreneurship otherwise would be able to exploit.

We should start by stating that all of in this research discussed countries have developed some legal frameworks (legal recognition) for WISE. We do not speak necessarily about legal status, which should be obtained by a special procedure, but also about the cases, which we can recognize, from the social mission or the specifics of activities of particular entities.

In Sweden WISEs have a slightly different status to other social enterprises, so they are basically recognized by the Swedish Government. However, as WISEs do not represent a specific legal form they are still governed by the same laws as other enter-

284 Jablonski, and Marek Jablonski, *supra note*, 117: 89 and 108.

prises of the corresponding legal form.[285]

Experts notice that: "because there are no specific legal structures of social entrepreneurship or social enterprises or specific certifications or other markers, it is not possible to quantify or categorize this phenomenon in Sweden today."[286] Despite that fact, they identify different "versions" of social entrepreneurship and social enterprises that are based on "sub-cultures in which initiatives largely take on norms and practices already established in the non-profit sector or the business sector or by co-operative organizations <…> that often focus on work and integration and social purpose businesses."[287]

The most commonly used legal forms adopted by social enterprises are the co-operative, non-profit association and limited company, which are adapted to provide for a social purpose in their constitutions. As mentioned, three main legal forms for social enterprise in Sweden are economic association (*ekonomisk förening*), non-profit association (*ideell förening*), and limited company (*aktiebolag, AB*). It means that all these companies can operate as WISEs. E.g., an economic association is regulated by the Law on Economic Associations (*Lagen om ekonomiska föreningar*).[288] If an economic association registered as a WISE there is only very restricted distribution of dividends to members. Members of an economic association are often employees. Many social enterprises are owned and run by the employees.[289] The other example from this context – a limited company – is a form of company commonly used by for-profit organisations. A social enterprise can use a private limited liability company as its legal form. The articles of association of a limited company can be drafted to provide for the features of a social enterprise. The Law on Limited Companies[290] (*Aktiebolagslagen*) regulates this legal form. There are no restrictions on distribution of assets unless the articles of association include such limits. If private limited companies registered as a

285 "A map of social enterprises and their eco-systems in Europe. Country Report: Sweden," European Commission, published October 2014, accessed September 14 2020: 5, https://ec.europa.eu/social/BlobServlet?docId=13277&langId=en.

286 Lundgaard Andersen, Gawell, and Spear, *supra note,* 31: 45.

287 *Ibid*.

288 "Lag (2018:672) om ekonomiska föreningar," Riksdagen, published May 2018, accessed 24 October 2020, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2018672-om-ekonomiska-foreningar_sfs-2018-672.

289 "A map of social enterprises and their eco-systems in Europe. Country Report: Sweden," *supra note*, 285: 26-31.

290 "Aktiebolagslag (2005:551)," Riksdagen, published June 2005, accessed 24 October 2020, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/aktiebolagslag-2005551_sfs-2005-551.

WISE, there is only very restricted distribution of dividends to members.

In terms of WISEs, and according to Sofisam (a joint initiative between the Agency for Economic and Regional Growth, the Social Insurance Agency, and the Public Employment Service which provides a range of information regarding WISEs), there are many different forms of governance that are used. These can be broken down into roughly four types of organisations (although new and innovative types constantly emerge and, in some cases, a combination of different structures is used). Therefore, WISEs in Sweden operate whether as social work cooperative (*sociala arbetskooperativ*), non-profit organization (*ideella organisationer*), staff cooperative (*personalkooperativ*), or a community enterprise (*gemenskapsföretag*).

Social work cooperative is one of the most common form of WISE in Sweden and is generally set up for the benefit of most of the members. The board is generally set up of members but may be complemented by representatives outside the cooperative. Non-profit organization in the sense of WISE may include religious organisations and social organisations targeting particular groups (e.g., disabled, etc.). Worker cooperative is quite similar to social work cooperative. This includes organisations involved in rehabilitation and other work integrating activities. Such enterprises generally have a high degree of participation from the individuals that they target. Finally, community enterprise is usually understood as non-profit organization that sets up a social enterprise to serve interests of local community.[291] From the above-mentioned information we can draw an observation that this form emphasizes the aspect of the staff participation in the governance of such organization, which can be seen as a positive legal precondition for social entrepreneurship in the terms of participatory aspects. However, as with the other models of WISE such entities limit their activity only to persons' integration.

Economic association in Sweden can be recognised as a WISE if it has the aim to integrate people into society and into a working life, creates involvement by co-workers, uses its profits for the furthering of its aim and is independent of public authorities. An economic association can pursue virtually any purpose subject to the requirement that there should be a common, economic, social, or cultural need or interest among the members of the association. In this light, the entity should be run for the mutual

291 Additional information on worker integration cooperatives and relevant challenges can be found in: Kristin Wiksell, "Worker cooperatives for social change: knowledgemaking through constructive resistance within the capitalist market economy," *Journal of Political Power*, May 2020, DOI: 10.1080/2158379X.2020.1764803

benefit of the members so that the benefit the members obtain will be caused by their participation in the business. Summarising we can say that an economic association must work for the sustainable development of its community. It also mentioned that economic association recognised, as a WISE must have as its primary aim the integration of target groups into working life. Any distribution of surplus capital is possible. However, in this case there is a requirement that it is not needed by the business of the economic association. There are no restrictions to trade.

The economic association operates on the principle, which require that share capital receive a strictly limited reward. Any distribution to members must be in the form of a dividend on their transactions/trade with the society. An economic association recognized as a WISE is only allowed to use its profits for the furthering of its aim.[292]

Another form of association – a non-profit association in Sweden is an organisation made up of a group of individuals, who have decided to come together for a particular purpose. An association can be recognised as a WISE if it has the aim to integrate people into society and into a working life, creates involvement by co-workers, uses its profits for the furthering of its aim and is independent of public authorities.

Because other forms of social enterprise are recognized indirectly, WISE is the only form, which has established requirements for its status it is mostly visible. It must have as its primary aim the integration of target groups into working life. Distribution of dividends on share capital is not applicable to this legal form. There are no other restrictions to an association's activities unless it is recognized as a WISE where it must have the aim to integrate people into society and into a working life, as well as create involvement by co-workers and only use its profits for the furthering of its aim. One of the most important sources of associations revenues are membership fees. An association can also seek donations or loans from its members, and it can issue bonds to its members. Dependent on the annual turnover of the association, it may have to file the annual report, accounts, and activity/management report with the Swedish Companies Registration Office.

As well as the association, the limited company can be recognised as a WISE if it has the aim to integrate people into society and into a working life, creates involvement by co-workers, uses its profits for the furthering of its aim and is independent

292 "A map of social enterprises and their eco-systems in Europe. Country Report: Sweden," *supra note*, 285: 26-31.

of public authorities. A limited company with restrictions on its distribution of assets can be registered as an *Aktiebolag (SVB)*, a special kind of limited company with limited profit distribution.[293] A company recognised as a WISE must have as its primary aim the integration of target groups into working life. It is required to have a capital of 50,000 SEK. In addition, in most cases the company will have to set aside assets for the stipulated reserve fund. There are no restrictions on ability to trade unless it is recognized as a WISE where it has to have the aim to integrate people into society and into a working life, as well as create involvement by co-workers and only use its profits for the furthering of its aim.

In *Finland*, the dedicated Act on Social Enterprise is created to define a status of WISE. However, social enterprises (here we have in mind – WISEs) have no different legal form that could distinguish them from other legal forms. According to the Act, the purpose of social enterprises is to create jobs in particular for the disabled and long-term unemployed. A social enterprise is a registered trader who is entered in the register of social enterprises.[294] Therefore, WISES are limited by the Act on Social Enterprise only to the field of work integration, and legally social enterprise entities in Finland act as WISEs.

Some experts emphasize that in Finland, there is a rich and established sector of social economy organizations. However, not all those organizations can be considered as social enterprise *per se*. Nevertheless, they have a legitimate role as a part of the welfare state. Such organizations as WISEs have an important role in the service delivery for specific special needs and areas.[295]

The Act on Social Enterprises (Section 3) defines that employment authorities may, within the limits of the national budget; provide support for the establishment of a social enterprise and the consolidation of its operations if the specific aim of the trading is to employ persons in a poor labour market position. Support can also be provided for some other corporation or foundation for the promotion and development of social enterprise under this Act. The support is further provided by Government decree. The provisions on employment subsidy granted to social enterprises are laid down in the Public Employment Services Act. The provisions on combined subsidy are laid down

293 "Aktiebolag med begränsad vinstutdelning (svb)," Bolagsverket, accessed 22 January 2021, https://bolagsverket.se/ff/foretagsformer/aktiebolag/starta/vinstutdelning-1.3169

294 "Act No. 1351/2003 on Social Enterprises," Finlex, published December 2003, http://www.finlex.fi/en/laki/kaannokset/2003/en20031351.pdf.

295 Lundgaard Andersen, Gawell, and Spear, *supra note,* 31: 58.

in the said Act and the Unemployment Security Act.

To be entered into register of social enterprises, a corporation, a foundation or another registered trader may on application be entered in the register of social enterprises provided that (Section 4) it produces goods and services on a commercial principle, at least 30 per cent of the employees in the company's employ are disabled persons, or at least 30 per cent of all employees are disabled and long-term unemployed, etc.

The above-mentioned status can be applied to different forms of legal entities: limited liability company (*osakeyhtiö*, LLC); cooperative (*osuuskunta*); and foundation (*rahasto*). In the case of LLC, its public good purpose must be provided in its articles of association. In addition, at least half of the profit must be used for its promoting public good purpose or developing the capacity for it. The same rule is applied to cooperatives and foundations – the primary objective of the social enterprise must be the promotion of public good.[296]

According to the above-mentioned Act on Social Enterprises, there are some possibilities for financial incentives. It means that the public employment services – within the limits of the national budget – can support the establishment of social enterprises (more specifically, WISEs – given the narrow focus of the Act). According to provisions of the Law, a social enterprise, which employs a disabled or long-term unemployed person, can receive wage-related subsidies as a compensation for potentially reduced productivity of the employee.[297] We can conclude that such situation is not unique, because mostly WISEs enjoy some level of state support for their mission on persons' integration. However, it hinders the competitive environment, which is obviously the downside of the WISE model.

The context of WISE regulation and its relationship with wider context of social enterprise recognition is quite well defined it the Latvian Law on Social Enterprises (already discussed in the previous sub-chapter). WISEs, despite wider legal recognition of social enterprise in the country, still remain an important part of social entrepreneurship sector. From the previous sub-chapter, we know that it is not obligatory for social enterprises in Latvia to employ individuals at risk of social exclusion. They may also promote the accessibility and quality of education, environmental protection, cultural

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296 "A map of social enterprises and their eco-systems in Europe. Country Report: Finland," European Commission, published October 2014, accessed 15 October 2020: 47-52, https://ec.europa.eu/social/BlobServlet?docId=13102&langId=en.

297 "Act No. 1351/2003 on Social Enterprises," *supra note*, 294.

diversity, social and health care, etc.[298] However, WISEs still make up a large and important part of social enterprise. On the other hand, we know that from all possibilities how social enterprises can operate WISEs represent only one possible way.

Generally, the main aim of WISEs would be to support improvement of the society's quality of life and to promote employment for groups at risk of social exclusion. However, WISEs, not like other social enterprises have to meet special criteria of persons' work integration. In WISEs, beneficiaries must represent at least 50% of the total employees. No less than 30% of total services must be provided for the target group intended to receive services from a social enterprise. The above-mentioned target groups include persons with mental disabilities; persons identified as having a poor family/person status; the unemployed who have dependents; the unemployed aged 54 and older and the long-term unemployed; the Roma; imprisoned individuals and those released from imprisonment; addicts; and several others.

In Lithuania, beside the already discussed initiative on the new Draft Law on Development of Social Business (not adopted) there exists legislation on social enterprises (WISE). The recognition of social enterprise as such started in Lithuania with the adoption of the Law on Social Enterprises (*Socialinių įmonių įstatymas*)[299] in 2004. The Law basically established the definition of a WISE. Despite the critics for the concept of WISE presented in this and other research, introduction of the general concept of social enterprise in Lithuania started quite early.

According to the current version of the Law, the purpose of social enterprises is to promote the return to the labour market, their social integration and reduce their social exclusion by employing persons of working age belonging to the target groups specified in this Law, whose ability to work has decreased due to disability, who are unable to compete in the labour market on equal terms (Article 2). According to Article 4, this law supports the employment of people of working age in social enterprises belonging to the following target groups:

- Disabled persons with a severe level of disability or disabled persons with a level of working capacity not exceeding 25 per cent, registered as unemployed with the Employment Service;
- Disabled persons with an average level of disability or disabled persons for

298 "A map of social enterprises and their eco-systems in Europe. Updated Country Report: Latvia," *supra note*, 264: 11.
299 Lietuvos Respublikos socialinių įmonių įstatymas," *supra note*, 6.

whom a level of working capacity of 30–40 per cent has been established, registered as unemployed with the Employment Service;

- Disabled persons with a mild level of disability or disabled persons, for whom a level of working capacity of 45–55 per cent has been established, registered as unemployed with the Employment Service.

The status of a social enterprise shall be granted if the legal person or its division applying for the status of a social enterprise meets the set of conditions provided in Article 8. We can mention some aspects in more detail. E.g., the objectives of a company have to be related with integration of persons belonging to the target groups. The enterprise also has to submit the plan of measures for the development of work and social skills and social integration of persons belonging to the target groups. This provision can be interpreted as an element of the social impact measurement. However, to consider it as a real social impact measurement, it has to be more advanced.

The other important provision is relating company's independence (which is important element according to our operational definition). It means that social enterprise (under provision of the same Article 8) should not be a state or municipal institution or body.

Based on the provided information we can say that legal status of WISE is quite similar to the one that is established in Finland. However, this regulation is criticized on the national and international level. According to Article 13 of the Law, a WISE can be granted a subsidy for wages and state social insurance contributions, a subsidy for the establishment of jobs for disabled workers and the acquisition of their work equipment, a subsidy for the adaptation of jobs for disabled workers and the adaptation of their work equipment, a subsidy for the training of employees belonging to the target groups, a subsidy for the adaptation of the working environment, production and leisure facilities of disabled workers, a subsidy for administrative expenses, transport costs and for assistant expenses. Moreover, according to the Law on Corporate Income Tax,[300] social enterprises are exempted from corporate income tax.

The above-mentioned critic of the Law is based on the fact that institutionalized WISEs are highly dependent on the state subsidies. A financial aid system for WISEs was originally set up to sustain their competitiveness in the market. Following the implementation of the Law, newly created "social enterprises" were indeed criticized for

300 "Lietuvos Respublikos pelno mokesčio įstatymas," TAR, published December 2001, accessed 23 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.A5ACBDA529A9/asr

taking advantage of the financial aid system by following the letter (i.e., hiring disadvantaged individuals) but not the spirit of the Law (i.e., creating social impact).[301] So far, the question of relationship between WISE and general social enterprise definition is the main problem in Lithuanian legislation, trying to define an operational definition of social enterprise in the country.

It has to be mentioned that stakeholder and employee involvement into management of social enterprises in Lithuania is quite under-regulated. There are not many options so far, and we see that such provisions could be included whether in the current Law on Social Enterprises (WISEs), or into other legislation. In addition, Article 43 of the Law on Companies foresees the possibility of the employee-shares. According to the article, the company may, if provided for in its articles of association, issue ordinary shares with the status of employee shares. We think that this scheme could be adapted and for the social enterprises. It could be important for several reasons; first, inclusion of employees and possibly other stakeholders in management of social enterprise is one of important components in our operational definition of social enterprise. Second, this could possibly have grater benefit in terms of quality of products/services that social enterprise provides, because involvement of stakeholders helps to elaborate better products/services. Third, the niche of social services, which typically are provided by the state and/or municipalities, could be opened for local communities that could participate (through form of social enterprise) in solving of their local social problems.

Of course, a separate question is the effectiveness of the mentioned regulation. In practice, Article 43 of the Law on Companies is not very effective due to its inflexibility. Therefore, some other options were introduced. Article $47^1$ of the Law on Companies foresees granting of shares to employees. Shares may be granted to employees, including the head of company, members of the supervisory board, and members of the board of directors who acquire such shares free of charge or in part for remuneration. It is a flexible provision, allowing simpler issuing emission of shares in comparison with the provisions of Article 43. Therefore, we see that different existing legal instruments can be employed and work right now allowing better legal preconditions and for social enterprises.

In addition, in Austria, the problem of understanding social enterprise defini-

301 *Boosting Social Entrepreneurship and Social Enterprise Development in Lithuania, In-depth Policy Review. OECD LEED Working Papers* (OECD Publishing, Paris, 2019): 26, https://www.oecd-ilibrary.org/industry-and-services/boosting-social-entrepreneurship-and-social-enterprise-development-in-lithuania_502fc6ef-en

tion (like in other countries) is often related with treatment of WISE as the only form of social enterprise. This situation is mostly common with policy makers who still tend to think of social enterprise as referring only to WISEs, which have long been a main instrument of Austria's active labour market policy.[302]

Special attention should be paid for the German WISE regulation. We can distinguish two different types of WISE in Germany: enterprises for the inclusion of persons with disabilities, and enterprises for the integration of low qualified youth, long-term unemployed and persons with labour market disadvantages other than a legally recognised handicap. These two types of WISE still associate quite separately.

Within the range of enterprises for the inclusion of persons (first type of the above-mentioned enterprises) with disabilities there also two types of companies. In Germany, two kinds of enterprises aim for the inclusion of persons whose disabilities are so significant that they cannot be included into employment within the existing subsidised employment system: workshops for persons with disabilities (*Werkstatt für behinderte Menschen, or WfbM*) and inclusive enterprises (*Inklusionsunternehmen*). In terms of employment of persons with disabilities, workshops still provide more significant opportunities than inclusive enterprises. Persons working in workshops act as employees concerning social insurances. They may not be fired. They earn relatively small salaries, augmented by social welfare payments. Employment conditions in inclusive enterprises fully comply with general labour law. Employees in inclusive enterprises have the same labour conditions as they would if employed in the first labour market.[303] Both types of social enterprise put forth a clear social dimension and govern themselves independently from the state, although they remain dependent on it for profit generation. The latter case applies to a much bigger extent to workshops than to inclusive enterprises. Inclusive enterprises usually tend to act more entrepreneurially than workshops, sharing many features with traditional enterprises (comparable to WISE elsewhere).

Basically speaking, such inclusive enterprises (inclusion companies) can be legally independent companies or legally dependent in-house companies or departments. Inclusion companies that are legally independent companies are predominantly

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302 "A map of social enterprises and their eco-systems in Europe. Country Report: Austria," *supra note*, 268: 28.

303 "Social enterprises and their ecosystems in Europe. Updated country report: Germany," European Commission, published 2018, accessed 25 January 2021: 44-45, https://ec.europa.eu/social/BlobServlet?docId=20563&langId=en,.

run in the form of a non-profit GmbH (gGmbH). [304]

The second category of WISE (within two primary categories) are enterprises for persons with other permanent labour market disadvantages. The European Commission's study states that the number of WISEs for persons with other permanent labour market disadvantages has decreased in the course of the last years, since the legal and financial framework changed drastically in the mid-2000s. Previously, the state originally covered up to 40% of salary costs Later this share was reduced dramatically. According to amendments of regulation, revenues can no longer be invested into permanent job creation and WISE must now use them to improve the employability of individuals in temporary employment. It means that earnings must be spent on reaching the social objectives. As a scheme for this goal serves the so-called *Außenarbeitsplätze,* which basically mean the creation of the transition to the general labour market, the workshops are increasingly offering employment opportunities outside the workshop. They try to find external jobs, internships or a position in an inclusive company for disabled people who have good qualifications for employment in the general labour market.[305] In the light of what has been said, we have to note that particular types of WISEs in Germany are gradually disappearing (because of the above-mentioned employment in the general labour market. It can be considered as positive tendency, because highly dependent on subsidies from state WISEs does not comply with our operational definition of social enterprise. .

Like in some other researched countries, the spectrum of social enterprise in Switzerland can be difficult to identify. The exemption lies only in the case of WISEs that have clearly distinguishable attributes. It is important to stress that in Switzerland definition of WISE can have a dual meaning. On one hand, a WISE can have a social work contract with the state, where the state mandates a WISE to carry out a certain task (i.e., training of an unemployed person for re-integration in the regular labour market). On the other hand, the result of this work or employment can be considered as a service or product to the market.[306]

The most popular operational form of social enterprise in Iceland – WISE does

304 "Inklusionsbetriebe. Talent Plus - Das Portal zu Arbeitsleben und Behinderung," accessed 16 December 2021, https://www.talentplus.de/in-beschaeftigung/alternative-beschaeftigung/inklusionsbetriebe/index.html

305 *Ibid*.

306 "Social enterprises and their ecosystems in Europe. Country report: Switzerland," European Commission, published 2014, accessed 25 January 2021: 11. https://ec.europa.eu/social/BlobServlet?docId=13279&langId=en.

not have a legal definition. However, for this purpose is used another definition "vocational rehabilitation organisation" (*starfsendurhæfing*). This term is used to refer to entities that pursue a work-integration goal. These organizations are often registered as self-governing foundations or associations. Such organizations have the aim to integrate vulnerable people into the labour market and/or society. In this sense, they can be identified as social enterprises according to the EU operational definition.[307]

Vocational rehabilitation has been defined as anything that helps a person with poor health to stay at work, get back to work and stay in work. From this definition, this is a very broad concept where many parties need to be involved in the vocational rehabilitation process of individuals, both within the health system, the social system and the business community as well as specialized parties in vocational rehabilitation. All these actors have a major impact on this process, as the goal is to assist individuals in self-help and return to work following ill health. In Iceland, there is a broad consensus that the main goal of rehabilitation is to improve an individual's skills and at the same time work on the obstacles caused by poor health. In vocational rehabilitation, work is the main goal of rehabilitation. Work here refers to social work, domestic work and paid work or employment. To distinguish vocational rehabilitation from other forms of rehabilitation, as defined above, one may wonder whether it is helpful to use the term primary rehabilitation. Primary rehabilitation aims to enable an individual to perform activities of daily living or to achieve maximum skills according to circumstances. Social activity can be part of primary rehabilitation. Primary rehabilitation can take place both within the health care institution and with professionals who specialize in this type of rehabilitation. Vocational rehabilitation is not primary rehabilitation, but often needs to be done in close collaboration with the parties who perform it.[308] In this sense, we see that the term of vocational rehabilitation even slightly differs from in most European countries common term of WISE, where main focus is paid for work integration, not necessarily linking it with medical (clinical) circumstances.

Summarizing this chapter, we can say that limitation of social entrepreneurship definition only to the category of WISE helps neither to improve definition of social enterprises, nor to create enabling framework for encouraging creation and development of social entrepreneurship sector. Therefore, we could state that limiting social

307 "Social enterprises and their ecosystems in Europe. Country fiche: Iceland," European Commission, published 2019, accessed 15 December 2020: 9-10, https://op.europa.eu/s/n1mn.

308 "VIRK – Starfsendurhæfingarsjóðs, Hvað er starfsendurhæfing?" accessed 18 December 2020, https://www.virk.is/is/moya/news/hvad-er-starfsendurhaefing-1

enterprise legal regulation only to the category of WISE from the legal point of view could be treated more as a disadvantage than advantage. However, as a separate form of operation of social enterprise (not a legal form) WISE definitely is useful in the whole spectrum of social entrepreneurship forms, as a form of operation, which deals with person integration. Nevertheless, it strictly limits possibilities of activity of social enterprises. We do not think that this form of operation of social enterprise should be abolished. However, we are sure that this form will undergo major transformations in the future. Such transformations may include both the expansion of the range of activities and the search for new opportunities for stakeholder involvement in governance, as well as the more active use of social innovations.

## 2.5. Recognition of *de facto* social enterprises and importance of operational definition

We have to emphasize one more time that illustrated legal frameworks (whether dedicated form/status or status of WISE) make a positive picture in the overall context of social entrepreneurship legal environment rather than a negative. The main mentioned flaws within regulation in particular countries cannot be ignored, but existing situation allows formation of some kind of legal preconditions for social entrepreneurship. Much more problematic is the third aspect, namely, the situation of *de facto* social enterprises. We have to remind one more time that in the most cases *de facto* social enterprises fall within the operational definition of social entrepreneurship. However, legally they are not recognized as social enterprises in their countries. It forms a number of problems, such as legal uncertainty, unawareness of general society about such de facto social enterprises and limited possibilities (or no possibility at all) to use for social enterprises (in the most cases – for WISEs) dedicated benefits.

By the regulation examples in this sub-chapter, we seek to show that *de facto* social enterprises exist in a great variety of legal forms. Moreover, we can state that by exploiting existing legal forms, they create a sort of network (informal system), which uses available legal resources for needs of social entrepreneurship.

The above-mentioned situation is not the case in Denmark, because in this country any form of entity can be recognized as socio-economic enterprise if it meets defined criteria. In other countries situation varies, however, most of the countries have their "grey" areas, where different types of entities could be suitable (without or with

small modifications in existing legal regulation) for social entrepreneurship. We would like to emphasize one more time that in this sub-chapter we discuss different legal forms, which are used by *de facto* social enterprises. It has to be stressed that some of these legal forms are used and by WISEs (which are legally recognized). However, in order to get the status of WISE, company (among some other requirements) has to be engaged in the integration of disadvantaged persons. On the other hand, *de facto* social enterprises could work with much wider spectrum of social challenges.

E.g., *in Sweden*, there is no legal form specifically designed for use by social enterprises. Social enterprises use adaptations of the cooperative (economic association), non-profit association, limited company, limited company with distribution restriction and foundation forms to carry out their activities. An economic association is an association of people united to meet their common economic, social, and cultural needs (to achieve social value). Associations are jointly owned and democratically controlled. Another legal form is a non-profit association. The founders can use the statutes of the association to establish the features of a social enterprise. For example, the statutes can include social purposes. This form is also not exclusively dedicated for social enterprise. Only employees who are members can participate in the associations' decision-making.[309]

Here we can state that in the sense of our operational definition social enterprises in Sweden are understood as companies with the aim to reduce social exclusion and to provide efficient welfare services in a not-for-profit environment. In addition, we can notice that Sweden has a long history of not-for-profit organizations with social aims. Social innovations are visible despite the low level of institutionalisation of different forms of social enterprises. Moreover, it can be emphasized positive tendency of collaboration between the public sector, the private sector and civil society, which can be considered as the form of welfare ideas and as social innovation for the twenty-first century.

Several other laws influence the *de facto* social entrepreneurship sector. E.g., the Public Procurement Act and The Law on Freedom of Choice ensure the right of citizens to choose their own welfare service provider amongst the possible actors from the pub-

309 "A map of social enterprises and their eco-systems in Europe. Country Report: Sweden," *supra note*, 285.

lic, the private and the not-for-profit sector.[310] In addition, from the looking point of the legal technology, the Swedish private and not-for-profit sector provides a variety of soft tools for social entrepreneurs to create a legal status, develop business ideas (usually provided by different social innovation incubators and a national knowledge platform for social innovation and societal entrepreneurship).[311]

Speaking about detailed legal regulation there are currently no marks, labels, and certifications systems for social enterprises in Sweden. Neither are there any plans to introduce such systems.

The other aspect of recognition of *de facto* social enterprises is initiative of different "marks" and "labels", implemented in different countries. Usually, such initiatives are only partly of a legal manner, because they are created and implemented by different private actors (self-regulation bodies) or on the project-basis between governmental institutions and private actors. It also has to be stressed that such "labelling" initiatives are not related with company's legal status or its operation (not-operation) as WISE. E.g., social enterprises in Finland receive the mark of certification (the Finnish Social Enterprise Mark) if they work with promotion well-being, limit their distribution of profits, and offer transparency of their business operations.[312] We can state that it is an innovative approach, which is based on a principle of self-regulation (as it was emphasized). It allows obtaining the social enterprise the additional label, which is not a legal status, but it definitely helps with additional awareness raising. The Social Enterprise Mark is granted and administered by the Association for Finnish Work. It gives identity to social enterprises and helps to differentiate them from traditional enterprises and raise awareness on the social enterprise business model.[313] Therefore, we can add that such Mark is a symbol of social enterprises. The Mark helps social enterprises to distinguish themselves from other businesses. It also helps to demonstrate that the enterprise applies the Finnish Social Enterprise business model.

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310 H. Thomas R. Persson, Niklas Hafen, "Social Enterprise, Social Innovation and Social Entrepreneurship in Sweden: A National Report," published November 2014, accessed 22 January 2021: 24-25, 37, https://portal.findresearcher.sdu.dk/en/publications/social-enterprise-social-innovation-and-social-entrepreneurship-i

311 *Ibid*, 42.

312 "Social Entrepreneurship Rising in Finland," Business and Innovation. This is Finland, published February 2014, accessed 15 October 2020, https://finland.fi/business-innovation/social-entrepreneurship-rising-in-finland/.

313 "The Finnish Social Enterprise Mark," Association for Finnish Work, published February 2019, accessed 15 October 2020, https://suomalainentyo.fi/en/services/finnish-social-enterprise/the-finnish-social-enterprise-mark/.

As we mentioned, such mark systems usually are administered on the self-regulation basis. It is important to notice that in Finland, however, regulation of the mark have and some legal consequences. The Association for Finnish Work owns and administers the Finnish Social Enterprise mark. In order to receive this Mark a social enterprise should have main office in Finland. The social enterprise should use most of its profits to contribute to social good in accordance with its business idea, by either developing its own operations or donating the profits in accordance with its mission (restricted distribution of profits). In addition, the social enterprise also has to include its employees in the company's decision making (including employee ownership). The right to use Finnish Social Enterprise mark is granted for three full calendar years, if the company is a member of the Association for Finnish Work, with the possibility to renew it every three years. The company, which is granted with the Mark, has to deliver the Association for Finnish Work an annual notification with a short report on the company's compliance with the criteria. The Finnish Social Enterprise mark can only be used in the registered visual format.[314]

Moreover, new organisations must have completed their first annual financial report. This requirement does not apply to organisations that have been active before and from which some activities have been separated as a new organisation or to those organisations, which have changed their organisational status but are continuing their activity seamlessly. Under special circumstances, the Social Enterprise Committee can award the mark case by case for one year even if the organisation has not completed their first annual financial report, if the other demands and criteria are met.[315]

Above-mentioned criteria to obtain the Finnish Social Enterprise Mark more detailed can be divided in two groups of primary and secondary criteria. The primary criteria are:

- Purpose and objective of the social enterprise is to contribute to social good. The social enterprise is engaged in responsible business activities;
- Restricted distribution of profits. The social enterprise uses most of its profits to contribute to social good in accordance with its business idea, by either developing its own operations or donating the profits in accordance with its mission;
- Openness and transparency of business activities.

314 "The Finnish Social enterprise mark Terms and Conditions," Association for Finnish Work, accessed 16 October 2020, https://suomalainentyo.fi/en/services/finnish-social-enterprise/the-finnish-social-enterprise-mark/

315 *Ibid*.

The Secondary criteria are:

- Participation and influence of employees in the enterprise's decision-making, including employee ownership;
- Measuring of social effectiveness and the generated social impact;
- Employment of persons with a weak position in the labour market;
- Adoption of innovative service and operational models within the organisation's field of work. The Social Enterprise Committee shall make further enquiries where necessary.[316]

Besides the quite strict criteria, there are detailed rules on how the Finnish Social Enterprise Mark should be used. The main point of rules set that the Marks shall only be used within the awarded usage rights and in accordance with the Terms of Use. If the usage rights, in accordance with the rules of the Mark, have only been awarded to certain products or services, the Mark shall only be used in the marketing of said products or services. If the same product name or label is used for products or services of which only some fulfil the conditions of the Mark, the Mark shall only be used on the products, which fulfil said conditions. Once the usage right of the Mark ends, the member organisations right to use the Mark in marketing shall end immediately. The Mark shall also not be used on any products manufactured after the usage right ends or any of their packaging. In general, the Mark may be used on the products and their packaging, which have been manufactured before the usage right ended for a maximum of six months, after which the Mark shall be removed from any products and their packaging, which remain in the possession of the member association after the usage right has ended. In the event that the Mark has not been used in accordance with the Terms of Use or the Mark's rules, the organisation shall pay the Association a compensation, which is twice bigger the Association's membership fee based on the organisation's turnover from the entire time of non-compliance, the sum always being at least 1,000 Euros per annum.[317]

We know that in *Estonia* there are no legal forms, which would be dedicated specifically for use by social enterprises. Moreover, there is no formal identification scheme for social enterprises. It means, on one hand – there are no particular restrictions, on the other – there is no legal regulation, which could help to identify social

316 Association for Finnish Work provides an information that there are 3 types of marks: "Key Flag"; "Design from Finland"; and "Finnish Social Enterprise". .

317 "The Finnish Social enterprise mark Terms and Conditions," *supra note*, 314...

enterprises. In such situation, the most common legal form for social enterprises is association *(ühing)* and foundation *(sihtasutus)*. A social enterprise can also use a private limited company *(osaühing)* as its legal form. [318]

The Non-profit Associations Act regulates a legal form of association in Estonia.[319] Any income of an association may only be used to achieve the objectives specified in its articles of association. An association shall not distribute profits among its members. A social enterprise can use this form by choosing a social purpose as its objective. An association may use its income only to achieve the objectives specified in its articles of association. Any economic activity can only be a mere by-product of the main activity. An organisation can establish a separate company and earn income from its dividends.[320]

The Foundations Act regulates another legal form – foundation. This legal form also does not distribute its profit to its members. A foundation may use its income only to achieve the objectives specified in its articles of association.[321]

The third legal form – private limited company, regulated by the Commercial Code[322] is a company commonly used by for-profit organization. It is typically established with commercial aims to distribute profits to its shareholders. However, a social enterprise can still use a private limited company as its legal form. The articles of association of a private limited company can be drafted to provide for the features of a social enterprise. For example, the articles can include social purposes and provisions, which cap the dividends that can be paid to shareholders.[323]

However, in Estonia social enterprise legal situation is concretized by the Public Procurement Law.[324] The provisions, included in this Law foresee that social considerations, implementation of innovation and environmentally friendly solutions are

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318 "A map of social enterprises and their eco-systems in Europe. Country Report: Estonia," European Commission, published 2019, accessed 20 November 2020: 9, https://ec.europa.eu/social/BlobServlet?docId=21574&langId=en

319 "Non-profit Associations Act," Riigiteataja, published March 2019, accessed 20 November 2020, https://www.riigiteataja.ee/en/eli/ee/520062017014/consolide/current.

320 "A map of social enterprises and their eco-systems in Europe. Country Report: Estonia," *supra note*, 318.

321 "Foundations Act," Riigiteataja, published January 2018, accessed 20 November 2020, https://www.riigiteataja.ee/en/eli/ee/529012015010/consolide/current.

322 "Commercial Code," Riigiteataja, published March 2019, accessed 20 November 2020, https://www.riigiteataja.ee/en/eli/ee/522062017003/consolide/current.

323 "A map of social enterprises and their eco-systems in Europe. Country Report: Estonia," *op. cit.*: 22-28.

324 "Public procurement Act of Estonia," Riigiteataja, accessed 20 November 2020, https://www.riigiteataja.ee/en/eli/ee/505092017003/consolide/current

considered upon planning and carrying out public procurement (Article 2). Moreover, the clause on reservation of public contracts foresees that the contracting authority or entity in the procurement documents may reserve the right to participate in public procurement to sheltered workshops and economic operators. The main aim of these economic operators must be the social and professional integration of disabled persons, persons with reduced ability to work or disadvantaged persons. In the context of the law, a definition of 'sheltered workshop' is used. It means a legal person or authority that offers jobs for the long-term unemployed, persons with reduced ability to work or disabled persons who are unable to find employment in the ordinary labour market (Article 13).

Here we can say that registering as a non-profit organization is a default option for social enterprises since there is no special legal structure. More detailed, most of such social enterprises are registered as either non-profit associations (governed by its members) or foundations (governed by a board).[325] Estonian Social Enterprise Network is an umbrella organization, which advocates social enterprise interests. In addition, several soft-law tools, such as "Social Impact Measurement Tools for Young Social Entrepreneurs", are available.[326]

So far, it is difficult to grasp even an operational definition of social enterprise in Estonia. The results of some surveys showed that there is a "strong desire to support social enterprising, however, the society and personal awareness of the respondents about social enterprising in Estonia appears low, therefore the outcome of the support is also not very high."[327]

The same authors stressed that they survey showed several implications. First of all, the survey emphasized the fact that if the state would like social enterprising to play an important role in modern social and business development more attention should be paid to this matter. Therefore, the support of social enterprises should become an item of a high priority as well as the society awareness of this phenomenon.[328]

So far, the only unification of social enterprise identity initiatives come from

325 "Estonian Civil Society," Network of Estonian Nonprofit Organizations, published 2018, accessed 21 November 2020, https://heakodanik.ee/en/civil-society/

326 "Know your Impact," Social Impact Measurement tools for Young Social Entrepreneurs, published November 1017, accessed 21 November 2020, https://knowyourimpact.ku.edu.tr/the-project/.

327 Natalja Gurvits, Monika Nikitina-Kalamae, and Inna Sidorova, "Social Enterprise in Estonia: Present Situation and the Perspectives of Future Development, Survey of Estonian Opinion," *Procedia - Social and Behavioral Sciences* 213, December 2015: 501. https://doi.org/10.1016/j.sbspro.2015.11.440

328 *Ibid*.

non-profit sector (with some cooperation with the governmental structures). Already mentioned Estonian Social Enterprise Network plays the most important role. It is a non-profit association that belongs to an official list (administered by Estonian Tax and Customs Board) of Estonian NGOs working for the public benefit. The association declares that it has 54 of top Estonian social enterprises as their members. Moreover, the association is an important stakeholder in relation with governmental structures. It has been among three contracted civil society partners for the Ministry of the Interior, helping to achieve the objectives of National Strategy for Civil Society 2015-2020. The association declares that their advocacy results consist of the inclusion of social enterprise concept and practical support measures into two national development plans as well as the new Public Procurement Law. Moreover, the association works closely with the main stakeholders in the field of formal and non-formal education in Estonia. For example, together with the Estonian Youth Work Centre and the Estonian Ministry of Education and Research they are implementing an informal strategy for developing youth social entrepreneurship. Both national (e.g., National Foundation for Civil Society, Ministry of Culture) as well as international funders (e.g., Nordic Council of Ministers, British Council) have supported the association.[329]

It was already mentioned that in Latvia according to relevant legal regulation of the Social Enterprise Law only limited liability companies could acquire social enterprise status. It basically means that existing associations and foundations will have to decide on how to continue operating. In such case, associations and foundations can only operate as so-called *de facto* social enterprises and they do not qualify for being legally acknowledged as social enterprises. Despite ambiguous legal status of associations and foundations in the context of their recognition as social enterprises, majority of such entities meet the criteria set by the SBI operational definition of social enterprise.[330] In such case, here and speaking about respective cases in other countries this kind of entities we call as *de facto* social enterprises.

Therefore, the main two forms of *de facto* social enterprise in Latvia are association and foundation. Speaking in more detail about these two legal forms, we can stress that an association can be considered as a voluntary union of persons founded to achieve the goal specified in the articles of association of the organisation. Generally, it

329 "Social Enterprise Estonia," About Estonian Social Enterprise Network, accessed 21 November 2020, https://sev.ee/en/who-are-we/

330 "A map of social enterprises and their eco-systems in Europe. Updated Country Report: Latvia," *supra note*, 264: 27.

has to have a non-profit nature. The Associations and Foundations Law,[331] and Public Benefit Organisation Law[332] regulate the legal status of association.

Generally speaking, associations are established to perform public benefit activities or to serve the needs of its members. In order to obtain public funding (e.g., to receive donations etc.) an association has to perform at least one public benefit activity. Information on public benefit activity, or in other words – social goal of association must be foreseen in the organization's articles of association.[333]

An association is allowed to perform number of economic activities. However, all these economic activities can only complement activities of the main purpose. If an association is planning to expand its economic activities, it has to establish its own business company. In such case, association's activities would be divided into two separate legal forms. Economic activities performed directly by association can include maintenance and utilisation of the association's property or have to meet the criteria set in the goals of the association or foster its achievement. If the economic activities do not exceed this principle, there is no specific restrictions regarding ability to trade or do other economic activities. However, in reality not all associations produce goods or provide services. Large part of associations depends on donations and grants. Therefore, not all associations meet operational of social enterprise set in the SBI.

Speaking about management of an association it has to be stressed that association must have a board. The board has several duties including overseeing and managing the association's affairs, managing the association's property and funds, organising the association's accounting in accordance with regulatory requirements. All members of an association have the right to participate in the members' meeting. Any distribution of profit is not applicable to legal form of association. The law sets restrictions of distribution of all incomes between founders, members of board or other stakeholders, and requires the use of incomes for the direct pursuit of the objective.[334]

Another legal form of de facto social enterprise is a foundation. Already mentioned Associations and Foundations Law, and Public Benefit Organisation Law regulate the legal form. According to the Law, a foundation is an aggregate of property set

331 "Biedrību un nodibinājumu likums," Likumi.lv, published November 2003, accessed 23 January 2021. https://likumi.lv/ta/en/en/id/81050

332 "Sabiedriskā labuma organizāciju likums," Likumi.lv, published July 2004, accessed 23 January 2020. https://likumi.lv/ta/id/90822-sabiedriska-labuma-organizaciju-likums

333 "A map of social enterprises and their eco-systems in Europe. Updated Country Report: Latvia," *op. cit.*: 28.

334 "Biedrību un nodibinājumu likums," *supra note*, 331..

aside for the achievement of a goal specified by the founder, which has a non-profit nature. Therefore, we can say that foundation's main goal is to gather financial resources in order to support its activities financially. Foundation, as well as association can obtain status of public benefit organisation. This kind of status allows receiving donations and tax reductions. To become a public benefit organization, the foundation must provide a significant benefit to society or a part of society (stakeholders' group). In such case, the social goal of a foundation has to be integrated in the articles of association of the foundation.

A foundation is allowed to perform economic activities but only to some extent. It has to be only complementary activity to its main purpose. If economic activities grow to become the main activities of the foundation, the foundation has to establish its own business company and separate all activities between the two legal forms. Economic activities can include the maintenance and utilisation of the foundation's property, to further the goals of the foundation, or foster its achievement. There are no specific restrictions on the ability to trade or engage in other economic activities if they do not exceed the above-mentioned rule. As the situation with associations, not all foundations also produce goods or provide services. Those foundations that heavily depend on donations and grants, do not meet operational criteria of social enterprise set in the SBI.

Speaking about management, a foundation as well as association must have a board. The board manages foundations affairs, property and funds, organizes accounting in accordance with regulatory rules.

Any kind of distribution of profit is not applicable to the legal form of foundation. The law restricts the distribution of all incomes between founders, members of board or other stakeholders. Any income can be used only for the implementation of direct goal of the foundation.[335]

The third legal form, as mentioned, is the only legal form recognized by the Social Enterprise Law as de jure social enterprise.

Despite the above-discussed initiatives to establish legal background for social entrepreneurship, the only legally recognizable form of social enterprise in Lithuania is WISE. Therefore, a question of legal status of de facto social enterprises is very relevant.

Speaking about certification of social enterprises we already emphasized that there can be distinguished several forms of legal recognition of the social enterprise.

335 *Ibid*.

First, it is a dedicated legal form, second, it is a legal status within the frame of an existing legal form, and third, it is a certificate or so called "label". The third option can be implemented whether there exists a dedicated legal form of social enterprise or only a status. Even if the state does not have any of two options, there is a possibility to implement a "label" system, which in such case will be a soft measure dedicated to raise awareness on the social enterprise without a legally binding status. In Lithuania, however, the "labelling" system of social enterprises is not implemented. Despite that, the concept of identification of social enterprises with help of *quasi* labels exist on the level of some public-private initiatives. E.g., "Enterprise Lithuania", a non-profit agency under Ministry of Economy and Innovation established to promote entrepreneurship, organizes creative workshops for young social businesses or social business start-ups, in order to promote their development.[336]

Nevertheless, experts notice that marks, labels, and certification systems for social enterprises are not particularly widespread across Europe, but they have been implemented in some European countries.[337]

In Lithuanian case, an international community (OECD) also noted that well-designed legal and regulatory frameworks are important to build a conducive ecosystem for social entrepreneurship and social enterprise development. In that endeavour, clear conceptual clarity and coordinated policies, including from a legislative perspective, are critical. Although Lithuania legislated early on to recognise and support social enterprises, existing laws and regulations are not harmonised, in particular when it comes to the several definitions and terms that are used to describe social enterprises.[338]

Moreover, the problem of misunderstanding of the definition of social enterprise and its potential will remain unresolved if the awareness of general society will remain low. One way to raise awareness would be the legislative initiatives, but they are highly dependent on political will of the Government. Another way to raise awareness is the strengthening of public-private initiatives, which is already partially implemented.

The already mentioned OECD study notes that the increasing number of policy initiatives illustrate the growing interest for social enterprises in Lithuania. Despite

336 „Turn on the Impact," Enterprise Lithuania, accessed 25 January 2021, https://www.verslilietuva.lt/verslauk/ijunk-poveiki/apie-projekta/

337 "A map of social enterprises and their eco-systems in Europe. Synthesis Report," *supra note* 187: 80.

338 *Boosting Social Entrepreneurship and Social Enterprise Development in Lithuania, In-depth Policy Review, supra note,* 301: 7.

that, experts notice, that social enterprises still struggle to find their place between civil society organisations (or NGOs) and traditional enterprises.[339] The lack of a clear conceptual framework and of coherence among the different existing, and in progress, legal frameworks lead to difficulties in reaching a common understanding, which consequently prevents the field from further developing. Such issues could be addressed by addressing cultural barriers and negative perceptions about social entrepreneurship by implementing awareness-raising strategies. In addition, a conceptual clarity could be improved by adopting a unique official definition of social enterprise harmonised with international standards.[340] We can add that here could come in handy our operational definition of social enterprise, which helps to evaluate legal and non-legal elements while defining status of a social enterprise (especially *de facto*).

In *Austria* there have been calls to reform public benefit status to make it more suited to today's needs and in particular those of social enterprises. Several limitations were pointed out. Firstly, activities considered as public benefit activities in the sense of the Federal Fiscal Code (Bundesabgabenordnung - BAO) are seen as quite limited. For example, it is specified that public benefit organisations should directly work with persons in need (which can de facto exclude certain fields of activity). Secondly, the need to clearly define the public benefit purpose and strictly identify the target group in the articles founding the organisation was seen as a barrier for social enterprises in their early phase of development (e.g., start-ups) which evolve very rapidly. Besides, the ability to build up reserves is restricted, which can in turn undermine the access to finance. In addition, the administrative burden associated to reporting requirements was also mentioned. Last but not least, the capital requirements are seen as a barrier for social enterprises (this is however not specific to public benefit private limited liability companies, but true for all private limited liability companies). On this last point, there has been a recent change in laws, which will make it easier to set-up private limited companies in Austria. Capital requirements were lowered from €35,000 to €10,000. At least one half must be fully paid in.[341]

In Austria, there is a Quality seal for social enterprise ("*Gütesiegel für Soziale Unternehmen*"). The seal stands for compliance with social, organizational, and economic quality standards in social companies that are dedicated to the professional inte-

339 *Ibid*.

340 *E.g., European Commissions definition, definitions used by the OECD, other international organizations, etc*.

341 "A map of social enterprises and their eco-systems in Europe. Synthesis Report," *supra note*, 187: 60.

gration of long-term unemployed people. The association "Arbeit Plus" issues the seal. The association presents itself as an independent Austrian network, which consists of 200 non-profit, labour market orientated Social Integration Enterprises. It was founded more than 30 years ago. The social integration enterprises belonging to the network offer job seekers a temporary development framework, pass on practice-oriented knowledge, and cooperate with other companies in the search for suitable employment opportunities.[342] We see that it is a half-private initiative. Therefore, it is hard to call it a soft law measure. Despite that, the initiative shows a rising awareness not only about social enterprises but also about the quality standards for social enterprise sector.

Generally speaking, in Austria, like in other countries that have no direct legal regulation of social entrepreneurship, we have to speak about and apply first of all the operational definition of social enterprise. The wording of "social enterprise" is not very frequently used in the Austrian context. This is because the more common German terms are used more commonly. These terms basically are social economy" (*Sozialwirtschaft*), "social-integration enterprises" (*Sozialintegrationsunternehmen*), "public-benefit organisations" (*gemeinnützige Organisationen*) and "cooperatives" (*Genossenschaften*). Returning to operational definition of social enterprise in Austria, we can stress that in Austria, a particular legal form for social enterprise does not exist, and the term is not even explicitly used in corporate law. Therefore, one of the following available legal forms can be treated as mostly matching definition of social enterprise:

- Public-benefit limited company;
- Association;
- Cooperative.

Association (*Verein*) is an important legal form. In the sense of social entrepreneurship, an association it is less market-oriented than the gGmbH but it has a strong focus on democratic decision-making and it allows for flexible membership. An association is per law defined as a non-profit organisation with a general-interest orientation. Speaking about profit generation, even if the core goal of an association is not to generate profit, the law allows associations to sell services and goods as long as the profits made are re-invested in the organisation to serve some kind public interest.

342 "Soziale Unternehmen Österreich. Ein Zeichen für Qualität: das Gütesiegel für Soziale Unternehmen," Arbeit Plus, accessed 25 January 2021, https://arbeitplus.at/guetesiegel/

The Law on Associations (*Vereinsgesetz*) regulates associations.[343] According to Law, an association within the meaning of the federal law is a voluntary, permanent organization organized based on statutes of at least two people for the pursuit of a specific, common, ideal purpose. The association has legal personality. The association's assets may only be used for the purposes of the association.

A branch association is an association that is subordinate to its main association in the statutes, and which supports the objectives of the superordinate main association. A branch (section) is a legally dependent, but largely independently managed, organizational sub-unit of an association. An umbrella organization is an association to pursue the common interests of associations.

The EC report shows that associations are allowed to perform as social enterprises. Nonetheless, since many associations rely exclusive on voluntary work and donations in Austria, not all of them fully meet the economic criteria of the operational definition of social enterprise. Additionally, within the spectrum of activities, which is very broad, the social goal—such as work integration, social care delivery, etc.—is one of many objectives of association as social enterprise.[344]

The third legal form – cooperative (*Genossenschaft*) has a long tradition and still plays an important economic role in the country in various fields of the market. Researchers notice that in principle, the hybrid character of a cooperative organisation makes it an ideal and typical legal form for a social enterprise, as it combines elements of the member-based association and the limited liability company.[345]

Austrian Law on Cooperatives (Article 1)[346] defines a cooperative as an association of persons with legal personality with a non-closed number of members, which essentially serve to promote the acquisition or the economy of their members (cooperatives), such as for credit, purchase, sales, consumption, exploitation, utilization, construction -, housing and settlement cooperatives. Funding means can also be the participation of the cooperative in legal persons under corporate, cooperative and association law as well as in entrepreneurially active registered partnerships, if this par-

343 "Bundesgesetz über Vereine (Vereinsgesetz 2002 - VerG)," Fassung vom 12.09.2020, accessed 25 January 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001917

344 "A map of social enterprises and their eco-systems in Europe. Country Report: Austria," *supra note*, 268: 33-34.

345 *Ibid*.

346 "Gesetz über Erwerbs- und Wirtschaftsgenossenschaften (Genossenschaftsgesetz – GenG)," Fassung vom 12.09.2020, accessed 25 January 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=-Bundesnormen&Gesetzesnummer=10001680

ticipation serves the fulfilment of the statutory purpose of the cooperative and not predominantly, the generation of income the deposit is used.

In Austria, all cooperatives have to implement a so-called two-tiered governance structure that must include a general meeting and a management board. According to legislation, its members direct the management of the cooperative and the board is exclusively appointed from the membership. The capital of a cooperative is variable. The focus on profits is encouraged by the law so that the cooperative remains economically viable and competitive. The profits of cooperative are mostly allocated to the reserve fund. In addition, it has to be stressed that paying dividends is an exception. E.g., cooperatives regulated by the Limited-Profit Housing Act (i.e., *gemeinnützige Wohnbaugenossenschaften*)[347] are limited in the distribution of their profit and have an obligation to reinvest gains into affordable housing construction and refurbishment.[348]

We already wrote some remarks on Scandinavian concept of the welfare state. Some researchers distinguish by the content quite similar phenomenon, called as the German Social Market Economy. This construction was especially developed during the period between 1948 and 1990 in Western Germany and was based on three main pillars: market economy, social order, and ecology (or the environment).[349] In theory, these are also identified as "first-level" principles, which are applied within each of these pillars via legislation and specific institutions. If we ask why it is important for the research of social entrepreneurship, we can stress that these principles of various levels of importance can be found in legislation, institutions, political regulation practice and business practice, therefore they inevitably influence and social business sector.

The first above-mentioned principle "market economy" is the mostly important because it state, "the national wealth is produced, ideally without interventions of the state institutions within the economic process."[350] Of course, we can criticize it as a nearly utopian model. However, it is hard to argue that market economy is not important for the development of social enterprise sector. It is important, because without market economy as a legal precondition, the social enterprise simply could not exist.

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347 "Bundesgesetz vom 8. März 1979 über die Gemeinnützigkeit im Wohnungswesen (Wohnungsgemeinnützigkeitsgesetz – WGG)," Fassung vom 12.09.2020, accessed 25 January 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10011509

348 "A map of social enterprises and their eco-systems in Europe. Country Report: Austria," *supra note*, 268: 33-34.

349 Stefan Sorin Muresan, *Social Market Economy. The Case of Germany* (Cham: Springer International Publishing, 2014): 159.

350 *Ibid*, 160, 164-166.

Still, if it would exist, it would not be called and identified as social enterprise.

The second principle of "social order" comes here in hand because it defines so called "absolute social minimum", which cannot be ignored in German (and, overall, in Western European) society: "this refers, for instance, to the reintegration in professional life of entrepreneurs who have failed and had to close their businesses, to the protection of workers and the unemployed against abuses and unbearable and limitless exploitation by their employers." And finally, "ecology" or the environment benefits from the strong and growing support of the population with strong accent on the responsibility of the human being towards the environment.[351]

In terms of corporate sustainability, Germany differs from Anglo-American systems. In this context, Germany is commonly referred to as a 'stakeholder value system', which places it in opposition to systems that reflect the idea of shareholder primacy.[352] E.g., German Corporate Governance Code highlights "the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour."[353] However, the Corporate Governance Code is applied only to large companies (public companies), which fall under the regulation of the Law on public limited companies, the Aktiengesetz (AktG).[354]

There are, however, several other alternative legal forms in Germany that have to be mentioned, namely: the public benefit association (*Gemeinnütziger Verein*), and the charitable foundation (*Stiftung*). These forms differ from gGmbH because they require less capital. With the legal form of the public benefit association, founding is possible from a share capital of one euro. It is also possible to establish a charitable foundation. It can be opened with various legal forms. The start-up costs are lower than

351 The ecological aspect is strongly associated with the Sustainable Development Goals, which are evaluated in the following sub-chapter.

352 Andreas Rühmkorf, "Stakeholder Value versus Corporate Sustainability: Company Law and Corporate Governance in Germany," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 232, https://doi-org.ep.fjernadgang.kb.dk/10.1017/9781108658386

353 "Deutscher Corporate Governance Kodex (German Corporate Governance Code)," accessed 25 January 2021, https://www.dcgk.de/en/code//foreword.html

354 "Aktiengesetz," accessed 25 January 2021, https://www.gesetze-im-internet.de/aktg/index.html

for corporations.[355]

Germany has developed its social enterprise mark, so called "Wirkt" ("*It Works*") label. The "Wirkt" label is issued to effective social initiatives by PHINEO, a public benefit venture. The label is aimed at distinguishing public benefit organisations that are especially effective in resolving social problems. Organisations applying receive useful feedback on their strategy and operations during the PHINEO-analysis and can – if the label is awarded and used in promotion activities – expect higher revenues from donations. Any public benefit organisation operating in the thematic fields covered in the given call can apply for the PHINEO-analysis. The organisation must be registered in Germany, have received the public benefit status, being engaged in the given thematic field at the operational level, and its activities or the given project must have been in operation long enough that first results are already visible. Furthermore, the activity must be continued for at least two more years. However, after awarding the label there are no ongoing monitoring activities required.[356]

Returning to specific legal forms, we can basically speak about the public benefit association (*Gemeinnütziger Verein*) and the charitable foundation (*Stiftung*) as the main alternatives for gGmbH as a legal form, suitable for social enterprise.

The Associations Act (*Vereinsgesetz*)[357] regulates the public benefit association's legal form. According to the Law, an association is any organization in which a majority of natural or legal persons have voluntarily come together for a long period for a common purpose and subject to an organized formation of will. In addition, according to Law, the public benefit association is organized on a participation basis. This means that every member of the association usually has one vote. This works well as long as all members have the same purpose. However, the association often outgrows its legal dress and takes on the character of a company. Then the democratic voting principle and the term limits become a burden, make the decision-making process more difficult and a conversion to a limited liability company is an option. Association law provides for the non-profit association to be represented by the board. This is elected by the association members. The association is liable with all of its assets.

Another legal form - a foundation is regulated in different Federal states (*Bun-*

355 *Ibid*.
356 "Wirkt" Siegel, PHINEO, accessed 25 January 2021, https://www.phineo.org/fuer-organisationen/wirkt-siegel
357 "Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz)," accessed 25 January 2021, https://www.gesetze-im-internet.de/vereinsg/BJNR005930964.html

*desländer*) separately. However, several main principles are of the same nature. Legally a foundation exists as soon as it receives state recognition. In the case of foundations, the decision-making process is based on the will of the founder set out in the statutes. It is difficult to change. In principle, this requires a state permit. On the one hand, this makes the decision-making process very inflexible. On the other hand, it is advisable to set up a foundation if you want to pursue a set purpose in the long term and continuously. An external manager represents foundations. This acts solely for the benefit of the foundation. In the case of the foundation, the board of directors is liable similarly to the association. Foundations are also liable with their entire foundation assets.[358]

Summarizing an overview of these legal forms, we can say that the differences have shown that the entrepreneurial legal form of the gGmbH is best suited to promoting charitable projects on a large scale. The gGmbH is particularly suitable for this in the culture, care, and education sectors. Foundations and public benefit associations can also set up gGmbHs or gUGs to implement charitable projects.

Therefore, authors in Germany speak more not about the legal forms of social enterprise. They concentrate more on so-called "new-style" social enterprises. In the German context, these organizations usually imply a special emphasis on "social innovation." These enterprises respond to trends such as ageing, rural depopulation, changing family structures, stronger demands for integration and autonomy (in employment, in care for the elderly, etc.) These new-style social enterprises can operate under many legal forms (that we already discussed) as associations, cooperatives, or public benefit companies (usually gGmbH). They frequently have public benefit status. They may not distribute profits or accumulate assets beyond certain limits. Moreover, what is of the most importance, current policy and stakeholder understanding regards them as agile (adaptive) organisations, usually establishing themselves in niche markets and developing innovative solutions. Therefore, this movement brings a lot of important change into the social sector.[359]

*Switzerland* also belongs to the group of those that have not developed specific legal forms for social enterprises. Moreover, bearing in mind the confederal structure of Switzerland there is no specific policy or legal framework for social enterprise that applies to the entire country. In addition, we have to stress that there are no public bod-

358 "Social enterprises and their ecosystems in Europe. Updated country report: Germany," *supra note*, 303: 39.
359 *Ibid*, 47-48.

ies at the national level (e.g., Ministries) that deal with social enterprise. In addition, at a regional level, no cross-canton structure can be distinguished.

As mentioned, there is no specific legal form dedicated for social enterprises. However, as in the most discussed cases in other countries, from a legal perspective, the Swiss laws allow for much flexibility in terms of the usage of the various legal forms. The most common case is that legal entities can declare themselves 'non-profit' in their articles of association. Available information shows that the most of social enterprises operate under the legal form of an association or foundation. There is no registration requirement for associations. [360]

The spectrum of existing organisations in Switzerland among which those that could potentially meet the operational criteria (to various degrees) include the following forms:

- WISE (which typically is not a separate legal form);
- Social enterprises in the tradition of the Social and Solidarity Economy (SSE) and the Gemeinwohlökonomie (GWÖ);
- Associations;
- Foundations;
- Cooperatives;
- Commercial enterprises with strong social orientation.

Speaking in more detail about legal forms available for social enterprise in Switzerland, we can say that three mostly used legal forms are association, cooperative, and company limited by shares.

The first legal form – association can be considered as organization created by a group of individuals in which articles of association is foreseen a common purpose. This purpose should be other than economic one. It can be political, religious, scientific, cultural, recreational, or charitable purpose. Therefore, the association only can use its profits to reach the above-mentioned non-economic purpose.

Associations are governed by Articles 60 to 79 of the Swiss Civil Code.[361] The legal form of association can be adapted for use by social enterprises. However, this legal form is not exclusively used by the social enterprise. In this case, one main rule applies. An association can be tax-exempted if its purpose is considered of public bene-

360 "Social enterprises and their ecosystems in Europe. Country report: Switzerland," *supra note*, 306: 11.
361 "Swiss Civil Code of 10 December 1907 (Status as of 1 July 2020)," accessed 25 January 2021, https://www.admin.ch/opc/en/classified-compilation/19070042/202007010000/210.pdf

fit provided certain further conditions are fulfilled. An association, which simply grants funds to other charities or charitable projects, is not a social enterprise.[362]

A social enterprise, which is an association should include in its articles of association reference to the social enterprise's social aim(s). Articles 61 and 62 of the Swiss Civil Code states that once the articles of association have been ratified and the committee appointed, the association is eligible for entry in the commercial register. In the case of association, operating as a social enterprise it must be registered according to the general rule. The general rule in the Civil Code states that the association must be registered if it conducts a commercial operation in pursuit of its objects, and it is subject to an audit requirement. The articles of association and a list of committee members must be enclosed with the application for registration. In another case, associations, which cannot acquire or have not yet acquired legal personality, are treated as simple partnerships. Distribution of dividends on share capital is not applicable to this legal form. Additionally, there is no requirements to allocate surpluses to compulsory reserve funds. The above-mentioned article of the Civil Code sets the rule that an association should only pursue an economic activity, which is consistent with the stated objectives of the association. In addition, the association's Articles of Association can stipulate that membership of the association is subject to members paying a membership fee. Moreover, an association can seek donations or loans from its members, and it can issue bonds to its members. As a characteristic feature of this legal form, an association does not have shares and accordingly cannot raise funds by way of equity investment. On the other hand, an association can obtain loans from banks or other financers, or it can issue bonds. In addition, transparency and publicity requirements and related auditing issues are not applicable to this legal form. Speaking about employee involvement systems, it has to be stressed that paid members of staff of the association can sit as members of the executive committee. It also should be mentioned that associations could involve their staff in other ways, such as establishing consultative boards or encouraging a staff representative to join the executive committee. However, there are no obligatory requirements to do so. In addition, employees cannot receive a proportion of this legal form's profits. [363]

362 "Social enterprises and their ecosystems in Europe. Country report: Switzerland," *supra note*, 306: 24-27.
363 *Ibid*, 31-32.

Another legal form – cooperative[364] is a corporate entity consisting of an unlimited number of persons or commercial enterprises who join for the primary purpose of promoting or safeguarding specific economic interests of the company's members by way of collective self-help. By the core of the idea, development and mutual assistance are the main goals of cooperatives. In a cooperative, the partners usually effectively participate to the company's business and their contributions are not merely financial.

Articles 828 to 926 of the Swiss Code of Obligations regulate cooperatives in Switzerland.[365] According to respective articles of the Code of Obligations, the cooperative is a very flexible structure, which can be adapted to the founders' requirements. It must have a minimum of seven members. The assets of the cooperative belong to the cooperative. Net profit generated by the cooperative's business operations accrues to the company's assets (unless articles of association permit otherwise). In addition, articles of association may provide for the distribution of whole or part of net profit among the members. Speaking about the cooperatives' management rules relevant to needs of social enterprise, it has to be mentioned that the founders can decide whether they want the cooperative to put aside and store profits or distribute them to the members. Both can be adapted for social enterprise, depending on the expectations of the members.[366]

As mentioned, this legal form is not exclusively dedicated for social enterprises. As described in Article 828 of the Code of Obligations, a cooperative is a corporate entity of persons or commercial enterprises who join for the primary purpose of promoting or safeguarding the specific economic interests of the society's members by way of collective self-help. It also has to be stressed that the corporate purpose of the cooperative must not exclusively or primarily be of a financial nature. Required capital or assets are not applicable for this legal form.

Speaking about the aspect of profit distribution it has to be stressed that cooperative's profits may be distributed to members, but only if the articles of association foresee such option. If not, any net profit on the cooperative's business operations accrues to the cooperative's assets. Moreover, if the net profits are used for another purpose

364 It should be noted that here and in other parts of this research discussed form of legal entity – cooperative – is one of the oldest legal forms of mutual help of small companies (production, retail, etc.), although it is not always used for merely social purposes.

365 "Swiss Code of Obligations of 30 March 1911 (Status as of 1 April 2020)," accessed 25 January 2021, https://www.admin.ch/opc/en/classified-compilation/19110009/

366 "Social enterprises and their ecosystems in Europe. Country report: Switzerland," *supra note*, 306.

than increasing the assets of the cooperative, at least one twentieth of these net profits must be allocated to a reserve fund.[367]

The articles of association of cooperative may provide that the members must make a one or regular contributions. Any cooperative can also seek donations or loans from its members, and it can issue bonds to its members. Third parties may invest in the cooperative through a loan. Non-member investors do not have a voting right. Transparency and publicity requirements including related auditing issues are not applicable to this legal form. There is combination of the employee participation rights and their rights to acquire proportion of cooperative's profits. According to the Law, employees can be members, directors, or officers of the cooperative and in these capacities participate in the decision-making. They also can receive a proportion of the cooperative's profits through the cooperative granting them a bonus or through an employee participation plan.[368]

Finally, the third legal form – a company limited by shares (CLS). As in other countries, this form of company is commonly used by for-profit organisations. A CLS is typically established with commercial aims, to distribute profits to its shareholders. Therefore, any CLS established with solely commercial aims would not be considered a social enterprise. Articles 620 to 763 of the Swiss Code of Obligations regulates CLS.[369]

This legal form is used not exclusively for social enterprise. However, a social enterprise can still use a CLS as its legal form. In such case, the articles of association could include social purposes and provisions, which cap the dividends that can be paid to shareholders. Inclusion of the non-commercial aims into the company's purpose is important because it could help to avoid a possible liability of the company's directors for failing to make the company produce as much profit as it could have. Although it is only a hypothetical possibility, it shows the aspects of legal duality facing regulation of social enterprise.

Being a commercial company, a CLS can pursue any purpose. Such purposes will be unrestricted unless any restrictions are specifically set out in the company's articles of association. In the case of social enterprise, such purpose has to include a reference to the social enterprise's social aim(s). It also should be noticed that company's purpose could only be amended by special resolution of the member, passed by at least

367 *Ibid*, 25-29.
368 "Swiss Code of Obligations of 30 March 1911," *supra note*, 365.
369 *Ibid*.

two-thirds of the voting rights represented and an absolute majority of the nominal value of shares represented.[370]

Although this legal form is quite flexible in terms of using it whether for the for-profit purposes or social aims, the downside of it (especially for small social companies) is the requirement of minimum share capital, which is CHF 100,000.

CLS dividends are distributed on paid-up share capital, unless the articles of association provide otherwise. In the case of social enterprise, articles of association of a social enterprise could include a restriction or prohibition on paying dividends. Moreover, any CLS whether it is social company or not, must allocate five per cent of the annual profit to the general reserve until it equals 20 per cent of the paid-up share capital.[371]

The objects set out in the CLS articles of association may include a reference to a social aim(s). If this is the case then the company should only pursue economic activity, which is consistent with the stated social aim. If not expressly stated, the company's purposes are unrestricted, and it can undertake any economic activity. What also relevant to social enterprise, a CLS can seek donations or loans from its members, and it can issue bonds to its members. A company can be financed by offering equity in the company or loans or other forms of debt. Employees can be members, directors, or officers of the CLS and in these capacities participate in the decision-making.[372]

In Norway, besides the above-discussed special branch of non-profit limited company (*ideelt aksjeselskap*) exist a number of companies, which according to our operational criteria could be, recognized as *de facto* social enterprises. Social enterprises operate within the framework of several suitable legal forms: private limited company *(privat aksjeselskap)*, association *(assosiasjon)*, foundation *(fondet)*, general partnership *(generelt partnerskap)* or cooperative *(kooperativ)*.

Moreover, some social enterprises swing between several legal forms to use benefits that can be reached by attracting public and private investors and funds. Many social enterprises have municipalities or other local (or regional) public entities as their partner and general client, usually for the delivery of welfare services. Generally speaking, it is a good practice of public-private partnership of delegation of some public

370 "Social enterprises and their ecosystems in Europe. Country report: Switzerland," *supra note*, 306: 27-29
371 *Ibid*.
372 *Ibid*, 30-34.

services to private sector.[373]

Experts notice that there exists an interest in social entrepreneurship. However, the concept of social enterprise has attributed various meanings and there is no widely used definition in either research, practice, or policymaking in Norway: "work on both social entrepreneurship and social enterprises addresses expressions of social engagement combined with entrepreneurial action and the constructs of enterprises as means for operation."[374]

Here we should emphasize that several historical events and processes influence the context for social enterprise in Norway. Particularly important is creation, practices and challenges of the public welfare state, and the continuously changing relationships between the public, voluntary and private sectors. Therefore, in Norway social enterprises can originate from within or outside of either the public, private or the voluntary sectors. Membership-based voluntary organisations contributed significantly to the creation of public welfare states in all the Nordic countries. Historically, they represented social groups and interest, stimulated citizen engagement on a variety of social issues into the political arena and initiated various entrepreneurial activities to address social problems. The Norwegian state generally welcomed and supported such initiatives from the beginning of the 20th century. In such circumstances, the public welfare state soon became the dominant provider for social needs. One consequence of this development was a relatively stable, or it can be said – even static, set of relationships between the three sectors in provision of public welfare. Voluntary organisations and private businesses still contributed, but in limited volume and with few responsibilities. This arrangement has been popular and continuous to receive wide public and political support, even though it is costly in terms of taxes. It was suggested that this support has a cultural explanation, for instance that Norwegians are very state-friendly. Therefore, it has to be explained that in Norwegian context if social enterprises are set side by side with private businesses, they run the risk of being understood by many as undesirable attempts to privatise some social sector services. However, researchers emphasize that situation is slightly changing during the past few decades.[375]

373 "Social enterprises and their ecosystems in Europe. Country fiche: Norway," European Commission, published 2019, accesed 28 January 2021: 10, https://op.europa.eu/s/nZwC

374 Lundgaard Andersen, Gawell, and Spear, *supra note*, 31: 77.

375 European Commission. DG Employment, Social Affairs and Inclusion. Peer Review on "Social entrepreneurship to tackle unmet social challenges" Host Country Discussion Paper – Norway. Social enterprise in Norway – caught between collaboration and co-optation? Norway, published December 2017, accessed 28 January 2021: 4-5, https://ec.europa.eu/social/BlobServlet?docId=18812&langId=en

The general distinctions between public, business, and voluntary sectors have softened. Voluntary organisations became more professionalised and similar to public service organisations in their approaches to social needs, while at the same time becoming more similar to private sector businesses by engaging more in commercial activities to finance their initiatives. Private sector businesses became more interested in contributing to social and environmental goals, for instance in CSR and corporate philanthropy. Moreover, the public sector has privatised more social services, and has some within-privatization by implementing business models and highlighting innovation in their daily operations. Simultaneously they set-up services facilitating participation by vulnerable individuals and groups in activities organised by voluntary organisations. Therefore, it is plausible to expect that these developments will make social enterprises' emphasis on combining social and economic gain more acceptable in general terms, and that they can develop markets for their activities in conjunction with cross-sector initiatives taken by actors in either sector.[376]

From the interviewed expert insights[377] we found out we could distinguish a social enterprise from other business forms in Norway we have to notice that in Norwegian law there is no separate legal entity for social entrepreneurship. Someone, who wants to undertake social entrepreneurship, can do that in the form of a limited liability company or they can set up an association or a foundation. It depends on how the social entrepreneurs want to run their entity. There are also possibilities to get some financial support for some undertakings. Therefore, there is no generally accepted definition of social entrepreneurship. In Norway, a social entrepreneur can operate in the form of limited company, which presumably is for-profit, but if the article of association state that this is a not-for-profit company (not in the form, but in the sense of its goals), or only partly for-profit company it could be considered as a social enterprise. Therefore, we can say that only imagination sets the boundaries between traditional and social enterprise. There can be a social entrepreneurship existing exclusively for profit, but the way the profit is used, distinguishes it from traditional businesses. In addition, it might promote other values, e.g., employment of vulnerable persons. You can also set up a foundation that also undertakes business. However, none of the mentioned distinctions defines what social entrepreneurship is. Another problem is that it is impossible to know whether they are actually doing good or they only claim to be doing it. However,

376 *Ibid*.
377 Sjåfjell, *supra note*, 156.

the same problem exists and with ordinary companies as well.

Another big part of social enterprises also organizes as voluntary associations. Another legal form – association can be considered as a member-based voluntary organization. Such organizations often have in practice a professional administrative structure, but the decision power belongs to the voluntary members. This legal form is possible to use by the social enterprises, however, in fact it is not widely spread, therefore will not be discussed further.[378]

The third legal form – foundations are legal entities disposing assets that have been given by will, gift, or other juridical dispositions for one or several purposes. When the founder (a natural person or a juridical entity) creates a foundation, he loses the right to use assets that are transferred to the foundation. Entities with humanitarian purposes often use the legal form of foundation. Additionally, other legal forms, like general partnerships or cooperatives are a rare legal form among social enterprises in Norway. Studies show that social enterprises in Norway earn their income from performing on a wide scale of different activities: education and training, food-related services, foresting, waste recycling, building service, manufacturing, and much more. However, social enterprise remains quite an immature political and economic field in Norway, but the interest is evolving. The main debate about social enterprises at national level in Norway unfolds between the role of local public administration, representatives of voluntary work, and social entrepreneurs, accompanied by a high level of political rhetoric.[379]

Moreover, nowadays it can be stated that Norway in fact does not act as a primarily welfare state.[380] Scholars notice that "the context in which social enterprise emerges in Norway is thus one characterized by a strong welfare state struggling to adjust its provision of services to increased demands, numerous well-established voluntary organizations more or less integrated in the welfare state, an increasing number of businesses wanting to sell their products and services to the state or alternatively engage in some form of corporate philanthropy, and an increased demand for voluntary engagement by a population on average more motivated by individual than collective projects."[381]

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378 "Social enterprises and their ecosystems in Europe. Country fiche: Norway," *supra note*, 373: 19-25.
379 *Ibid*.
380 A wider discussion on the aspects of welfare state i sprovided in the sub-chapter, speaking about the history of the concept of social entrepreneurship.
381 Lundgaard Andersen, Gawell, and Spear, *supra note*, 31: 82.

Despite a non-profit limited company is quite popular legal form, a significant number of social enterprises also organise as voluntary associations. We already mentioned that associations in Norway are seen as member-based democracy constructed as voluntary organisations. Such organisations often have a very professional administrative body, but the seat of power belongs to the voluntary members. Putting it simply, an association is a self-owned group of members, which shall promote one or more purposes of a non-profit, political, or other nature. If the association or team, for example, engage in sports, humanitarian work or other voluntary activities, persons can register this legal form. The association's profits, debts or assets cannot be distributed to the members, in contrast to a limited company where the owners, for example, can receive dividends from the company. It also has to be stressed that legal status of association is not regulated in a separate law. However, over time, so-called association law principles have been developed which are used to determine whether one meets the requirements to be registered as an association.

The Foundations Act (*Lov om stiftelser*) regulates the third legal form – foundation.[382] According to Law (Article 2), by foundation is meant a property value, which by will, gift or other legal disposition has been independently made available for a specific purpose of a non-profit, humanitarian, cultural, social, educational, economic, or other nature. A legal formation that meets the conditions in the first sentence is a foundation under this Act, regardless of whether it is designated as a legacy, institution, and fund or other. A foundation can be an ordinary foundation or a business foundation. Business foundations are whose purpose is whether to conduct business themselves, or by agreement, or as owners of shares or company shares, have a controlling influence over business activities outside the foundation. All other foundations are treated as non-business foundations. In case of doubt, the Norwegian Board of Trustees decides whether a foundation is a business foundation or a general foundation.

The articles of association should include the purpose of the foundation and assets to be used as share capital. At the time of establishment, ordinary foundations must have a share capital of at least NOK 100,000. Business foundations shall have a share capital of at least NOK 200,000. The foundation's capital shall be managed in a prudent manner, so that at all times sufficient consideration is given to the security and the possibilities of achieving a satisfactory return in order to fulfil the foundation's pur-

382 "Lov om stiftelser (stiftelsesloven)," published 2001, accessed 14 November 2020, https://lovdata.no/dokument/NL/lov/2001-06-15-59

pose. The board decides distribution of the foundation's funds. The distributions must be in accordance with the foundation's purpose.[383]

From this example we see that a foundation is potentially one of the most suitable legal forms for social enterprise in Norway because it has the right to carry out economic activities on one hand, can choose in its articles of association to lock assets and can provide for its stakeholders and employees representation schemes in the management bodies of the foundation.

*Iceland* has the same legal situation with the spectrum of legally unrecognized *de facto* social enterprises. Historical research showed that in Iceland civil society was a great contributor to social innovation and social entrepreneurship (while the beginning of the freedom of association reaches 19th century). Moreover, there is a tendency noticed that some of the older initiatives have grown into partially governmental organisations. In addition, as a favourable environment for implementation of the social entrepreneurship policy in the country is considered close cooperation of the public and private sector.

According to EC country fiche, *de facto* social enterprises in Iceland usually take one of the three following forms: association *(félag)*, cooperative *(samvinnufélaga)*, or self-governing foundation *(sjálfstjórnandi grunnur).*[384] The first legal form – association – has no distinguished legal regulation. It is considered as "an organised entity of a number of persons who unite or join together on a voluntary basis for some special non-profit purpose".

Main status of cooperatives is laid down in the Co-operatives Act.[385] They are founded based on cooperation to seek for mutual monetary benefit for cooperatives' members. In addition, some cooperatives are regulated by special legislation. The Act on Housing Cooperatives[386] and the Act on Building Cooperatives[387] regulate these specific cooperatives.

The third legal form – foundations (in Iceland foundations are referred to as "self-governing foundations") are created for a definite purpose. The division of profits

383 "Social enterprises and their ecosystems in Europe. Country fiche: Norway," *supra note*, 373.
384 "Social enterprises and their ecosystems in Europe. Country fiche: Iceland," *supra note*, 307: 9-10.
385 "Act No. 22/1991 - Lög um samvinnufélög," Althingi, published 1991, accessed 15 December 2020, https://www.althingi.is/lagas/nuna/1991022.html
386 "Act No. 66/2003 - Housing Cooperatives Act," Althingi, published 2003, accessed 15 December 2020, https://www.government.is/lisalib/getfile.aspx?itemid=86752054-626b-11e8-942c-005056bc530c
387 "Act No. 153/1998 - Lög um byggingarsamvinnufélög," Althingi, published 1998, accessed 15 December 2020, https://www.althingi.is/altext/stjt/1998.153.html

to the members of the board of foundation is not allowed, and there are no shareholders. All the possibly generated profit must be put back into the foundation's activity.[388]

Even though there is no specific legal definition and framework for social enterprises in Iceland, different entities can be considered as social enterprises, using the EU operational definition as a frame of reference. The elements of the operational definition of the social enterprise in Iceland can be found in the Law on self-governing foundations,[389] already mentioned legislation on cooperatives, and legislation on Vocational Rehabilitation and on the Operation of Vocational Rehabilitation Funds.[390] It was mentioned that there is no general law on associations. However, the term "association" is mentioned in 44 items of legislation in Iceland.[391] According to the Act on the Registration of Enterprises,[392] associations can be voluntarily registered in the public register of enterprises. Summarising can be stressed that organizations that can be considered as social enterprises are mostly registered as self-governing foundations and associations. However, only several are registered as private companies or cooperatives.[393]

Separately we must mention status of non-governmental organization. Despite the existence of a high number of NGOs in the country and their important social function, in fact a comprehensive legislation on their activities does not exist in Iceland. However, theoretically NGOs in Iceland are defined as entities that meet the following criteria: (a) they must not distribute profit; (b) they are self-governing and organisationally separate from the government; (c) they must have some formal structure, defined by regulations or formal rules; and (d) they must be based on free membership, and involve, to some extent, voluntary work. Even though this definition covers some important elements of the operational definition of social enterprise, it is quite wide and does not allow to fully grasping the complexity of the sector.[394]

Because of the limited practice in Iceland to link social enterprise to one or another legal entity, we will not discuss in more detail none of the legal forms (as we did research other countries). First of all, practice shows that Icelandic social enterprise

388 "Social enterprises and their ecosystems in Europe. Country fiche: Iceland," *supra note*, 307: 24.
389 "Act No.19/1988 - Lög um sjóði og stofnanir sem starfa samkvæmt staðfestri skipulagsskrá," Althingi, published 1988, accessed 17 December 2020, https://www.althingi.is/lagas/nuna/1988019.html
390 "Act No. 60/2012 - Lög um atvinnutengda starfsendurhæfingu og starfsemi starfsendurhæfingarsjóða," Althingi, published 2012, accessed 17 December 2020, https://www.althingi.is/altext/stjt/2012.060.html
391 "Social enterprises and their ecosystems in Europe. Country fiche: Iceland," *op.cit*.
392 "Act No. 17/2003 - Lög um fyrirtækjaskrá," Althingi, published 2003, accessed 17 December 2020, https://www.althingi.is/altext/stjt/2003.017.html
393 "Social enterprises and their ecosystems in Europe. Country fiche: Iceland," *op. cit.*: 17.
394 Ibid, *21.*

movement is not linked to one or another legal form. Generally speaking, social enterprise sector in most cases in Iceland so far exists whether on the level of non-governmental organizations or on the level of separate smaller or bigger projects. In the most cases, such projects are run under the leadership of some non-governmental movement or led by the academic institutions like universities.

Several recent examples show that namely this way of social enterprise development is quite popular and successful. E.g., in the end of 2019 a centre or Social Innovation and Social Entrepreneurship at The School of Social Sciences, University of Iceland, was opened. The objective of the centre is to create conditions for social progress by becoming centre of knowledge and learning for the Icelandic civil society, especially for new social entities "to grow". Specifically, the aims are to:

- Create incentives and support for social innovation and new social entrepreneurs.
- Work on applied research and projects dealing with new approaches for social progress.
- Be a centre for education, training and public debate on social innovation, social enterprise, and social entrepreneurship.[395]

Another example is *Snjallræði* - the first social accelerator in Iceland. It was launched in the end of 2018. Although business accelerator (in this case – social business accelerator) is not a legal category it is worth mentioning because of its importance for social businesses (despite their legal form) starting their operation. The traditional role of a business accelerator is to speed up the process companies need to go through after an idea is born until business is developing. Participation in a business accelerator includes free access to joint work facilities and specialised assistance in the development of projects from industry or academia. Moreover, such kind of accelerators help social enterprises to innovate. The organizers of such accelerators stress that innovation and entrepreneurial work is often linked to new technology in the field of natural sciences with great emphasis on financial gain. However, innovation is even more important in the fields of health, education, and welfare where rapid technological changes benefit the whole of society. Accelerator in social start-up encourages individuals, associations, and companies to participate in innovation that bring about

395 "A New Centre for Social Innovation and Social Entrepreneurship at The School of Social Sciences, University of Iceland," EMES - International Research Network, published December 2019, accessed 17 December 2020, https://emes.net/news/a-new-centre-for-social-innovation-and-social-entrepreneurship-at-the-school-of-social-sciences-university-of-iceland/

positive changes to society and opens the eyes of the general public to the fact that innovation benefits everyone. The project outcome can thus be extremely diverse and may include establishing charity organisations, encouraging cultural activities, environmental solutions, developments in the educational system and new technology for the public health care system.[396]

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Basically, this sub-chapter showed that besides some examples of up-to-date legal regulation of social entrepreneurship in some countries, and recognition of WISEs in all countries, there is a huge untapped potential of legally unrecognized (or unidentified) *de facto* social enterprises. It means that despite significantly different experiences and historical backgrounds, particular groups of countries have a lot in common when developing a legal environment for social entrepreneurship.

If the advanced legal framework for social enterprises did not emerge in particular countries, it does not mean that sector of social entrepreneurship in these countries does not exist *per se*. In contrary, existing legal forms with great addition of social innovation are exploited by the social entrepreneurship sector. They indirectly contribute to sectors development. As a positive side of this phenomenon, we can see the knowledge level of the social innovators and entrepreneurs, who operate despite great legal uncertainty (and unrecognition). As a downside, we can distinguish the same argument about legal uncertainty and add the factor of low level of public awareness. We think that namely the low level of public awareness is caused by legal unrecognition. It means that if the existing forms of de facto social enterprises were recognized legally their potential and social impact could become significantly bigger.

The examples discussed above allow us to argue that all countries are aware and analyse the potential for social entrepreneurship that can be exploited and in tackling social problems, and (besides that) in implementing the SDGs (which going to be discussed later in more detail). Even if legal framework in particular countries suits for social enterprises only indirectly. It is natural that some countries have longer tradition of social awareness (e.g., Nordic Countries). Countries also trying to implement different schemes of public–private partnership (e.g., Iceland), which could lead to more successful implementation of initiatives that before often were attributes of the Governmental welfare policy. It is, however, not the case in every country. Therefore,

396 "HÖFÐI Reykjavík Peace Centre. Snjallræði - The first social accelerator in Iceland," accesed 18 December 2020, https://www.fridarsetur.is/en/news/first-social-accelerator-launched-iceland/

continuous attention to the development of social entrepreneurship must be paid at a political level.

Despite positive general tendencies, such aspects as awareness raising, better access to finance and overall legal conditions for social enterprises have to be created having in mind not only conventional but also *de facto* social enterprises. Some initiatives on the EU level would be useful in this situation possibly helping to create some "proposed framework," which according to operational definition would help national legislators to distinguish *de facto* social enterprises in their jurisdictions. Proposed framework could include best practices from countries that are more advanced in the social entrepreneurship legislation, also Commission's insights. It could become an operational tool for national legislators, which could choose from proposed options of social enterprise recognition. We also think that some good practice can be preserved and in the area of WISE regulation. This option of social enterprise has the right to exist and perform its social mission furtherly.

## 2.6. Aspects of common interest and implementation of the Sustainable Development Goals

After the thorough examination of appropriate legal forms in the context of social entrepreneurship, we must make clear that this research does not deal with the entire legal framework of social entrepreneurship. The reason for this is and technical, and pragmatic at the same time. Such aspects as taxation and funding in the most countries are regulated in great detail and some aspects of this regulation change frequently. Therefore, these aspects of social enterprise regulation fell out of the scope of this research. Moreover, we think that legal forms of entities are crucial part of legal framework for social entrepreneurship. It is kind of base on which other legal aspects can be tailored and further developed.

As a matter of that, we have to discuss some aspects that does not fall directly into the sub-chapters above. It was purposefully chosen to distinguish several aspects into separate sub-chapter. We think that such aspects as legal technology, SDGs and other aspects of legal framework can be as important for development of social entrepreneurship as legal forms, legal definitions and other directly regulations-related nuance.

As we discussed legal forms suitable (or partly suitable) for social enterprises,

we can consider and some other legal aspects that are not directly related with development of different legal forms but rather with alternatives to imperative regulation. In this sense, we can speak about soft law, legal technology etc. In addition, from that what was stated we see in the context of the whole research of social enterprise sector, is that the area where social enterprises could work actively and use their potential, is particularly the cooperation with municipalities and providing different social or public services.

Of course, we already mentioned that inaccurate, unclear, or excessively narrow legal frameworks can harm social enterprises, by causing confusion or failing to capture the array of entities that may qualify as social enterprises in a given context. Legislators can create a dedicated and appropriate legal framework by adapting existing legislation on specific legal forms or passing new laws. However, less rigid normative tools should also be considered, as they may be easier to adapt to new developments in the field.[397]

In this research, we also have to bear in mind that social enterprises have some points of contact with efforts to promote CSR but differ when it comes to optionality. The aim of CSR is that undertakings should voluntarily in CSR in the conduct of their business, so it is up to each undertaking to decide the extent of their social responsibility (if any). In contrast, social enterprises have an obligation to take account of social considerations, and according to the Commission's definition, they should even have a social purpose as their primary purpose, outweighing the aim of creating profit for their owners. Finally, a social enterprise can be distinguished from operators that have a purely social purpose or philanthropy by the fact that it carries on some commercial activity and that it, to some extent, fulfils the owners' expectations regarding the payment of profit.[398]

The same question can be raised when we speak about involvement of elements of legal technology in the sphere of social entrepreneurship. Usually, legal technology refers to the use of technology and software in order to provide legal services. Mostly it is associated with technology start-ups in the area of the practice of law by giving people access to online software that reduces (or in some cases eliminates) the need to address a lawyer. Traditionally legal industry is mostly seen to be conservative and traditional. However, the saturation of the market leads to ways of using legal technology, or the adoption of technology in law.

397 *Boosting Social Enterprise Development: Good Practice Compendium, supra note,* 215: 23.
398 Sørensen, and Neville, *supra note*, 19: 271.

In such situation, we usually can speak not only about hard law, but also about the measures of soft law. These soft law measures could be considered as possibility to implement self-regulation of particular business sectors. Self-regulation tools, which are implemented with help of legal technology, could be an important step forward to promote social entrepreneurship and to lighten legal conditions for social entrepreneurship in the EU. In the strict sense of the definition, the soft law is not directly related with legal technology. Nevertheless, the access to online software can reduce or in some cases eliminate the need to access a lawyer directly, and also can promote a simplified development of social entrepreneurship. In such case, legal technology and arrangement of private standards, guidelines, codes of conduct, etc., can minimize the need to use direct legal consultations.

In this context, we can ask on what level law can be separated from politics (whether it can be separated at all). Some researchers think that the "turn from law's myths to its facts, from the falsehood of law's neutrality to the truth of its politics, could only be accomplished by turning away from traditional jurisprudence to society and history (reality)."[399] In addition, they claim "law would no longer be able to resist politics on the spurious grounds that politics was something other than law. The result would be law opened to explicit political reimagination and change."[400] We can state that it is rather controversial idea if we have in mind that the legislature creates a new legal regulation not accidentally, however, with a specific purpose to tackle a need of society, which requires such new legal regulation. In addition, there could be a lack of legal regulation within the process of formation of new social phenomenon such as social entrepreneurship. Moreover, such kind of lack of regulation is important to define timely.

The applying soft law elements to the governance of social enterprise is in the beginning stage of development. It can be argued, "One could measure intermediate results, such as the farmers' crop yields, but determining quality of life is more challenging. The absence of effective pay instruments for aligning managerial and stakeholder interests adds greatly to the costs of contracting to produce charitable goods."[401] Soft law measures can be compared with mentioned measures of CSR. It is noticed that corporate governance and CSR initiatives started on the ground of soft law. However,

399 Christopher Tomlins, "Law 'And', Law 'In', Law 'As': The Definition, Rejection and Recuperation of the Socio-Legal Enterprise," *Law In Context*, Vol.29, No.2, 2013: 138.
400 *Ibid*.
401 Brian Galle, "Social Enterprise: Who Needs It*?" Boston College Law Review* 54, no. 5, 2028, 2045.

later such initiatives evolved beyond being only soft law instruments. Now they exist as hard law elements regarding disclosure requirements. CSR (and CSR reports) is becoming part of the corporate governance system. According to Directive 2003/51,[402] corporations have to disclose non-financial key performance indicators in their annual reports, which include environmental and employee aspects, to the extent necessary for an understanding of the corporation's development, performance or position.[403] Of course, at this time it is applicable to certain types of large, listed companies. However, it is possible that at some level it could become a prevalent practice in entities operating like social enterprise.

Different EU countries take various regulatory initiatives in regard of regulation of social entrepreneurship. We will see that there is main tendency is moving towards the domain of the soft law (including use of legal technology) and digital social innovation. Particular digital solutions (which could be called as a phenomenon of digital social innovation) to social challenges can range from social networks for those living with chronic health conditions, to online platforms for citizen participation in policy-making, to using open data to build more transparency about public spending.

Experts highlight that digital social innovation has lot of common features with other terms like "tech for good", "civic tech" and "social tech".[404] We see that they all are heading in the same direction and share similar aims. They seek to reorient technology to social needs, to use collective knowledge and skills to strive for positive effect. They also aim to make government more accountable and transparent; and to promote alternatives to the dominant technological and business models (the alternatives, which are open and collaborative instead of being closed and competitive). Significant number of technologies are used by the digital social innovation (open hardware, peer-to-peer platforms, open data etc.). It is used to tackle problems in a great number of areas, such as healthcare, education, transparency, democracy, justice, and accountability.[405]

We can state that connection of the legal technology with regulation of incorporation and maintenance of social enterprise is experienced very differently in different

402 "Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings," accessed 29 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0051&from=EN

403 Dániel Gergely Szabó, and Karsten Sørensen, "Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU," *European Business Law Review*, no. 6, 2013: 789.

404 For more on digital social innovation see: "Digital social innovation," accessed 29 January 2021, https://digitalsocial.eu/

405 *Ibid*.

states. Despite the amount of exploitation of legal technology, it can be noticed that correlation between the use of legal technology and soft law so far is not significant. However, where social entrepreneurship legal environment is advanced it correlates more frequently with the elements of soft law and legal technology.

The potential of the synergy between legal technology and soft law in the field of social entrepreneurship could be exploited more (despite use of some technology, including legal technology is becoming more frequent). "The community of legal technology start-ups is familiar with such new areal of legal service as legal research, notarization tools, intellectual property/trademark services, etc."[406] That can be used by the social enterprises to manage and lower costs of such services. On the other hand, namely the social enterprises could become start-ups providing above-mentioned legal technology services, which could tackle social challenges. One of the up-to-date legal technology start-up databases[407] states that in the above-mentioned countries there are no specialized legal technology start-up, which work with social businesses exceptionally or operate as social business itself. However, there are several examples that are worth to mention despite they were out of the scope of this research.

With a slight deviation from the scope of this research, we can mention that quite good examples of the legal technology start-ups, which work with the goal of social mission, can be found in India. Such start-ups like Lawtoons'[408] or 'Law for Me'[409] provide range of legal services and educational materials dedicated to people who could not afford traditional legal services. In Europe, German start-up of legal technology 'Helpcheck'[410] defends consumer interests against big corporations and insurance companies, helping those who could not otherwise afford legal services. Authors in the area of research of legal technology notice, "In recent years clients have been more thorough with their billing and spending on legal services, resulting in a need to be more transparent and efficient."[411]

We already can say that adoption of advanced technologies, digitalization, or

406 "Legal Tech Market Map: 50 Startups Disrupting The Legal Industry," accessed 29 January 2021, https://www.cbinsights.com/research/legal-tech-market-map-company-list/

407 "Legal Tech Startups," accessed 29 January 2021, https://airtable.com/shr74dsY3wZMwLMBg/tble-1gLbY7XwrlSQD/viwp8mj6JmaFoqZVK?backgroundColor=blue&layout=card&blocks=hide

408 "Lawtoons," accessed 29 January 2021, http://www.lawtoons.in/

409 "Law for Me," accessed 29 January 2021, http://lawforme.in/

410 "Helpcheck," accessed 29 January 2021, https://www.helpcheck.de/

411 Guillermo Miranda, "How Legaltech Startups are Revolutionizing the Legal Services Industry," LAWAHEAD hub, accessed 29 January 2021, https://lawahead.ie.edu/how-legaltech-is-revolutionizing-the-legal-services-industry/

the incorporation of artificial intelligence are leading to the emergence of new ways of working, producing, and providing services whether in the field of social entrepreneurship or not. Because social enterprises do not completely fit into the pure concepts of 'for-profit' or 'not-for-profit', this concept of 'limited profitability' should be recognized more widely. For the same reason some aspects of legal technology could be useful when thinking about encouraging the social entrepreneurship.

The legal technology industry is still growing. Therefore, we can ask how legal technology can serve to development of this phenomenon as such. It is noticed that this industry "has quietly built up a number of new categories over the last few years such as electronic discovery, law practice management, and online legal services. However, there is still a lot of opportunity to improve processes within a legal industry still attached to manual and paper-based processes."[412] Most of social enterprises use social innovation (or other kind of innovations). Therefore, they need and innovative legal services. Here we could mention the concept of the Economy for the Common Good (ECG). Austrian economist Christian Felber founded this socioeconomic and political movement in 2010. The central proposition of ECG model is that "the economy should be at the service of people, i.e., of the common good. The ECG model is cross-disciplinary and applicable to all kinds of companies and organisations."[413]

We have already mentioned in this research that specific legal form of social enterprise is not necessary for the legal framework of social entrepreneurship in every particular state. Some legal frameworks at national level are necessary to provide legitimacy and visibility to social enterprises (also to organize incentives on state or local level) allowing them to undertake unrestricted economic activity. However, different traditions of the development of social entrepreneurship in different countries probably will not lead to the unified European legal form of the social enterprise.

From the scientific point of view, future evolution of different types of social enterprises is inevitable. Therefore, what we have researched here can be re-evaluated after several years and supplemented with aspects of constant change in society as well as in legal development. Nowadays solutions that suit in different cultural environment will inevitably shift, opening opportunities for continuing research.

Legal frameworks are important tools, which could help establish social enter-

412 Rafael Ziegler et all, *An Introduction to Social Entrepreneurship: Voices, Preconditions, Contexts* (Cheltenham, UK: Edward Elgar, 2009): 1.
413 *Ibid*.

prise sector in particular countries. The most important is the legal clarity which entities can be considered as social enterprises, what are their main objectives, duties, and fiscal aspects of their operation. Moreover, such legal framework should not be too strict, to avoid the over-regulation, which allows using more flexible legal tools.

We already mentioned, however, it is important to emphasize that social entrepreneurship legal frameworks develop in many countries differently, according to that, what is the most suitable in order to implement ideas of social entrepreneurship. Whether existing legal forms are adapted for social entrepreneurship or new legal forms created, the socio-economic aspects should be kept in mind (including costs of incorporation).

This approach has been used in the United States for the benefit corporations, and in the United Kingdom. Although this example does not fall within the scope of this research, we can mention legislation of the United Kingdom. The Companies (Audit, Investigations and Community Enterprise) Act (2004) of the United Kingdom introduced a dedicated form of legal entity – a community interest company.[414] According to this Law, a company limited by shares or a company limited by guarantee may become a community interest company. The overall legal regulation of companies under the Companies Act is applied to the community interest companies as well as to the traditional companies; however, there is the specific regulation: community interest companies must not distribute assets to their members. If regulations authorise community interest companies to distribute assets to their members, the regulations may impose limits on the extent to which they may do so. To obtain the status of the community interest company, such company must comply with the so-called "social enterprise test" requirements and its business results (profits) must target certain public social needs (e.g., social housing, public transport). We see a distinct social character in the content of the company's activities, but the legal regulation emphasizes that such a company is a profit-making private entity, not a charity or a public institution, and so on. We have mentioned that the legal environment of the social enterprise in the United Kingdom is outside the scope of this research. However, from this example we see that legal framework for social enterprises in different countries can vary a lot.

We mentioned that on a freedom of choice of the legal form based certification scheme (e.g., in Denmark) contains some visible advantages. First, entities of all corporate forms can use it if their legislation allows the pursuit of social goals. Second,

414 "Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27)," *supra note*, 188.

certification scheme does not require reincorporation as a new legal form of company (because reincorporation could cause significant costs).

As one of tasks, implementing main objective of this research has been the evaluation of the phenomenon of social entrepreneurship in the broader context of social innovation, CSR, legal technology, and such global initiatives as the UN's Sustainable Development Goals (SDGs).[415]

We can ask why different legal forms of social enterprise could be important and have an impact in seeking to implement SDGs? We already have noticed that the legal framework for social entrepreneurship is important by creating social impact and providing additional possibilities for using entrepreneurial methods. In addition, we also think that it can act as SDG facilitator.

Various legal forms of social enterprise can be important for implementing SDGs in particular countries (including countries that are investigated in this research). In the simplest way of interpretation, they can provide space for entrepreneurial methods, which could meet social challenges, because the SDGs cover such for social entrepreneurship important areas as education, health, employment, equality, environment, etc. We could add that historically and traditionally, most of those areas are, together with other political measures, tackled by social enterprise, especially in the countries with more advanced sector of social entrepreneurship.

In our previous research, we already noticed that some of the legal forms mentioned in the Nordic countries correlate with the implementation of SDG's more closely than other legal forms. It should be stressed that not only described legal forms of social enterprise determine correlation with SDG's. Other factors, such as different strategies and state policies, also affect this process. In Denmark, the role of social enterprise has so far been disconnected from the implementation of the SDGs. Although with the potential of the new legislation on social enterprise (socio-economic company) status, the country is on the right track.[416]

E.g., Denmark developed an action plan as a framework for how the Danish government is working with the SDGs. Priorities in the action plan are divided among environment, climate, growth, prosperity, and ensuring peaceful and safe communi-

415 The 2030 Agenda for Sustainable Development, including its 17 sustainable development goals (SDGs), was adopted by Heads of State at a special United Nations (UN) Summit in 2015. The Agenda is a commitment to eradicate poverty and achieve sustainable development worldwide by 2030. More on that: "Sustainable development goals," United Nations, accessed 29 January 2021, https://sdgs.un.org/goals

416 Lavišius, Bitė, and Andenas, *supra note*, 53.

ties.[417] We think that social enterprises can work in all these areas, especially in cooperation with government and local municipalities. However, social enterprises almost entirely operate as WISEs. It means that they mostly specialize on including people with disadvantages or disabilities into the labour market, whether in businesses, or in projects with no dependency on public service delivery.[418]

Sweden's Government is also concentrating on achieving better results in the implementation of the SDGs. Up to date Sweden's National Action Plan is intact. The Government seeks with this Plan it to end hunger and poverty, achieve gender equality, realise the human rights, and the empowerment of all women and girls. In addition, it seeks for the lasting protection of the planet and its natural resources.[419]

The SDG situation and its correlation with the social enterprise sector in Finland, we think can be highly related with the Finnish Social Enterprise Mark. It could be an instrument, which helps to achieve such goals as decent work, reduced inequalities, and economic growth. Finland declares officially that it is one of the leading countries in the implementation of the 2030 Agenda. We also have to add that Finland developed a practical tool, called "Society's Commitment to Sustainability". With help to this tool, government gathers stakeholders from different fields to promote the goals of sustainable development.[420]

At this time in Norway, there is no specific legal form, which could fit the concept of social enterprise on the full basis of our operational definition. Nevertheless, Norway states great political and public awareness about the SDGs. The country's involvement in the implementation of SDGs can be potentially merged with a potentially high level of social innovation. It also could become a tool for the further development of the synergy between social entrepreneurship and SDGs.[421]

Iceland's voluntary national review on the implementation of the 2030 Agenda for Sustainable Development states that the SDGs have been integrated into government policy on social, economic, and environmental affairs. Therefore, we can state

417 "Handlingsplan for FN's 17 verdensmål," Regeringen.dk, published 2019, accessed 29 January 2021, https://www.regeringen.dk/publikationer-og-aftaletekster/handlingsplan-for-fns-verdensmaal/

418 Bruhn Lohmann, *supra note*, 242.

419 "Single country profile: Sweden," European Sustainable Development Network, published 2020, accessed 29 January 2021, https://www.sd-network.eu/?k=country%20profiles&s=single%20country%20profile&country=Sweden#sdg

420 Lavišius, Bitė, and Andenas, *supra note*, 53.

421 "Norway: Initial steps towards the implementation of the 2030 agenda. Voluntary national review," United Nations SDG Knowledge Platform, published 2016, accessed 29 January 2021, https://sustainabledevelopment.un.org/memberstates/norway

that Iceland's government understands the potential of different stakeholders (including legal entities that from the perspective of the operational definition can be considered as *de facto* social enterprises) to help in SDGs implementation. Iceland's Government states that it seeks to identify marginalised groups in society, and help them to build partnerships with different stakeholders, which could address environmental issues.[422] In our previous analysis, we already stressed importance of the vocational rehabilitation organisations in Iceland. An inter-ministerial working group leads the work of the Icelandic government towards implementing the SDGs. In addition, the government builds public–private partnerships and declares that the SDGs will not be met without the involvement of the private sector.[423]

Speaking about the Nordic and Baltic States, we should notice that they also have strategies for helping to reach the SDGs. E.g., Estonian government takes actions and implements measures in the fields of 17 SDGs through the support from the non-governmental sector.[424] However, it is unclear what the potential involvement of the social entrepreneurship sector in this field is, because of the lack of information.

Latvia's newly established social enterprises could apply for benefits from the Government. The Law on Social Business (Section 8) defines types of benefits available to social enterprises. It can be fiscal awards or many other benefits. Nevertheless, up to this point it is difficult to decide how this regulation correlates with SDGs. The same as the other mentioned countries, Latvia has a Sustainable Development Strategy, which defines the sustainable development objectives. One of the most recent review provides information that Latvia's SDG challenges are mostly visible in such areas as development of eco-efficient and innovative economy and reduction of income and opportunity inequality.[425] The above-mentioned problems also can be tackled by using the potential of social enterprise, especially having in mind potential of new legislation on social enterprises.

Lithuania still lacks legislation, which could define social enterprise as it is de-

422 "Iceland's implementation of the 2030 Agenda for sustainable development. Voluntary national review," Government of Iceland, published 2019, accessed 29 January 2021: 4, https://sustainabledevelopment.un.org/content/documents/23408VNR_Iceland_2019_web_final.pdf

423 Lavišius, Bitė, and Andenas, *supra note*, 53.

424 "Executive summary of the Estonian review on implementation of the Agenda 2030," Government Office of Estonia, published 2016, accessed 29 January 2021, https://www.riigikantselei.ee/sites/default/files/content-editors/Failid/SA_eesti/2016_06_14_executive_summary_of_estonian_review_on_agenda2030_final.pdf

425 "Latvia: Main messages. Voluntary national review," United Nations SDG Knowledge Platform, published 2018, accessed 29 January 2021, https://sustainabledevelopment.un.org/memberstates/latvia

fined in our operational definition. The small exemption is only the law on WISEs. It also has to be stressed that Draft Law on Social Business has a close relationship to the SDGs. However, it is not stressed in the Draft Law explicitly. The Draft Law has foreseen an obligatory social aim that must be sought by the social enterprise. Additionally, in the Draft Law are included varieties of activities, from the integration of the disadvantaged to protection of the environment or cultural activities, which definitely could be considered as closely relate with the SDGs. Therefore, it is quite early to draw conclusions on perspectives of legal innovations that still are pending. If they finally find their place in the legislation, they will introduce the process of establishing and maintaining social business entities. Then they could possibly correlate and with the SDGs. The Lithuanian report to the UN stresses that the development of an innovative economy and smart energy is one of the main priorities.[426] Here we could probably notice that if the legal framework for social enterprise would be implemented soon (having in mind the Draft Law on Social Business), it could significantly help with the implementation of the above-mentioned priorities by exploiting potential of social enterprises as partners of the Government and local municipalities, involving in different SDGs-related projects.

Speaking about the implementation of SDGs in Germany, the state's government has decided to make its National Sustainable Development Strategy a key framework for achieving the SDGs in Germany. The National Sustainable Development Strategy sets the key principles guiding the national sustainability policy, which are intergenerational equity, quality of life, social cohesion, and international responsibility.[427] When seeking to implement proposed measures, especially before amendments to legislation, the German government engages in a dialogue with stakeholders and other relevant parties. This creates an opportunity to explain the proposed measures and enables stakeholders to articulate their ideas, criticisms, and suggestions for improvements. The local authorities, the scientific and academic community and the private sector are also involved in this dialogue. Therefore, we can think that such approach is favourable for governments and social enterprise sector cooperation while implementing sustainable development goals. This approach can be effective especially since one of the SGDs

426 "Lithuania: Main messages. Voluntary national review," United Nations SDG Knowledge Platform, published 2018, accessed 29 January 2021, https://sustainabledevelopment.un.org/memberstates/lithuania

427 "Executive summary of the report of the German government to the High-level political forum in July 2016," United Nations SDG Knowledge Platform, published 2016, accessed 29 January 2021, https://sustainabledevelopment.un.org/memberstates/germany

implementation goals is Making globalisation equitable, in particular by promoting fair trade and income and job opportunities that ensure sustainable livelihoods (with particular emphasis on promoting responsible supply chains and minimum social and environmental standards).[428]

Austrian SDGs implementation is based on principles of ecological, social, and economic dimensions, and it is declared as a constitutional state goal. Austria promotes competitiveness and innovation while safeguarding the diversity of natural resources, ecosystem services and social progress. SDGs are anchored in nationwide Austrian strategy documents: Climate and Energy Strategy, Three-Year-Programme on Development Policy, Health Targets, Youth Strategy, and Foreign Trade Strategy. SDGs-References are also included in federal states'-strategies. In the light of social enterprise development, it is important to mention that the Government Programme 2020–2024 further strengthens a targeted coordination in implementing the 2030 Agenda by systematically involving relevant stakeholders. Following a multi-stakeholder approach, representatives of federal states, cities, municipalities, and social partners, stakeholders from civil society, business and scientific community are committed to SDG-implementation.[429] Therefore, it can be considered as for social enterprise sector favourable approach.

Switzerland is already at an advanced stage in achieving various SDGs and has already fulfilled a number of targets. For example, Switzerland is free from extreme poverty, education is free, compulsory and of good quality. However, the baseline assessment identifies areas where efforts at national and international level beyond existing policies are needed to achieve the SDGs. Consumption of natural resources, for example, is increasing overall. Use of resources from within Switzerland for consumption by its population is decreasing but use of resources from abroad is increasing in an unsustainable way. Switzerland is also committed to enabling disadvantaged groups – for example people with disabilities – to benefit from the country's prosperity. Moreover, Switzerland's private sector, NGOs and scientific community have also been committed to sustainable development for a long time.[430] An advisory group composed of inter-

428 *Ibid*.

429 "Austria: Voluntary National Review 2020," United Nations SDG Knowledge Platform, published 2020, accessed 29 January 2021, https://sustainabledevelopment.un.org/memberstates/austria

430 "Switzerland implements the 2030 Agenda for Sustainable Development. Switzerland's Country Report 2018," Eidgenössisches Departement für auswärtige Angelegenheiten EDA, published 2018, accessed 29 January 2021, https://www.eda.admin.ch/dam/agenda2030/en/documents/laenderbericht-der-schweiz-2018_EN.pdf

ested non-state actors has identified what it considers Switzerland's priority challenges. This group provides a platform for further dialogue with the federal government and for partnerships for implementing the 2030 Agenda.[431] It is hard to distinguish social enterprise involvement in this field. However, the provided information on involvement of private sector, NGOs and scientific community allows progress to be assessed positively.

We already emphasized that variety of legal forms can be used as some sort of social enterprise. It is also important to stress that most of them can become a subject of implementation of the SDGs. In addition, we have to note that all jurisdictions that were compared in this research have developed legal forms suitable for social enterprises. Some of researched countries have legal framework directly dedicated for development of social entrepreneurship (e.g., Latvia or Denmark). In addition, in all countries exist *de facto* social enterprises, which operate by using existing legal forms, even if these forms are not directly developed for social entrepreneurship. We have to emphasize that if countries only indirectly recognise social entrepreneurship sector, the main characteristics of *de facto* social enterprises still meet the main criteria of our operational definition (an entrepreneurial dimension, a social dimension, and a dimension related to governance structure).

In this case, the most important aspect is the social mission of enterprise, which should be expressed explicitly, whether by defining it in entity's statute or by expressed in some other (legally acceptable) way. In this context, we have to mention that there is another part of social enterprise, which are in the "grey" area of legal regulation, or are called *quasi*-social enterprises or social enterprises acting in *quasi* markets[432] that could be more detailed discussed in the future.[433]

Speaking about the necessity of the legal framework for social enterprises, experts notice, that it depends on what one wants with social enterprises. One danger with having a specific form for social entrepreneurship is that the form could be used as a legalized form for greenwashing. It means that somebody who does business in usual unsustainable form could signal misleadingly to investors and society that they are sustainable. Another danger is that if we have a separate legal form for social entrepre-

431 *Ibid*.
432 Chris Mason, Michael J. Roy, and Gemma Carey, "Social enterprises in quasi-markets: exploring the critical knowledge gaps," *Social Enterprise Journal* 15(3), 2019: 358-375, https://doi.org/10.1108/SEJ-09-2018-0061
433 Lavišius, Bitė, and Andenas, *supra note*, 53.

neurship then it can be seen as a way of signalling that companies, which are not social entrepreneurships, do not have to think about social issues anymore. In this context, the argument that limited liability companies must strive only for profit is not correct. It is a legal miss that the ordinary company form mandates maximization of returns for shareholders. It does not do that in any country. So far, there are simply not enough arguments, why the separate legal form of social enterprise should be introduced. It is also unclear what could be the requirements for that form, and what kind of external assessment would be used. Maybe it is something that could be done within the scope of the ordinary company instead. Another question is how we regulate most existing business undertakings and how we reform the mainstream company law in order to ensure that any type of business is run in the sustainable way.[434]

One of the most important challenges in the context of social entrepreneurship legal framework is the measuring of social performance. Especially that this question is only partially of a legal manner. Performance of social enterprise is not related with its existence as a legal entity, but rather with evaluative aspect of its existence. It means that legal form may not directly influence social performance of enterprise. However, we think that different legal forms provide different possibilities for action and therefore they indirectly influence social performance or social impact of particular social enterprise. We fairly understand that social enterprise (at least in the most cases) could not exist *per se*. To be a social enterprise means not only obtain e.g., a dedicated legal status or legal form (which is strictly legal question). To be a social enterprise means to carry out a social mission (which is not a legal question or partially legal). Social good is usually recognized by society without a legal recognition of it. However, in the most cases it is impossible to cover the whole spectrum of social good fully, which has to be maintained on the state level. Therefore, countries prioritize some areas of social good more than the other does. Then respective prioritized areas become a part of political agenda. In this place, legal regulation steps in. The topics of political agenda are usually implemented by different legal instruments (laws, rules, conditions, etc.). It means that social enterprise performance is related with social good that is recognized on the state level as important.

Additionally to our insights we can mention that researchers raise questions what and how has to be evaluated in the context of social enterprise performance. Should the focus be concentrated on revenues or earnings? Alternatively, it must be

434 Sjåfjell, *supra note*, 156.

concentrated on return on invested capital or profits per employee. When a company simultaneously pursues a social mission and profit, it becomes hard to measure. However, the range of possible evaluative metrics for social enterprise exists. Usually those are very specific measures of impacts achieved by a particular type of entity, in a particular industry, perhaps in a particular geography.[435]

Several measurement tools can be mentioned here for the sake of example (as we mentioned, this question is only partially of a legal manner). E.g., already discussed "B Lab" certification system in the US has its own "Impact Assessment" in the form of an online survey available to dual- mission businesses free of charge. One more in the US located private initiative is the "Impact Reporting and Investment Standards (IRIS)" of the "Global Impact Investing Network (the GIIN)", which provides common metrics for reporting the performance of impact capital.[436] In Europe, one of best-known initiatives is a methodical used and promoted EU-wide by the Swedish non-governmental organization "Reach for Change".[437] We believe that there can be found much more examples of such activities. However, most of such impact measurement activities or projects are run by the non-governmental sector. In this context, we come back to legal area and raise question, whether such examples could encourage policy makers to consider development of new legal tools, which could be used by social enterprises officially. We know that most of the entities that operate like de facto social enterprises (despite their legal form) are obliged to produce some kinds of annual accounts. However, despite those accounts can provide some information about social enterprise performance in general (mostly financial) sense, they are not tailored for social impact measurement. One of realistic scenarios that we have in the EU on our hands is the CSR reporting, which is obligatory for large companies.[438] Of course, such scale of reporting would be burdensome if it would become obligatory for smaller-scale enterprises. However, the aspect of the social impact measurement (probably by some soft-law measures, at least) could be considered in the countries that seek for the more active promotion of social innovation through social enterprise sector.

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435 Dean, *supra note*, 189: 126.

436 „IRIS+ the generally accepted system for measuring, managing, and optimizing impact," accessed 29 January 2021, https://iris.thegiin.org/#about

437 „Reach for Change," accessed 29 January 2021, https://reachforchange.org/en/

438 "Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups," accessed 1 February 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095

We think that one important remark must be done in regard of social enterprise relation with charitable organizations, or simply charities. From the legal point of view, in the most European countries charities are set up using legal form of foundation. In this research, we speak a lot about foundation's legal form as one of the alternatives suitable to establish a social enterprise (set up a social business). For the sake of this research, it has to be emphasized that not every single foundation could be considered as *de facto* social enterprise.

Researchers stress that there is an ongoing debate whether philanthropic organizations can honestly be called enterprises and whether they have made the required cultural and organisational changes to operate as businesses. It is natural that some voluntary and community organisations have not transformed and will not transform into social enterprises.[439] Therefore, discussion about potential legal forms for *de facto* social enterprises has to be moderate concerning some legal forms (as foundations, or more precisely, charitable foundations.

In this sense researchers emphasize that "those who are interested in social enterprises primarily as a means of supplementing and/or replacing the income of charitable and voluntary organisations can be described as operating within the 'earned income' school of thought about social enterprise."[440] Separation of philanthropic activity and social entrepreneurship is also important because by its nature philanthropic activity has a top-down direction: people who have more give to those who have less. When the social entrepreneurship with its mutuality has bottom-up direction: people sharing democratic control over mutually beneficial activities.[441]

Additionally to already-mentioned relation of the welfare state policy with social entrepreneurship can be said that some also suggest, "Any approach to outsourcing public service provision that transfers control from government to organisations or communities would damage the universality of public service provision, because each local area would decide on different approaches and priorities."[442] We would not agree with this statement because social entrepreneurship (as it was already emphasized in this research) is inseparable from social innovation process, which in the most cases comes only from bottom-up approach. Therefore, the question what role social enter-

439 Helen Fitzhugh, and Nicky Stevenson, *Inside Social Enterprise: Looking to the Future* (Bristol, England: Policy Press, 2015): 11. DOI: 10.2307/j.ctt1t894vk
440 *Ibid*.
441 *Ibid*, 13.
442 *Ibid*, 14.

prises could play in providing social welfare and local services could be answered by emphasizing inevitable changes in the welfare state concept itself, which will have to adapt (or is already adapting) social innovations to solve 21st century's societal challenges.

After these remarks, we could proceed to some kind of evaluation and inventory of the system of social enterprise legal forms. In this place, we think that our original observations could be pared with observations of other researchers.

Based on some ideas of Kerlin[443] and our personal observations, we can distinguish legal models of social entrepreneurship in countries without deviating from economic factors that are important for this research looking from the interdisciplinary context. We suggest that the legal typology of social enterprise models would be derived from three areas: non-profit (or non-governmental), partially profit-driven, and for-profit. Then these models correlate with Kerlin's factor-driven, efficiency-driven, and innovation-driven economic models.[444]

Although Kerlin methodology is well established we do not rely solely on it, because we seek for categorization of the legal models of social enterprises. Therefore, we suggest that the above-mentioned Kerlin factor-driven, efficiency-driven and innovation-driven economic models can be interchangeable and cannot be strictly tied with the stage of economic development in particular country. Based on that we suggest that there can exist several different social enterprise models in one particular country. This suggestion comes from such variables (or legal framework elements) in the legal field as governance, initial capital, accountability, profit distribution, etc.

We already made some concluding remarks after comparative analysis of social enterprise regulation in different countries. However, having in mind Kerlin's methodology and our personal observations we can stress one more time that socio-economic aspects of social entrepreneurship are primary reasons why social entrepreneurship exists *per se*. Legal preconditions, however, support the existence of the phenomenon of social entrepreneurship. Historically such legal forms as associations and foundations were intended to serve for a quite narrow goal. Nowadays, with help of social innova-

443 Kerlin, *supra note*, 10: 12-16.

444 Kerlin describes factor-driven model (stage of economic development) as caused by the low GDP per capita that necessitates need-based entrepreneurship in the traditional civil society. In the efficiency-driven stage, entrepreneurial activities often take the form of small- and medium-sized businesses and, in some cases, are involved in larger scale manufacturing activities. For the innovation-driven model (stage) is characteristic availability of a high degree of wealth necessary to support a large welfare state, as well as government policies and other institutions supportive of innovative entrepreneurship.

tion or an innovative attitude to solution of social problems, understanding of possibilities behind traditional legal forms expands thanks to social enterprise. Therefore, social entrepreneurship not only seeks to implement its social mission, but (we already emphasized) its initiatives create new forms of business and society partnership, from which benefit not only target social groups, but also the whole society. Usually, the set-up of social enterprise is dictated by the nature of the social needs addressed, resource availability, and the ability to capture economic value. However, prospects of universal European legal form of social enterprise at this point are very questionable because of very different legal and socio-economical traditions in different countries.

In addition, we have to notice that legal status of social enterprise creates more challenges than it could be seen from the first sight. Different definitions, methods, and procedures are utilized in different countries to obtain the legal status of social enterprise. The most challenging aspect is the hybridity of the legal status of social enterprise. Social enterprises usually seek the dual mission of achieving financial benefit (or at least financial sustainability) and serving social purpose. In such way, they cannot be categorized within traditional categories of private, public, or non-profit organizations.

Definitely, legal framework of social enterprises correlates with actual circumstances in order to create (or to amend, or adopt) legal basis for actual social relationship, in this case – social entrepreneurship. The above-mentioned aspects show that most of the social problems go in front of the social innovation. More precisely, aspiration to solve a social problem leads to social innovation, which then can be implemented with or without help of special legal framework. It can be the case in any of the above-mentioned (factor-driven, efficiency-driven, and innovation-driven economic) models or non-profit, for-profit, or hybrid legal forms. It means that not in all cases there is a need of a concrete legal framework to solve a social problem with help of social innovation. On the other hand, in some cases a new legal framework as such can serve like social innovation itself. In such case, boundaries between social and legal aspect of social entrepreneurship are even more blurred. In such cases, we have to stress one more time importance of socio-economic and cultural environment. If some social innovation (like, certain legal framework) in particular societies is acceptable, in other societies it can be unwelcome, or at least not understood. Therefore, we can one more time emphasize that natural development of societal relations could not be forced by any legal framework if it is not accepted by society. We already emphasized that such approach meets the view of legal realism. The starting point of the realist account of

law is its critique of a purely doctrinal understanding of law. Law is going institution (or set of institutions) caused by the tensions: between power and reason, and tradition and progress and a social process is not something that can happen at a certain date.

Moreover, different organizational approaches, whether it is dedicated legal form (status), WISE, or *de facto* social enterprise, theoretically use a different instrument (a kind of a specific tool) to address need of society. We already agreed on that according to our personal observations and insights of other researchers. We also stressed that this did not necessarily affect the effectiveness of social entrepreneurship sector. It means that, from the legal point of view, market or public policy failures not necessarily indicate a need for an original legal solution. On the other hand, a legal solution does not have to be underestimated, because legal framework may create or demolish barriers for implementation of public policy measures.

Appendix B shows summarised information on the main and most popular legal form suitable for social enterprise in every discussed country. We several times emphasized that operational definition of social enterprise, used for the purpose of this research, consists of three dimensions: an entrepreneurial dimension, a social dimension and a dimension related to governance structure. Therefore, in the Appendix B mentioned legal forms meet best this definition and the categories, defined in the SBA and our operational definition:

A social enterprise as a legal entity operates in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders.

This legal entity operates by providing goods and services for the market in an entrepreneurial and innovative way.

It uses its profits primarily to achieve social objectives.

It is managed in an open and responsible manner and involving employees, consumers and stakeholders affected by its commercial activities.[445]

Here also we can see already mentioned pattern where special (dedicated) regulation exists beside traditional legal entity regulation. The last one is the most common social enterprise development scenario. I.e., employment of existing legal forms in social enterprise sector is the most commonly found approach.

445 "Social Business Initiative," *supra note*, 7.

# 3. CHALLENGES OF LEGAL REGULATION OF SOCIAL ENTREPRENEURSHIP AT THE EU LEVEL

## 3.1. Context of the EU legally binding acts

In the beginning of this part, it is worth considering whether the refinement of social entrepreneurship legal preconditions could come from EU regulation or vice versa. The national regulation in our research is examined first because we think that it is more significant. We base this on the argument that is difficult to regulate social entrepreneurship at EU level, as social enterprises operate at a more micro level and adapt to local specificities. Therefore, we can suggest that it is more rational to set only soft law measures (guidelines, value standards, etc.) at EU level, which not always are subject to law but allow good practice to be adapted.

We think that the most important is to allow national legislation to adapt good practices, which may not necessarily be transferred from supranational EU initiatives, but from the state to the state on a cross-border basis. So, it is not just legislative initiatives at EU level that matter, but also discussion platforms such as GECES[446] where cross-border experiences can be shared horizontally while discussing key principles in this area at EU level.

Despite this assumption, we have to look into legal preconditions of social entrepreneurship, which possibly exist on the EU level and evaluate them according to goals of this research.

Speaking about nowadays company regulation (and not only about social enterprise), it has to be kept in mind multinational legal environment. Despite social enterprise most commonly being small entities, they also are actors of international business community. They have possibilities to choose not only from a national catalogue of domestic legislative variations, legal forms, codes of conduct and funding options, but if they act internationally, they can choose from several jurisdictions. Of course, besides the mentioned economic benefits there are concerns about environmental degradation, human rights violations, and tax evasion. Therefore, different jurisdictions try to prevent undesirable corporate conduct. In this case, the EU acts as a supra-national norm creator and establishes at least a certain minimum of legal standards for companies.

446 "Expert group on social economy and social enterprises (GECES)," European Commission, accessed 20 March 2021, https://ec.europa.eu/growth/sectors/social-economy/enterprises/expert-groups_en

The minimal standards for sustainable corporate conduct are created and through various policy documents and secondary legislation, and even determined in the primary EU legislation.[447] Article 3 of the Treaty on European Union defines that the Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."

We already emphasized that the legal frameworks are important for legal certainty in the particular area of legal regulation. By defining the nature, mission, and activities of social enterprises, and by granting social enterprises recognition and visibility (e.g., by implementation of national strategies), such legal certainty could be reached. It can also be supported by the above-analysed examples.[448]

The European Commission declares that social economy gives a lot to the European Union. The Council of the European Union defines the social economy as a key driver of economic and social development in Europe.[449]

Although in this work we research concrete countries, it must be mentioned that countries, which do not fall within the scope of this research, also have their own level of development of the legal framework of the social entrepreneurship. E.g., adoption of laws regarding the social economy in some countries (e.g., Spanish Social Economy law of 2011,[450] Portuguese Social Economy law of 2013,[451] and French Social and Solidarity Economy law of 2014[452]) constituted a significant step forward, fostering the development and rising the visibility of the social economy in the above-mentioned Member States of the EU.

The European Economic and Social Committee highlights the figures that "in 2016 there were 2.8 million social economy enterprises and organizations in the European Union that employed 13.6 million people and represented 8% of the EU's GDP.

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447 Clarke, and Anker-Sørensen, *supra note*, 55: 190-191.

448 Lavišius, Bitė, and Andenas, *supra note*, 53: 277.

449 "Social Economy in the EU," European Commission, accessed 21 March 2021, https://ec.europa.eu/growth/sectors/social-economy_en

450 "The Spanish Law on Social Economy," published 2011, accessed 1 February 2021, https://www.eesc.europa.eu/resources/docs/the-spanish-law-on-social-economy.pdf

451 "Portuguese Framework Law on Social Economy," published 2014, accessed 1 February 2021, http://www.socioeco.org/bdf_fiche-document-4127_en.html

452 *Boosting Social Enterprise Development: Good Practice Compendium, supra note,* 215: 101.

Therefore, the social economy is a crucial part of the EU socio-economic landscape."[453]

"Despite the social entrepreneurship has become a source of hope, people still know little about its origin. By their origin, social entrepreneurs usually do not rely on business and government for the realisation of their ideas and aiming systematic change. Social entrepreneurs are usually promoted by the non-governmental organizations, the media, policymakers, etc. They become branded and politicised actors".[454] Marked-based social system of democratic society has clear advantages in comparison to other socio-economical systems. However, some researchers argue, "the danger of an uncritical and exclusive promotion of a free and market based (social) system is obvious. There are areas where the state has a duty to act and to ensure the basic security of its citizens."[455] Therefore, the question is, whether legal environment for social entrepreneurship should be developed only as recognition of such business form, which tackles social problems, or also as a societal phenomenon *per se*.

European Commission report on social enterprises and their eco-systems in Europe illustrates the state and development of social enterprise and pays attention to the findings of recent empirical and theoretical research on social enterprise at the international level. [456] What can we learn from such empirical studies? It showed that national legislatures interpret definition of social entrepreneurship very differently. The opinions vary and among academics, and even among social entrepreneurs. Two main approaches are usually mixed. First approach consists of efforts to identify main features of social enterprise. The other approach focuses on general entrepreneurial dynamics oriented to social innovation and social impact; therefore, it is wider than only social enterprise-oriented approach. Therefore, from the legal point of view the European Commission states that legislation designed for social enterprises could boost reproduction of legal forms, which could be based on deeper understanding of social enterprise dynamics.[457]

Therefore, we can stress that development of legal preconditions of social entrepreneurship in the origin country of the author of this research – Lithuania – could

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453 "Recent evolutions of the Social Economy in the European Union," European Economic and Social Committee, published 2016, accessed 1 February 2021, https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/recent-evolutions-social-economy-study

454 *Ibid,* 1.

455 Ziegler, *supra note*, 412.

456 *Boosting Social Enterprise Development: Good Practice Compendium, supra note,* 215: 17.

457 *Ibid*.

take place in two concrete directions. First, there could be pro-active promotion of private business initiatives, which could deal with social problems. Second, it could be application of social innovations and business models for the purposes of encouraging companies of different legal structures and non-governmental organisations to get involved in social entrepreneurship. The drafting of the future legislation for social entrepreneurship is possible only with pro-active involvement of the social enterprise community in the drafting process. In addition, a top-down approach probably would fail because of insufficient knowledge of social entrepreneurship and social innovation structure within the governmental organizations. No active engagement on the part of the social enterprise community could lead to legislation, which could be excessively restrictive or ineffective at all.

We know the European Commission refers in its Communication not to concrete legal forms, but to variety of types of business. It is an important statement, which could indicate that legal definition within the frame of one legal form is encouraged by neither the Commission, nor possible knowing lots of variations of legal forms in different states. Typically, those are businesses, which provide social services or goods do disadvantaged or vulnerable members of society. Such services can consist of housing, health care, elderly or disabled persons' assistance, childcare, inclusion of vulnerable groups, etc. On the other hand, it could be models of business with a method of production of goods or services with a social objective. It can be social and professional integration via access to employment for people disadvantaged in particular by insufficient qualifications or social or professional problems leading to exclusion and marginalisation but whose activity may be outside the realm of the provision of social goods or services.[458]

We know that the definition of Social enterprise in the SBA is not legally binding. However, it became legally binding in the other legal acts. E.g., Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement[459] is an important legally binding act, which sets public procurement rules for all Member States.

Article 77 paragraph 1 of the Directive defines legal definition of the reserved contracts. Above-mentioned article states "Member States may provide that contract-

458 *Ibid*.

459 "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC," accessed 1 February 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024

ing authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services. An organisation referred to in paragraph 1 shall fulfil all of the following conditions: its objective is the pursuit of a public service mission; profits are reinvested with a view to achieving the organisation's objective; the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders." We see that Article 77 defines the most important features of the organization, which actually match the criteria of social enterprise defined in the SBI.

In addition, Article 20 of the Directive also speaks about reserved contracts: "Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers." We can state that this particular Article refers to WISEs, which are the main forms of social enterprise in most countries.[460]

The next legally binding document to be mentioned is the Regulation (EU) No 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation.[461] This particular Regulation establishes a European Union Programme for Employment and Social Innovation. In Article 2 of the Regulation social enterprise is defined in the same was as it is in the SBI. Despite definition of the social enterprise status is not the goal of this Regulation per se (it regulates financial support measures for different activities, which include and support for social enterprise), it is very important for the recognition of social enterprise status for practical purposes. Together it strengthens and legal status of social entrepreneurship on the EU level.[462]

These examples showed how legally non-binding definition becomes legally binding and affects not only the EU supranational legislation, but also for the purposes

460 Lavišius, Bitė, and Andenas, *supra note*, 53: 286.

461 "Regulation (EU) No 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion," accessed 1 February 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1296

462 Lavišius, Bitė, and Andenas, *supra note*, 53: 286.

of implementation of the above-mentioned Acts, it also affects Member States legislation.

Moreover, from the above-discussed examples, and from general observations we can state that overall EU legal framework for social enterprises can exist. In addition, some of elements of such legal framework, we see, exist already. However, speaking not about regulation of some concrete areas (as mentioned public procurement, financial support measures) the definition of social enterprise based on the SBI is not legally binding for the EU Member States. Therefore, Member States and other countries can define their own legal status and general legal framework for the social enterprise. However, there are several cases where the social entrepreneurship is mentioned in the obligatory EU legislation. We already discussed Directive 2014/24/EU and Regulation (EU) No 1296/2013.

In legal and regulatory terms, social enterprise, as used in the context of the SBI, is primarily a policy concept and not, generally, a legal or regulatory concept. The primary legal and regulatory means of understanding and 'interpreting' the concept of a social enterprise in different Member States is by reference to the underlying legal forms that are available for different forms of economic activity and are used by social enterprises.[463] From the examples above, we see that the definition of the identity of social enterprise allows policy makers to design and implement specific public policies for social enterprises or social investors, including measures under tax and public procurement law. It prevents 'abuses' of the social enterprise brand and helps to identify potential investees for social investors.

We already mentioned that the above-mentioned legal acts could not be called legally binding in the overall sense (we already emphasized that specific legal regime for the social enterprise is applied only in the context of the purposes of particular Regulation and Directive). Returning to the question raised in the beginning of this chapter, we can rearrange it and ask whether the overall EU legal framework for social enterprises is necessary.

One of the concrete examples of the complexity of this situation can be the Statute for a European foundation. The project of the Statute drew a perspective of the first potential European social enterprise form. The Proposal on the Statute for a European Foundation was presented in 2012. The main purpose of the Proposal was to create new

463 "Social Enterprise in Europe. Developing Legal Systems which Support Social Enterprise Growth," *supra note*, 214: 32.

European legal form intended to facilitate foundations' establishment and operation in the single market. It would allow foundations to more efficiently channel private funds to public benefit purposes on a cross-border basis in the EU. After the unsuccessful negotiations, the Proposal was withdrawn from the EU legislative agenda in December 2014.[464] It is difficult to consider whether the Statute for a European Foundation would be the first significant step towards harmonization of social entrepreneurship legal framework on the EU level. It was stressed in the Proposal that "the legal framework in which public benefit purpose entities carry out their activities in the Union is based on national laws, without harmonisation at Union level. In addition, there are substantial differences between civil and tax laws across the Member States. Such differences make cross-border operations of public benefit purpose entities costly and cumbersome."[465] Despite the Proposal was not developed further, European Commission emphasized in such way that legal framework for social entrepreneurship is needed. However, since the Statute was not adopted it reflected opinion of the EU Member States, which indicated that the Member States (at least so far) are keen to regulate respective area independently.

Moreover, in this context we can raise question whether existing European legal forms (European Economic Interest Grouping, European Cooperative Society, and European Company) would be suitable for social entrepreneurship. The Regulation (EEC) No 2137/85 on the European Economic Interest Grouping (EEIG)[466] provides that the purpose of the grouping is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills. Therefore, grouping differs from a firm or company principally in its purpose, which is only to facilitate or develop the economic activities of its members to enable them to improve their own results it is not intended that the grouping should make profits for itself. a grouping's activities must be related to the economic activities of its members but not replace them so that, to that extent, for example, a grouping may not itself, with regard to third parties, practise a profession, the concept of economic activities being interpreted in the widest sense.

The other European legal form – European Cooperative Society – according to

464 "Proposal for a Council Regulation on the Statute for a European Foundation (FE)," COM/2012/035 final - 2012/0022 (APP), accessed 1 February 2021, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=-CELEX%3A52012PC0035

465 *Ibid*.

466 "Council Regulation (EEC) No 2137/85 on the European Economic Interest Grouping (EEIG)," published 25 July 1985, accessed 21 March 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=-celex%3A31985R2137

Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)[467] should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities. Profits should be distributed according to business done with the SCE or retained to meet the needs of members.

The third European legal form – European Company (SE) – is a type of public limited-liability company that allows running business in different European countries using a single set of rules. Public limited-liability companies, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger if at least two of them are governed by the law of different Member States.[468] In general, principles, a SE is limited liability company with accent on certain rules that help to operate it internationally.

Following our operational definition of social enterprise, we can see that EEIG would not be suitable legal form for social enterprise because of its specific purpose. The SCE technically could meet the criteria of our operational definition of social enterprise. Moreover, cooperative as a legal form, in the most countries is suitable for operation of *de facto* social enterprises. However, having in mind that the scale of operation of the most of social enterprises is small, the form of SCE would be hardly suitable for most of them, having in mind that according to the Regulation subscribed capital an SCE shall not be less than EUR 30000. The same situation is also with a SE, which technically being a limited liability company could set in its articles of association a social mission and define restrictions on profit distribution. However, the amount of the subscribed capital, which shall not be less than EUR 120 000, would be burdensome for the most of social enterprises.

The examples above illustrate that legal framework of social entrepreneurship is a complex thing, where adoption of existing legal forms (whether on European or national level) is not easily implementable. However, that one of the most important aspects is the general understanding of the concept of social enterprise. In any way, poor understanding of the concept of social enterprise could be defined as one of the most

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467 "Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)," published 22 July 2003, accessed 22 March 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R1435

468 "Council Regulation (EC) No 2157/2001 of on the Statute for a European company (SE) ," published 8 October 2001, accessed 22 March 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414751773266&uri=CELEX:32001R2157

important aspects for the future development of this sector. The strict harmonization should not be there where it is not strictly necessary. Usually, business people are in favour of harmonization, because they like to have one set of rules, because it is easier to understand. However, sometimes it is bad idea to go in that direction. The harmonization is problematic because it prevents competition in rule making. "We can understand that competition can be bad sometimes, because than we can have a race to the bottom. Therefore, we must set some minimum standards. Nevertheless, competition is healthy in that sense that people usually strive to do better. Therefore, the competition in regulation is also a good idea."[469]

We know that there are some elements that already reflected in the EU regulation, whether it is directive on reporting, which obliges companies to report on their CSR activities. The so-called non-financial reporting directive lays down the rules on disclosure of non-financial and diversity information by large companies. This directive amends the accounting directive (2013/34/EU). Companies are required to include non-financial statements in their annual reports from 2018 onwards. Under this Directive (2014/95/EU), large companies have to publish reports on the policies they implement in relation to environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery, as well as the diversity on company boards (in terms of age, gender, educational and professional background).[470] Also there is an ongoing discussion on the quota system on the boards of companies. Resent study showed that despite some encouraging progress in recent years, the under-representation of women on companies' boards and among the management positions remains an important challenge for EU Member States. As the authors of the study notice, "this under-representation means that the potential of highly skilled and needed human resources remains untapped, as evidenced by the discrepancy between the high number of female graduates and their number in top-level positions. Women still face numerous obstacles on their way to reaching senior positions."[471]

Therefore, in the future, there will be additional social elements included in the corporate legislation on the EU level. On one hand, it will be caused by the European

469 Hansen, *supra note*, 147.
470 Directive 2014/95/EU, *supra note*, 438.
471 "2019 report on equality between women and men in the EU," Directorate-General for Justice and Consumers (European Commission), published 2019, accessed 1 February 2021: 27, https://op.europa.eu/en/publication-detail/-/publication/f3dd1274-7788-11e9-9f05-01aa75ed71a1

Green Deal,[472] on the other, by the environmental or social limitations or guidelines that are applied on different EU financial programmes.[473] In this context, we can mention the very recent initiative. In October 2020, the Council of the EU adopted the Plan on the Recovery and Resilience Facility (RRF), a new tool providing Member States, with financial support to step up public investments and reforms in the aftermath of the COVID-19 crisis. To receive support from the RRF, Member States must prepare national recovery and resilience plans setting out their reform and investment agendas until 2026. The most important is that the national recovery and resilience plans must rely on such aspects as climate action, environmental sustainability, social resilience, etc.[474] It means that national governments will have opportunity to include increased social clauses in the projects, which will be implemented by different actors (including businesses) nationwide.

Moreover, experts have an opinion that we have some kind of harmonization in the sense that we have limited liability companies all over the world, we have some forms of cooperatives, foundations, and associations in the most countries and so on.[475] If we speak about full harmonization in the sense of separate legal form, that is exactly the same in all countries, then in the best case it would be a very long term to implement it. However, it would be very important to have some kind of general framework for assessment of business, disregarding how it calls itself. In that sense, harmonization would be useful. The harmonization of different assessment forms of sustainability reports also might be very important. The legal form for social entrepreneurship can be useful. However, legislators – in any country – could start by looking into legal forms that they have if the existing legal forms could be used for what they want to achieve. E.g., cooperative, used in many countries as an organizational form of some kind of social entrepreneurship.[476]

In the context of our research, we can emphasize that such assumption is important and in the case of social enterprise legal framework. First, we already emphasized that the most important accent in the social enterprise legal framework is legal certain-

472 The European Green Deal provides an action plan to boost the efficient use of resources by moving to a clean, circular economy restore biodiversity and cut pollution. For more on the European Green Deal, see: "European Green Deal," accessed 1 February 2021, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

473 Andhov, *supra note*, 139.

474 "A recovery plan for Europe," Council of the European Union, accessed 1 February 2021, https://www.consilium.europa.eu/en/policies/eu-recovery-plan/

475 Sjåfjell, *supra note*, 156.

476 *Ibid*.

ty. So, while developing legal frameworks for social enterprises in different countries (despite the variety of legal forms), some basic steps of harmonization could take place as it takes place in the case of limited liability companies (and some other legal forms) in terms of assessment, impact measurement, value orientation, stakeholder priority approach, etc.

## 3.2. The EU soft law measures as important part of the legal framework

We already mentioned that unified social enterprise form on the EU level would be hardly possible for multiple above-mentioned reasons. However, it does not mean that harmonization of this area in the legal sense is not possible. We think that other kind of means could be used more actively in this area. It means that further question is whether some alternatives to strict legal regulation could be useful. In this case, we have in mind soft law measures, which could catalyse faster development of the social entrepreneurship sector.

We already know that there is variety of social economy operators across the EU. We can distinguish them in two main groups – market producers and non-market producers. The group of market producers consists of non-financial entities (e.g., co-operatives, social enterprises, other association-based enterprises, other private market producers), financial entities (e.g., credit cooperatives, mutual insurance companies, insurance cooperatives), and governmental sector. The group of non-market producers, on the other hand, consists of households and non-profit institutions serving households (e.g., social action associations, social action foundations, other non-profit organizations serving households: cultural, sports, etc.). Most of the above-mentioned operators can be considered as social enterprises. However, tot all of them are recognized as social enterprises by local governments or communities. We can say that they are 'players' of the third sector and together – the social economy.[477]

Another quite relevant definition is a 'collaborative economy'. We can state that it is closely related to 'social economy'. Both definitions were discussed in the theoretical part of this research. In the Communication "A European agenda for the collaborative economy" (COM/2016/0356 final), the European Commission defines that collaborative economy consist of "business models where activities are facilitated by

477 "Social Enterprise in Europe. Developing Legal Systems which Support Social Enterprise Growth," *supra note*, 214: 17-24.

collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals".[478]

The European Commission defines that collaborative-economy transactions can be carried out for profit or not for profit. Several categories of actors (stakeholders) are involved in the collaborative economy. Those stakeholders are service providers — private individuals or professionals; users of such services; and intermediaries who connect providers with users. Such intermediaries can also be called as 'collaborative platforms'.[479]

In addition, we can mention that in development of social entrepreneurship are involved not only political but also financial institutions. E.g., the Social Impact Accelerator is a fund of funds created in 2015 by the European Investment Bank group and European Investment Fund (EIF) that targets social enterprises. Its goal is to invest funds in social entrepreneurship based on a new framework (developed by EIF) for quantifying and reporting on social impact metrics.[480] We see that the sphere of financing of social entrepreneurship clearly relies on technological aspects, such as social impact metrics, etc. Despite is not directly related with use of legal technology, it clearly indicates connections between technological and social innovation.

European Commission in 2011 published a document: "Buying social: a Guide to taking account of social considerations in public procurement."[481] This document was dedicated to assist public authorities to buy products and services in a socially responsible way in line with EU regulations and general political lines. The tool of public procurement from the perspective of this document was seen as instrument to stimulate greater social inclusion. The Guide explained the wide range of possibilities offered by the EU public procurement rules, which could allow involvement of social aspects in the procurement processes. Therefore, it can be seen as an attempt to stimulate pro-active use of soft-law measures in the regulation of social entrepreneurship. However, the above-mentioned Guide now is already outdated should be revised in order to keep it

478 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy," COM(2016) 356 final, accessed 1 February 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0356&from=EN

479 "Social Enterprise in Europe. Developing Legal Systems which Support Social Enterprise Growth," *op. cit*.: 26.

480 "The Social Impact Accelerator," European Investment Fund, accessed 1 February 2021, http://www.eif.europa.eu/what_we_do/equity/sia/index.htm

481 "Buying social: a Guide to taking account of social considerations in public procurement," European Commission, accessed 1 February 2021, http://europa.eu/rapid/press-release_IP-11-105_en.htm

up to date.

We can state that different stakeholder groups make their attempts to introduce more soft-law measures in the regulation area of social entrepreneurship. E.g., Social Economy Europe (SEE)[482] proposed to introduce a European commission recommendation, which would establish the main principles and characteristics of the social economy, as well as its main legal forms. According to SEE such legal forms are cooperatives, associations, mutual organizations, foundations, and social enterprises.[483]

We see that different social economy legislators (and stakeholder groups) have their interests and make attempts to encourage the European Commission to work more actively towards clear social enterprise measures (whether defined by hard or by soft law). First steps, as removing barriers for cross-border operations, could possibly allow and greater recognition of social entrepreneurship as a unified concept. In addition, we can say that such stakeholders as the SEE think that "social economy can flourish only if a legal framework with suitable political, legislative, and operational conditions is introduced at EU level."[484]

As the quite new phenomenon, social enterprises acquired significant importance in European and national policies in recent years. Together with that grows the awareness that social enterprises create sustainable and inclusive development and stimulate social innovation.[485] By focusing on people as much as profit, they foster a sense of social cohesion and promote the common well-being.

We could definitely state that the potential of the social economy and social enterprises is not exploited fully. Attention to social innovation grows in some countries more rapidly than in others. However, we see that there is a lack of information about social innovations on the EU level. Therefore, we think that much more needs to be done at different levels of public policy to optimize the general conditions and funding support for social entrepreneurship sector.

To foster the social economy, we have to develop an environment that facilitates access to funding, adequate legal framework, and awareness on the national and local

482 Social Economy Europe (SEE) was created in November 2000 under the name of CEP-CMAF – the European Standing Conference of Cooperatives, Mutuals, Associations and Foundations with the purpose of establishing a permanent dialogue between the social economy and the European Institutions. In 2008, CEP-CMAF changed its name and officially became the "Social Economy Europe". More about SEE: http://www.socialeconomy.eu.org/.

483 "The Future of EU policies for the Social Economy: towards a European Action Plan," *supra note*, 103.

484 "Social Enterprise in Europe. Developing Legal Systems which Support Social Enterprise Growth," *supra note*, 214: 17-26.

485 GECES, *supra note*, 1.

level. The EU policy should guide national policies, possibly, through the soft law measures, towards this goal. The definition of social innovation and its relation to the status of social enterprise as a legal concept can significantly contribute to this purpose.[486]

European Commissions definition of a social enterprise shows us that there can be hundreds of social enterprise model variations. Nevertheless, the core elements of the definition of social enterprise are based on the criteria defined in the several times mentioned Commission's Social Business initiative. Such elements as social impact (instead of profits for owners or shareholders), way of operation in an entrepreneurial and innovative fashion and use of the profits primarily to achieve social objectives are distinctive (however, not always legally defined) features of the social enterprise. According to Commissions definition, a social enterprise supposed to be managed in an open and responsible manner, involving employees, consumers and stakeholders affected by its commercial activities. The Communication of the Commission does not prioritize any specific form of legal entity as a social enterprise.

Any country can decide by itself whether the social enterprise is supposed to obtain special legal form or not, therefore in some countries social enterprises fall into some legal regulation, in others – not. In some countries, social enterprises operate in so-called "grey area", by using other forms of entities for their legal status. European Commission, by its definition, recognizes such social enterprises. However, there is a lack of certainty because of the multitude of variations. This leads us to the conclusion that soft law measures and initiatives taken by the Commission could be more pro-active, or have to be more purposefully aimed at target groups in the sector (policy makers and social entrepreneurs.

Answering the question whether the soft law measures and legal technology could catalyse development of legal preconditions for social entrepreneurship highlights three tendencies.

The first, so far particular countries can decide whether the special legal form of social enterprise is needed. Therefore, connection of regulation of incorporation and maintenance of social enterprise with legal technology also varies in different states. We can say that the correlation between the above-mentioned aspects is so far quite insignificant.

The second, the legal technology is already contributing to the area of social entrepreneurship in particular circumstances. We see that sphere of financing of so-

486 Lavišius, Bitė, and Andenas, *supra note*, 53: 277.

cial entrepreneurship hugely relies on the technological aspects, such as social impact metrics, etc.

The third, soft law measures could be seen as instruments, which help to implement the self-regulation of particular economic sectors. By adding the aspect of legal technology, a significant step forward can be made. Giving social enterprise access to online software that reduces or in some cases eliminates the need to legal consultation, can promote a simplified development of social entrepreneurship. In addition, different guidelines, codes of conduct, standards, CSR principles, and other soft-law measures agreed on transnational dialogue can bring more clarity in the regulation of the sector.

Not only EU, but also OECD (usually in cooperation with the EU institutions) pays attention for importance of different soft law measures dedicated for social enterprises. The OECD together with the European Commission recently launched an initiative called "The Better Entrepreneurship Policy Tool." It is an online tool designed for policymakers and other interested parties at local, regional and national level who wish to explore how public policy can support youth, women, migrants and the unemployed in business creation, self-employment, and the development of social enterprises.[487] By using provided tools, policy makers and stakeholders can evaluate the overall situation, whether current policies and programmes enable and support social enterprises to start-up and scale-up. Therefore, this initiative can serve as an example of the components needed in order to improve general infrastructure for social entrepreneurship. Analysis of the social entrepreneurship infrastructure can be implemented in different countries using the same set of components. Schematically those components can be depicted like this:

487 "The Better Entrepreneurship Policy Tool," OECD/EU, accessed 1 February 2021, https://betterentrepreneurship.eu/

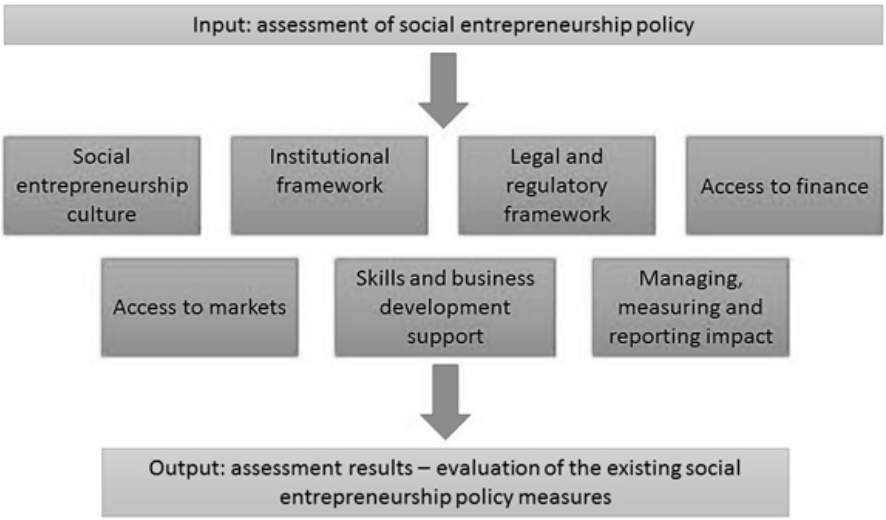


***Figure 5. Analysis of the social entrepreneurship infrastructure***[488]

By the definition of social enterprise, culture is referred to local traditions and activities, including those by civil society and social economy organisations. By the definition of institutional framework, it is referred to the evaluation of institutional support to social enterprise development. In addition to this, under the definition of legal and regulatory framework, it is evaluated whether the existing legal framework defines social enterprises and whether administrative procedures to start a social enterprise are easy to access and understand. Under the definition of access to finance is assessed whether the finance market has been mapped, which financing instruments are available for social enterprises. Under defining access to markets, it is looked at the extent to which public procurement is used to support access to public markets by social enterprises, and whether social enterprises make use of new technologies. Considering whether affordable training, coaching and/or mentoring initiatives are available for the different stages of development of social enterprises is evaluated under definition of skills and business development support. And finally, under the definition of managing, measuring, and reporting impact is evaluated whether social enterprises and their

488 Based on: "Social entrepreneurship Self-assessment. The Better Entrepreneurship Policy Tool," OECD/EU, accessed 1 February 2021, https://betterentrepreneurship.eu/en/node/add/social-quiz

umbrella organisations engage in creating measurement and reporting frameworks, and if support like training and/or access to existing methodologies is provided.[489]

Experts also notice that soft law measures are important and relevant. They affect the life. The main difference between hard law and soft law measures is a different time span. In the case of the soft law or the guideline, it takes longer period for the companies to accept it, adopt it, and to reflect on it. "Often there are some first movers, leaders take the initiative and the others then follow, therefore it can be called a grassroots movement. When we have a hard law, then it is lowered from the top and is implemented on the obligatory basis, without any leadership and initiatives. As we go forward, there will be more emphasis on soft law measures, especially different internal guidelines within companies – it is different important topic."[490] Since we already discussed the European Commission's efforts to implement some supra-national regulation in the social entrepreneurship sector by adopting Statute on European Foundation, which was unsuccessful, we can think that hard law measures in the field of social entrepreneurship are whether untimely, or at all unneeded because of very nationally- or locally-oriented social enterprises sector in all discussed countries.

Moreover, most of the experts agree[491] that it is necessary to have a framework in legislation that is a default system. Even it is non-mandatory, it is still a good idea to put that provision in the companies' act, because it becomes a default rule that people can follow or not, but it helps them in the sense that the legislation is like a "standard model contract". We can agree with this opinion because it could create possibility to evaluate personally (from the point of view of a social entrepreneur) whether provision important and applicable in their personal case. Character of default provision determines whether it becomes binding for parties or not. First of all, it could help entrepreneurs to set up a company, using particular default provisions, which are tailored for social enterprises.

The next question is do we need such provisions in the respect of social companies. From interviewed experts we found out that it is not necessary in some particular countries (e.g., Denmark), because the most countries have legal framework where social enterprises could either set up an ordinary company and simply disregard the profit motive and run the company for other reasons, or (in some countries) could use

489 *Ibid.*
490 Andhov, *supra note*, 139.
491 Based on the expert interviews (see Appendix B).

more tailored legal forms (like industrial foundation). "In [some] jurisdictions it could be necessary because their way of thinking is different. If you believe that it is necessary, then it is a good idea to set up a legislation that is tailor-made to that kind of companies. If there is a feel that there is a need for some regulation, but the legislator is not certain then it is a good idea to go for a soft law rule, where people can choose whether to follow certain recommendation, or if they feel strong necessity, they can choose the other direction."[492] However, we have to admit that such entities that could be called industrial foundations are not typical for other countries (e.g., Baltic States). Therefore, it means that such option could not be considered as widely applicable. The experts also stress that: "it is not wise to make hard law on things, which is really soft. In other case – the hard law rules sometimes are easily circumvented by formal implementation of requirements. Therefore, a soft law, voluntarily acceptable rules can be more appealing."[493] It means that the perspective of legal framework for social enterprises in the EU is a matter of political statement. In this context, different soft law measures and not the strict regulation on the EU level would be the balanced way to regulate the situation. According to that what was said, we could conclude that the current approach on the EU level will not change dramatically in the nearest future. It was already stressed that EU largely focuses on the listed companies and tries to encourage them to be more socially responsible. It is difficult to guess whether there will be adopted a supplementary or alternative approach (e.g., European social enterprise form).

Interviewed experts express their opinion that there are many arguments in favour, but probably the European Commission is slightly undecided, because they try to encourage traditional companies to be also more socially responsible.[494] Therefore, we think that on the national level it is also challenging to encourage traditional businesses be more responsible (CSR approach) and promote social enterprises (social entrepreneurship approach).

492 Hansen, *supra note*, 147.
493 Lilja, *supra note*, 149.
494 Sørensen, *supra note*, 150.

## 3.3. Social enterprises in the context of competition law and case law

Evaluating systematically the concept of social entrepreneurship, in the most cases it stresses social innovation processes. Social entrepreneurs in a wider spectrum of organisations undertake these processes. The spectrum ranges from profit-oriented businesses engaged in socially beneficial activities, to dual-purpose businesses, which mediate profit goals with social objectives (hybrid organizations), to non-profit organisations.

OECD notes that in this context the law can provide incentives for creating a particular type of enterprise (social enterprises in particular). These incentives, for example, can be monetary through direct contributions, tax exemption, or non-monetary reduction of administrative costs such as incorporation costs, registration costs and so on. In addition, OECD emphasizes that in relation to the different functions of legislation surrounding social enterprises, it is also important to note that European legal systems promote social enterprises mainly using non-monetary incentives or by regulating organisational models, rather than providing direct monetary support. Company models that are able to reflect a balance between its "social mission" (sociality) and entrepreneurship are what is fundamentally lacking within traditional legislation on both traditional for-profit enterprises and non-profit organisations.[495]

However, in this situation we could ask whether incentivizing of social enterprises would not contradict rules of competition law national or EU wide. The area of competition is strictly regulated by the primary and secondary EU law. In the EU Member States, the competition regulation arises exclusively from the EU law. In the EFTA countries, it is regulated individually; however, basic principles stay the same.

We already discussed a lot about different aspects of social enterprise legal regulation. We know that social enterprise sector merges different elements of company law, as well as elements from other legal regulation areas. To be more precise, we have also to discuss briefly the aspects of the competition law, which, inevitably influences and social enterprise regulation area.

Therefore, in this sub-chapter we discuss aspects of the EU competition law that are relevant for the overall social enterprise legal environment. On the other hand, we try to emphasize aspects of competition regulation that are relevant in traditional business conduct but may have some exemptions (or at least are interpreted slightly

495 Noya, *supra note*, 111: 26-27.

differently) in the light of social enterprise regulation.

The experts in the competition law area emphasize common presumption that competition brings various benefits for the market economy. It ensures low (or relatively low) prices and variety of choices for consumers and encourages efficiency and innovation. However, it has to be made a clear separation – competition law does not necessarily seek to protect individual competitors, but instead it seeks to protect competition for the benefit of society as a whole.[496]

Experts emphasize that market mechanism forces enterprises to compete. Inevitably such situation may lead to some winners and losers: "by constantly forcing firms to improve what they offer through lower prices, lower costs, innovative product features or additional services, competition keeps firms 'on their toes', which will benefit consumers and society as a whole. Central to the idea of competition is the idea of a marketplace where sellers and buyers meet."[497] Nevertheless, is this really a case for social enterprises where goods and services are often of the niche manner, and simply cannot be provided at the lowest possible price? We think that together, yes and no.

In normal circumstances, sellers would like the price to be as high as possible to maximise profits, and this can be also a rule in the case of social enterprise. Buyers, on the other hand, usually prefer to buy products at as low a price as possible. However, this statement is not always relevant for products and services provided by social enterprise. There are many examples when depending on specific product or service provided by social enterprise buyers tend to pay more because of the specific benefit.

So, do the competition rules are applied for social enterprises? Definitely yes, but some peculiarities have to be kept in mind. Article 3 of the Treaty on the Functioning of the European Union defines that the EU establishes competition rules necessary for the functioning of the internal market. Article 26 (2) defines very well-known statement that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties. It is very important aspect within the context of the EU competition law because without an effective competition the above-mentioned goals (known as the main freedoms) would be hardly achievable. Therefore, and the regulation area of social enterprise falls within the scope of the above-mentioned goals

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496 Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge, U.K.: Cambridge University Press, 2013): 1-2. https://doi-org.ep.fjernadgang.kb.dk/10.1017/CBO9781139087452
497 *Ibid*, 3.

(freedoms).

Primary EU law (Articles 101–106 of the Treaty on the Functioning of the European Union) deals with competition rules that apply to undertakings. Article 101 defines that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market, should be prohibited as incompatible with the internal market. It means that primary EU law prohibits such activities as directly or indirectly fix purchase or selling prices or any other trading conditions; limiting or control of production, markets, technical development, or investment; applying apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, etc. Of course, these rules are firs of all relevant for traditional business sector.

Moreover, Articles 119 and 120 of the Treaty oblige Member States and the EU to act in accordance with the principle of an open economy with free competition. More important in the legislation of social enterprise are Articles 107–109 of the Treaty on the Functioning of the European Union, which set the rules on the state aid within the EU. As we said, it is important for social enterprise regulation environment because in many countries such entities as social companies, especially, WISEs, receive from national governments different kinds of benefits. The types of benefits can vary from salary subsidies (e.g., when employing disadvantaged persons) to tax reductions or even exemptions. Therefore, in the strict sense one can argue that such actions reduce competition environment in the market economy, and it can be considered as the violation of competition rules. However, having in mind goals of social companies behind profit maximization, it is allowed to have some "competition distortion" because it falls into state aid (or insignificant aid) regulation area.

Therefore, the above-mentioned Articles 107–109 define that with the internal market is compatible aid having a social character, granted to individual consumers, if such aid is granted without discrimination related to the origin of the products concerned. Moreover, compatible with the internal market may be considered aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the particular regions in context of their structural, economic and social situation. On the other hand, the European Commission is obliged to keep under constant review all systems of aid existing in

those States. It has to propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

Researchers summarize that the EU rules on state aid "govern the measures necessary to prevent anticompetitive State aid. These provisions are addressed to States and aim at preventing distortions of competition through the granting of economic benefits of selected undertakings from State resources. This section of the <Treaty> complements the fundamental freedoms, which aim at shielding off national markets from competition from other Member States. State aid has not the effect of shielding off competition from other Member States but improves the competitive position of individual undertakings."[498] In this context, it is important to stress that experts namely underline the "competitive position of individual undertakings" because in the case of social enterprises there is no discussion on the scale of particular players in the market (because social enterprises usually are very small in scale), but "individual undertakings" in the social enterprise sector are quite vulnerable. Therefore, some kind of aid from the state is not disturbing social enterprise market but help to survive for many "individual undertakings". Nevertheless, we have several times mentioned an operational definition of social enterprise, which includes a necessary attribute that social enterprise has to receive a significant part of the revenue from the business activity on the market. Therefore, speaking about state aid for social enterprises the particular balance has to be kept in mind in order not to disturb above-mentioned balance.

An aspect of the insignificant aid (or so-called *de minimis* doctrine) stands next to the state aid. European Commission Notice on agreements of minor importance[499] define that agreements fall outside the prohibition defined in the Treaties when it has only an insignificant effect on the markets.

Additionally, an aspect of the market failure has to be kept in mind. Experts notice that no one can be excluded from benefiting from a pure public good, because otherwise the self-regulating market mechanism based on each individual pursuing his own personal interest will lead to a situation in which less of a public good is produced than would be socially optimal.[500] Despite the idea that the market mechanism can

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498 *Ibid*, 30.

499 "Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)," Official Journal C 368, 22/12/2001, accessed 1 February 2021, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF

500 Lorenz, *supra note*, 496: 26.

deliver overall efficiency and maximise social welfare, experts argue that it will only be able to do so if there are no distortions arising from externalities, asymmetric information, or the existence of public goods. In such case, additional policies – e.g., social, cultural, and environmental – may be required to correct for this and allow the market to function effectively. Therefore, competition policy cannot be considered in isolation but must be seen in the context of the overall objectives of a society.[501]

Some researchers stress that there are many characteristics to EU competition law, which make it a unique type of law, "especially when compared to the competition laws of other regimes. EU competition law is enforced in a special context, namely the goal of market integration and therefore it has a market-integrating aspect."[502] In this context, we believe that social enterprise sector is not only an object of the above-mentioned state aid legislation, but also as a contributor to the overall competitiveness of the EU internal market.

Here we can speak not only about competition rules that are not always applied for and certainly not created particularly having in mind social enterprises, but still important for social enterprise legal environment. In addition, we can mention that legal cases of the European Court of Justice in some cases have emphasized the difference of the concept of social enterprise in comparison with traditional business entities.

In several cases, the European Court of Justice highlighted the applicability of competition law in the context of "the specific role of social enterprises operating within the market according to solidarity standards, calling, in some cases, for the application of different principles, at least in relation to competition law."[503] According to Noya, the case law in the context of social enterprise sector contributes to several aspects. First of all, it contributes to the definition of undertaking and profit-making entities. It clarifies that the non-distribution constraint is compatible with the definition of undertaking, deepens distinction between enterprises, including for profit and not for profit ones, and non-entrepreneurial organisations. It also draws a distinction of a social enterprise definition on national and the EU level. In this regard, Noya notice, "unlike the national systems, where social enterprises are generally part of the third sector, but for those systems that have adopted a company-based model, the European approach is organised around the distinction between enterprises exercising economic

501 *Ibid*.
502 Maher M. Dabbah, *International and Comparative Competition Law* (New York: Cambridge University Press, 2010): 164. https://doi-org.ep.fjernadgang.kb.dk/10.1017/CBO9780511777745
503 Noya, *supra note*, 111: 30.

activities and organisations that exercise activity for solidarity purposes."[504]

For example, Advocate General Jacobs in Joined Cases C-180/98 to C-184/983 emphasized that "in Community competition law there is no general exception for the social field. Contrary to many national competition law systems, the Community rules apply to virtually all sectors of the economy. <...> however, even where concertation between private actors (for example in social or environmental matters) analysed in isolation restricts competition <...> the State might have legitimate reasons to reinforce and officialise on public interest grounds the effects of that concertation."[505] It generally means that economic activity can be considered differently. E.g., if a fund is non-profit-making and it pursues a social objective with restricted and controlled investments, such circumstances might partly justify the fund's exclusive right to manage its particular activity.

In the Case C-67/96 Albany International v Stichting Bedrijfspensioenfonds Textielindustrie, the Court of Justice emphasized, "The activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted but also a policy in the social sphere."[506] It basically means that the Community (nowadays – the EU) has to balance its policies between ensuring by legal means fair competition and creating a high standard of social life within the Community. Therefore, we can add based on above-discussed observations that the role of social entrepreneurship is contained somewhere between pure competitive business legal environment and legal regulation of social good with emphasis on the sector's hybridity and versatility.

It is also worth mentioning several other cases, where peculiarities of the social clause were emphasized and by the Court, and by Advocate General. In Case C-222/98, Advocate General emphasized that basically there had to be no exemptions from the prohibition of an abuse of a dominant position in the market. Nevertheless, the acts that are done exceptionally in pursuit of a social objective should not be easily considered as an abuse. The circumstances of abuse should become important only when disputed situations "go beyond what is necessary for the attainment of that objective,

504 *Ibid*.

505 "Opinion of Advocate General Jacobs, 23 March 2000, Joined Cases C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten," accessed 2 February 2021: para. 101, 164. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61998CC0180&rid=2

506 "Court of Justice, 21 September 1999, Case C-67/96 Albany International v Stichting Bedrijfspensioenfonds Textielindustrie," accessed 2 February 2021: para. 54.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61996CJ0067

and are otherwise not justifiable, that an abuse may be said to occur."[507] Moreover, the activities of the Community are to include not only a system ensuring that competition in the internal market is not distorted but also a policy in the social sphere. It means that a particular task of the Community is "to promote throughout the Community a harmonious and balanced development of economic activities" and "a high level of employment and of social protection."[508]

The quite similar statements were repeated and in cases C-475/99 and C-222/04. In Case C-475/99, Advocate General Jacobs stated that "if for social reasons user charges are uniform throughout the Land then they will necessarily be higher than the remuneration requested by private undertakings which provide their lucrative services only in densely populated areas during peak times, <however, the EU legislation> seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the internal market."[509] Therefore, we see that the line between justification of restrictions on grounds of social welfare and the ensuring compliance with the rules on competition in the internal market is very thin.

In the preliminary ruling in Case C- 222/04, it was stated that "a legal person, such as a banking foundation the activity of which is limited to the payment of contributions to non-profit-making organisations, cannot be treated as an 'undertaking' within the meaning of Article 87(1) EC. Such an activity is of an exclusively social nature and is not carried on the market in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking."[510] However, if a banking foundation acts in the fields of public interest and social assistance but performs operations on the market (provides goods and services) in order to achieve the aims prescribed for it, it must be regarded as an undertaking, despite "the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators and must be subject to the application of the Community rules relating to State

507 "Opinion of Advocate General Fennelly, 11 May 2000, Case C-222/98, Hendrik van der Woude v Stichting Beatrixoord," accessed 1 February 2021: para. 38.
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61998CC0222&from=HR
508 *Ibid*, para. 20.
509 "Opinion of Advocate General Jacobs, 17 May 2001, Case C-475/99, Ambulanz Glöckner v Landkreis Südwestpfalz," accessed 2 February 2021, para. 145 and 184.
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CC0475&from=EN
510 "Case C- 222/04, Cassa di risparmio di Firenze and others ECR-I- 289," accessed 2 February 2021: para. 4.
http://curia.europa.eu/juris/showPdf.jsf?docid=64088&doclang=en

aid."[511]

Moreover, in the same preliminary ruling was stated that State aid should be well measure, because some of the entities (as the above-mentioned banking foundation, which holds shares in banking companies and pursues exclusively aims of social welfare education, teaching, and study and scientific research) getting the aid from the State ""may be categorised as State aid within the meaning of Article 87(1) EC. <Because> such a national measure involves State financing. Also, it is selective."[512]

Of course, there is not a lot of examples within the cases of the Court of Justice, but it shows, first of all, that the court responds to the factors that social business may be treated differently from competition law and other legal aspects, both at national and EU level. Therefore, it is important to raise awareness about complexity of cases, which involve questions of competition and aspects of the specifics of social entrepreneurship within the EU internal market. It can be especially important in different cases in the national courts or national competition authorities, because such cases are rare and without understanding of legal specifics of social entrepreneurship, could be interpreted in a wrong way.

511 *Ibid*.
512 *Ibid*, para. 8.

## CONCLUSIONS

After researching materials and applying other qualitative research methods in both – theoretical and practical parts of this research – we can argue that the defensive statement, which states that there is a lack of legal certainty in the European Union and in particular countries in the field of regulation of social entrepreneurship can be supported in the most cases by following arguments.

1. Legal preconditions of social entrepreneurship lay on the top of theoretical and philosophical foundation. Definition of legal good, which should be protected by the legislation in the field of social entrepreneurship, defines and elements of the definition of social entrepreneurship itself. Therefore, lack of legal certainty (with its weaknesses, differences, and contradictions) comes from weak foundation of conceptual legal philosophy. The socio-economic aspects of social entrepreneurship are primary reasons why social entrepreneurship exists *per se*. Legal preconditions derive from socio-economical preconditions and support the existence of the phenomenon of social entrepreneurship.

2. Definition of social entrepreneurship consists of multitude of elements, which not all of them can be directly observed from the legal regulation alone and are theoretically much more complex. Different elements of the social entrepreneurship framework (non-legal aspects) constantly interact with regulatory framework (legal aspects). Such situation determines the definition of social entrepreneurship overall. The current EU legislation does not form any concrete legal framework for social enterprises – it consists of several legally binding documents and several soft-law measures. Despite that, social enterprises are influenced by the economic and social conditions, which vary in particular country or region. However, in some concrete circumstances not legally binding definition (provided in the SBI) becomes legally binding (provided in directives) and affects not only supranational legislation, but also the legislation of the Member States. It is so far the only supranational legal effect on legal framework for social entrepreneurship.

3. The supranational EU legislation of social entrepreneurship can be implemented only partially (placing an accent on the soft-low measures). Ideal (possibly superlative), or at least best-suitable European legal form of social enterprise is particularly difficult to develop and create considering very different legal and socio-economical traditions of the development of social entrepreneurship in different countries. Before

creating legal framework, societies must identify what kind of socio-economical relationship has to be defined legally and it is hardly implementable on the supranational level.

4. We can see the problem of legal uncertainty in the area of social entrepreneurship emerges whether in legal non-recognition of social enterprise as such, or unclear rules and general legal environment for social entrepreneurship. The question of legal forms is directly related with question of legal certainty. The situation may occur when social enterprise is legally not defined at all and operate only as regular company (entity), which socio-entrepreneurial identity cannot be spotted looking into its legal form. Despite that, some legal preconditions of social entrepreneurship exist in researched EU/EFTA countries. However, those preconditions cause a lot of legal unpredictability and not necessarily mean for social enterprise dedicated legislation. Often those preconditions are not even obvious and can be found only by systematically looking into the content of the legislation where features of operational definition of social enterprise can be identified.

5. In different societies, social entrepreneurship pursues different goals and depend on different level of welfare. In more developed societies, these goals are aimed at reducing exclusion, disadvantaged integration, etc. In less developed (or developing) societies, these goals are aimed at solving structural problems (access to education, health services, etc.). Since all researched countries are considered as developed countries most of social enterprises aimed at integration of disadvantaged (WISEs), however also range of other social problems is covered.

6. From the systematic evaluation of materials, we can state that definition of social entrepreneurship, first of all, is an attitude, a point of view, a value system. It can be implemented by using different legal forms and other legal instruments (therefore concrete legal definition may vary). Social entrepreneurship could not exist *per se*. To be a social enterprise means not only obtain e.g., a dedicated legal status or legal form (which is strictly legal question). To be a social enterprise means to carry out a social mission (which is not a legal question or partially legal).

7. The place of social entrepreneurship legal regulation in the legal system of the EU and particular countries depends on the recognition of social good. Social good is usually recognized by society without a legal recognition of it. However, in the most cases it is impossible to cover the whole spectrum of social good fully, which has to be maintained on the state level. Therefore, countries prioritize some areas of social good

more than the other does. Then respective prioritized areas become a part of political agenda. The topics of political agenda are usually implemented by different legal instruments (laws, rules, conditions, etc.). It means that social enterprise performance is related with social good that is recognized on the state level as important.

8. We can state that any legal framework could not force natural development of societal relations if it is not accepted by society (such approach meets the view of legal realism). We assume if some social innovation (like, certain legal framework, CSR, legal technology, SDG's) in particular societies is more acceptable, in other societies it can be less welcome, or at least not correctly understood or poorly implemented. It means that performance of social enterprise is not related with its existence as a legal entity (legal form may not directly influence social performance of enterprise), but rather with evaluative aspect of its existence. However, we think that different legal forms provide different possibilities for action and therefore they indirectly influence social performance and social impact of particular social enterprise.

## RECOMENDATIONS

In most countries, it is possible to use an existing legal form specifically for purposes of a social enterprise, for example, by specifying a social purpose, limiting the means by which profits may be distributed and by specifying other 'social' features. We can state that even if a dedicated legal framework for social enterprises can be found not in all countries, the research showed that existing spectrum of legal forms also indirectly contributes to development of social entrepreneurship sector.

In the light of researched materials, we can state that a strict regulation of social enterprise legal forms in the most cases is not necessary, although possible (and – in exceptional cases – required). We can state this because the definition of social entrepreneurship is only partially legal category. It means that legal preconditions of social entrepreneurship can be flexible. The same or very similar results can be achieved by using different legal and policy instruments. Most of the feasible scenarios lead to the general goal of social life improvement. According to this, we have formulated the following recommendations.

1. Despite positive general tendencies, such aspects as awareness raising, better access to finance and overall legal conditions for social enterprises have to be created having in mind *de facto* social enterprises. It would be useful to create on the EU level some "proposed framework," which according to operational definition would help national legislators to distinguish *de facto* social enterprises in their jurisdictions.

2. Proposed framework could include best practices (e.g., those on obtaining legal status of social enterprise) from countries that are more advanced in the social entrepreneurship legislation, also Commission's insights; it could become an operational tool for national legislators, which could choose from proposed options of social enterprise recognition. We also think that some good practice can be preserved and in the area of WISE regulation. This option of social enterprise has the right to exist and perform its social mission furtherly.

3. Particular legal forms, which fall within operational definition of social enterprise, can satisfy the need for social enterprise legal regulation in particular countries. It can be implemented with or without modifications in existing legal forms, depending on the level of flexibility in given legal regulation. Modifications of legislation within the company law rules (e.g. allowing stakeholder participation in the decision-making, clauses on assets lock etc.) or beyond (in the area of taxation regulation, accountability,

etc.) can be made, where social enterprises could have some benefits (which comply with the competition rules) for their contribution to social problem solving.

4. We can suggest that as a social policy implication, governments should take steps to introduce laws that encourage the entry of social enterprises in social services sectors, and the outsourcing of social services from public bodies to private social enterprises – a common feature of many European countries – should be further encouraged.

5. While developing legal frameworks for social enterprises in different countries (despite the variety of legal forms), some basic steps of harmonization could take place as it takes place in the case of limited liability companies (and some other legal forms) in terms of assessment, impact measurement, value orientation, stakeholder priority approach, etc. This research showed that societies that have many legal alternatives for operation of social enterprises by exploiting different existing legal forms (and this is the case in most European countries) must be aware of these available alternatives and avoid seeking of the new "universal" alternative because such universal alternative may not exist.

6. We think that social business development in the origin country of the author of this research should take place in the following two directions. Firstly, it could be involvement in dealing with social problems for the purposes of promoting social enterprise as private business initiative. Secondly, it could be application of business models, as well as social innovations, for the purposes of encouraging non-governmental organisations and companies of other legal structures to get involved in social entrepreneurship. Greater involvement of stakeholders in management of social enterprise could possibly have grater benefit in terms of quality of products/services that social enterprise provides, because involvement of stakeholders helps to elaborate better products/services. In addition, the niche of social services, which typically are provided by the state and/or municipalities, could be opened for local communities that could participate (through form of social enterprise) in solving of their local social problems.

7. Regulatory situation of social enterprise balances between strict regulation and self-regulation. Therefore, it cannot be directly recommended to multiply existing practices in different countries. Nevertheless, it can be recommended for legislators, when considering some concrete model as an example, to have in mind socio-economic and cultural environment in particular country. In this context, it is important to understand that future evolution of different types of social enterprises is inevitable.

Therefore, what we have researched here can be re-evaluated after several years and supplemented with aspects of constant change in society as well as in legal development. Nowadays solutions that suit in different cultural environment will inevitably shift, opening opportunities for continuing research.

8. Paying sufficient attention to the phenomenon of social entrepreneurship, in general, is also important for the development of the legal environment of this phenomenon. Therefore, it can be recommended to legislative bodies in particular countries to learn more about the concept of social enterprise while adopting different measures on the daily basis (e.g., amendments in business environment legal regulation) in order to respect interests of (potential) social enterprises. Second, national courts as well have to be familiar with the definition of social enterprise (whether it is defined in the national law or not) in the cases where questions of legal entities (sometimes *de facto* social enterprises) are disputed in various contexts. Third, legal scholars (especially specialising in the business law), whether they are interested in topic of social enterprise legal regulation or not, also have to be at least familiar with this concept in order to raise general awareness about this concept among other legal scholars.

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# APPENDIX A

**Scheme of the possible solutions and outcomes for the theoretical and practical problems examined in the research.**[513]

| General problem – lack of legal certainty:<br>*- socio-economic aspects;*<br>*- legal preconditions.* | **European Union and particular countries** | |
|---|---|---|
| | ***Theoretical problems*** | ***Practical problems*** |
| | - multiplicity of theoretical approaches;<br>- interdisciplinary confusion;<br>- unreliability of information;<br>- fragmentation of research. | - lack of links between socio-economic and legal aspects;<br>-weak conceptual foundation of legal / public policy decisions;<br>- legal non-recognition, unclear rules and general legal environment; |
| | ***Solutions*** | ***Solutions*** |
| | - introduction of the set of universal criteria for definition;<br>- introduction of the interdisciplinary research based on a broad context;<br>- dissemination of reliable information;<br>- synergies between theoretical and practical aspects. | - inventory of suitable legal forms (regulation revision);<br>- raising institutional awareness (synergy with theoretical research);<br>- integration in the wider context of welfare policies;<br>- application of social innovation;<br>- constant monitoring and application of hybrid elements in the existing legal regulation;<br>- Involvement of stakeholders in potential process of drafting new legislation. |

513 Appendix shows schematically the contribution of this research to the theoretical and practical aspects of legal preconditions of social entrepreneurship, and suggestions for solutions of the theoretically- and practically-based problems according to theoretical and practical outcomes of this research. The information in this appendix complements detailed insights provided in the conclusions and recommendations, as well as in the other parts of this research.

| *Outcomes:* |
| --- |
| - Several different social enterprise models can exist in one particular country, depending on variables (legal framework elements): governance model, initial capital, accountability, profit distribution, etc., as long as they pursue social goal / mission. |

# APPENDIX B

**Legal forms of social enterprise in researched countries.**[514]

| Country | Most popular legal forms and their legislation | | Dedicated legislation |
|---|---|---|---|
| | | | |
| **Denmark** | Association | No written legislation for association except for tax regulation | Law on Registered Social Enterprises |
| | Foundation | Danish Act on Commercial Foundations;<br>Danish Act on Foundations and Certain Associations | |
| | Company limited by shares | Danish Act on Public and Private Limited Companies | |
| | | | |
| **Finland** | Limited liability company | Limited Liability Companies Act | Act on Social Enterprise – only applicable to WISEs |
| | Cooperative | Co-operatives Act | |
| | Foundation | Foundations Act | |
| | | | |

514 All compared countries have at some level created legal forms that are not necessarily dedicated for social enterprises, but can be used by *de facto* social enterprises. In more advanced cases, a legal framework was developed to serve directly social entrepreneurship sector. Even if legal forms are not directly tailored for social enterprises (in less advanced cases), we can consider it as legal recognition of main characteristics of social enterprise according to criteria set in the SBA and our operational definition (an entrepreneurial dimension, a social dimension, and a dimension related to governance structure). Countries in the table are grouped by geographical region.

| | | | |
|---|---|---|---|
| **Iceland** | Association | No distinguished legal regulation of associations | No legal form or other legislation specifically designed for use by social enterprises, some specific provisions on WISEs |
| | Cooperative | Co-operatives Act | |
| | Self-governing foundation | Law on self-governing foundations | |
| | | | |
| **Norway** | (Non-profit) Limited company | Foundations Act | No legal form or other legislation specifically designed for use by social enterprises |
| | Foundation | Limited Companies Act | |
| | | | |
| **Sweden** | Economic association | Law on Economic Associations | No legal form or other legislation specifically designed for use by social enterprises |
| | Non-profit association | No legislation on non-profit associations (apart from certain tax rules) | |
| | Limited company | Law on Limited Companies | |
| | | | |
| **Estonia** | Association | Non-profit Associations Act | No legal form or other legislation specifically designed for use by social enterprises |
| | Foundation | Foundations Act | |
| | Private limited company | Commercial Code | |
| | | | |
| **Latvia** | Association | Associations and Foundations Law | Social Enterprise Law |
| | Foundation | Public Benefit Organisation Law | |
| | Private limited company | Commercial Law | |
| | | | |

| | | | |
|---|---|---|---|
| **Lithuania** | Limited liability company | Law on Limited Liability Companies | Law on Social Enterprises – only applicable to WISEs |
| | Association | Law on Associations | |
| | Foundation | Charity and Support Foundations Act | |
| | Public establishment | Law on Public establishments | |
| | | | |
| **Austria** | (Public-benefit) limited company | Law on Limited Liability Company | No legal form or other legislation specifically designed for use by social enterprises, except the provisions on public-benefit limited company |
| | Association | Law on Associations | |
| | Cooperative | Law on Cooperatives | |
| | | | |
| **Germany** | (Public-benefit) limited company | Law on Limited Liability Company | No legal form, however, some specific provisions on public-benefit limited companies and WISEs |
| | Public benefit association | Associations Act | |
| | Charitable foundation | Foundations regulation in separate federal states | |
| | | | |
| **Switzerland** | Association | Swiss Civil Code (associations) | No legal form or other legislation specifically designed for use by social enterprises, some specific provisions on WISEs |
| | Cooperative | Swiss Code of Obligations (cooperatives and companies limited by shares) | |
| | Company limited by shares | | |

# APPENDIX C

**List of interviews.**

| Participants | Date and place | Duration | Interview methods |
|---|---|---|---|
| Alexandra Andhov, Assistant Professor, Københavns Universitet, Det Juridiske Fakultet, Center for Private Governance | September 15, 2020, Copenhagen | 28 min | Active interview/key informant interview/ in-depth interview |
| Jesper Lau Hansen, Professor, Københavns Universitet, Det Juridiske Fakultet, Center for Market and Economic Law, Member, Commission's Informal Company Law Expert Group (ICLEG 2014-19), reappointed (2020-). | September 17, 2020, Copenhagen | 31 min | Active interview/key informant interview/ in-depth interview |
| Troels Michael Lilja, Copenhagen Business School, Chair of the Board, JurForsk – The Danish legal research education programme. Associate Professor, PhD | September 23, 2020, Copenhagen | 25 min | Active interview/key informant interview/ in-depth interview (performed online) |
| Karsten Engsig Sørensen, Professor, dr. jur., PhD, Aarhus University<br>School of Business and Social Sciences Department of Law | September 23, 2020, Copenhagen – Aarhus | 21 min | Active interview/key informant interview/ in-depth interview (performed online) |

| | | | |
|---|---|---|---|
| Beate Kristine Sjåfjell,<br>Professor, dr. juris, University of Oslo, Faculty of Law. Adjunct Professor at Norwegian University of Science and Technology, Faculty of Economics and Management. | October 20, 2020,<br>Oslo – Vilnius | 21 min | Active interview/key informant interview/ in-depth interview (performed online) |
| Emil Bach Worsøe,<br>Danish Business Authority | September 25, 2020, Copenhagen | 20 min | Active interview/key informant interview/ in-depth interview (performed online) |

MYKOLAS ROMERIS UNIVERSITY

**Tomas Lavišius**

# LEGAL PRECONDITIONS OF SOCIAL ENTREPRENEURSHIP: PERSPECTIVES IN SELECTED EUROPEAN COUNTRIES AND IN THE EUROPEAN UNION LEGISLATION

Summary of Doctoral Dissertation
Social Sciences, Law (S 001)

Vilnius, 2022

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*Scientific supervisor*:
Prof. Dr. Virginijus Bitė (Mykolas Romeris University, Social Sciences, Law, S 001)

The doctoral dissertation will be defended at the Law Research Council of Mykolas Romeris University and Vytautas Magnus University:

*Chair*:
Prof. Dr. Salvija Mulevičienė (Mykolas Romeris University, Social Sciences, Law, S 001).

*Members:*
Dr. Alexandra Andhov (University of Copenhagen, Denmark, Social Sciences);
Assoc. Prof. Dr. Alessio Bartolacelli (University of Macerata, Italy, Social Sciences);
Prof. Dr. Lyra Jakulevičienė (Mykolas Romeris University, Social Sciences, Law, S 001);
Prof. Dr. Agota Giedrė Raišienė (Mykolas Romeris University, Social Sciences, Management, S 003).

The public defence of the doctoral dissertation will take place at the Law Research Council at Mykolas Romeris University on 23 May 2022 at 10 AM in the Conference Hall (I-414) of Mykolas Romeris University.
Address: Ateities str. 20, LT -08303, Vilnius, Lithuania.

The summary of the doctoral dissertation was sent out on 22 April 2022.

The doctoral dissertation is available at Martynas Mažvydas National Library of Lithuania (Gedimino ave. 51, Vilnius) and the libraries of Mykolas Romeris University (Ateities str. 20, Vilnius) and Vytautas Magnus University (K. Donelaičio str. 52, Kaunas).

**Tomas Lavišius**

# LEGAL PRECONDITIONS OF SOCIAL ENTREPRENEURSHIP: PERSPECTIVES IN SELECTED EUROPEAN COUNTRIES AND IN THE EUROPEAN UNION LEGISLATION

## SUMMARY

**Relevance of the topic**

In the European Union (hereinafter also – the EU) as well as in the European Countries (not only EU Member States) legal regulation of different areas of social life constantly changes in accordance with social, economic, and political changes in the society. Legislation regulating the business relationships also changes inevitably. Legal sciences aim to consider the trends and features of such changes at the relevant time. Therefore, it is reasonable to study the primary reasons why the particular legal rule develops itself in one or other way, to define the current stage of development and to predict possible direction of future development, identify the advantages and possible gaps in the regulation, and suggest ways to remedy these gaps. Moreover, it is important to examine the emergence of a new regulatory approach and determine what goals are aimed with the introduction of new regulatory. In addition, there can be a lack of legal regulation, which occurs in society during the formation of new social phenomenon. Such lack of regulation also should be timely defined.

We can presume that the legislature (both, of the EU and of the particular states) creates a new legal regulation not accidentally, but with a specific purpose – to meet a need of society, which requires such new legal regulation. One such relatively new phenomenon in nowadays society is a concept of social entrepreneurship. In recent years, more and more one can hear about the social entrepreneurship initiatives. Different definitions of this phenomenon are being provided by the researchers across Europe and other continents (especially, in the United States). As the business relationship in-

evitably falls into specific regulatory area, it can be assumed that social entrepreneurship (or social business) also falls (or should fall) into area of specific legal regulation.

Social enterprises became an important topic in European and national political agendas in several recent years. The awareness constantly grows that social enterprises create sustainable and inclusive development of society and excite social innovation.[515] It is not surprising that focus on people as much as profit (which is characteristic for social entrepreneurship), fosters a sense and meaning of social "togetherness" and promotes solidarity and common well-being. Social economy, however, cannot develop itself naturally. To have a greater development of social economy we have to develop for it adopted environment.

In this research, we will see that the justification of the concept of social entrepreneurship and definition of its legal framework and regulatory characteristics are important for every state individually. Lithuania is also starting its way toward the national definition of the social entrepreneurship and its legal framework. In this step, different legal approaches should be considered to define what kind of legal forms are available to facilitate the legal concept of social enterprises. In 2015, Lithuanian Ministry of Economy adopted the Concept of the Social Entrepreneurship, which aimed to define the main principles of the social entrepreneurship, identify the problematic areas, and determine general tasks to foster the development of the social entrepreneurship. The document did not define any specific legal form of the social enterprise yet, but it aimed to evaluate the best practices of other European countries in legislation of the social entrepreneurship.[516] Later on, in 2019, there was an attempt to adopt new Law on Development of Social Business. The Draft of this legal act is still under consideration.[517]

In this context, we see that there exist considerable number of difficulties related with the core definition of social enterprises. What are the main reasons for such situation? It should be mentioned that the Communication of the European Commission links the concept of social entrepreneurship more with the content of activity of social

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515 "Social Enterprises and the Social Economy Going Forward. A Call for Action from the Commission Expert Group on Social Entrepreneurship," GECES, published 31 October 2016, accessed 14 January 2021, http://ec.europa.eu/growth/content/social-enterprises-and-social-economy-going-forward-0_en

516 "Socialinio verslo koncepcija, patvirtinta Lietuvos Respublikos ūkio ministro 2015 m. balandžio 3 d. įsakymu Nr. 4-207," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/353c1200d9fd11e4bddbf1b55e924c57/asr

517 "Lietuvos Respublikos socialinio verslo plėtros įstatymo projektas," e-seimas, https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/1ec626406a6e11e99684a7f33a9827ac?jfwid=-1c703921t9

enterprise than with the particular form of legal entity. However, in some countries exists special legislation defining special forms of legal entities. We will see this from further investigation of the regulation in particular countries.

Hence, the question is how to define social entrepreneurship legally if there is no specific legal form or existing legal form is too narrow and does not cover all forms of social entrepreneurship or social business? In such situation, there must be found and defined certain *legal preconditions – what could be considered specifically as social business or social entrepreneurship*. Mostly social businesses operate providing public services. Meanwhile, the legal form of such business might be a limited liability company, or other legal form of a private (or sometimes public) legal person. Such company, in its legal form, is adapted for the for-profit corporate governance and multiplication of its shareholders' welfare.

This kind of dichotomy must be thoroughly investigated in order to provide greater clarity and legal certainty in the legal regulation of social entrepreneurship. It was mentioned that this problem of legal certainty is relevant because of rapid development of social entrepreneurship in nowadays society. The lawmakers react in different ways, but the common features can be identified, and can be useful as possible best practice examples, or at least such practices could be modelled from different elements (both, theoretical and practical) that currently exist in different countries.

Authors like Antonio Fici, Giulia Galera, and Carlo Borzaga share their insights that company law was designed to maximize shareholder value. The pure legal forms of the non-profit sector and the pure forms of the for-profit sector are inadequate to accommodate the phenomenon of a social enterprise.[518] It has to be stressed that the social enterprises influence the theoretical concept of enterprise in general: the conception of enterprises as organizations promoting the exclusive interests of their owners is questioned by the emergence of enterprises supplying general-interest services and goods in which profit maximization is no longer an essential condition.[519] With this starting position, we can agree that the research field is really wide and covers various areas of legal regulation – from company law to public procurement, competition law and beyond. Within the scope of this research the attention must be payed not only

518 Antonio Fici, "Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective," *Euricse Working Papers*, 82 (2015), https://dx.doi.org/10.2139/ssrn.2705354

519 Giulia Galera and Carlo Borzaga, "Social enterprise: An international overview of its conceptual evolution and legal implementation," *Social Enterprise Journal*, 5(2009): 224, doi: 10.1108/17508610911004313.

to legal preconditions of social entrepreneurship but also answered such questions as what is the particular social good on which the legislation of social entrepreneurship focuses (or should focus).

**Research novelty and significance of the problem**

In today's rapidly changing society and global trends in different areas, legal preconditions of social entrepreneurship become a complex topic that is not easy to contemplate. The definition "legal preconditions" in the title of this dissertation was chosen not by accident. Usually speaking about things related with law we can discuss legal regulation, which refers to existing different kinds of legal acts. It is the most concrete thing in the legal research. In addition, we can speak about legal environment or legal framework, which refer to legal system or a legislation as a whole. It is also rather concrete criterion to evaluate the area of social entrepreneurship from the legal point of view. Third, we can speak about legal preconditions. This is the term chosen to operate in this research for several reasons. First of all, it is wider; however, this property is useful because of the particularity of social entrepreneurship not only as a legal category but also as a societal phenomenon. Research of this phenomenon balances between different areas of social sciences. Therefore, throughout this research we use an interdisciplinary approach to evaluate legal status and other different legal preconditions of social entrepreneurship together with such non-legal aspects by their nature as the purpose and impact of social entrepreneurship, phenomenon of social innovation, sustainable development, and several other non-legal aspects.

Consequently, this research raises legal questions (although not all discussed aspects are of a legal manner). It also approaches other areas of social science. By that we think that looking into legal preconditions of social entrepreneurship should include and such aspects as research on how legal regulation in the particular area correlates with the success, popularity, usefulness of that form of activity (in this case – social entrepreneurship). In addition, we think that this research is useful by looking for different angle of view in the field of legal preconditions for social entrepreneurship. Therefore, such novelties as legal technology are also considered. They are evaluated by trying to answer the questions such as how legal technology affects social business. On the other hand, we try to expand insights on the assumption that social business can become a good provider of legal tech services.

This dissertation does not seek to emphasize the problems in the particular country. However, as a researcher from particular country we could provide an example for the sake of the introductory context. Due to the small social entrepreneurship awareness, social entrepreneurship in Lithuania is often identified only with the work integration social enterprise (hereinafter also – WISE). In this research, we found out that the concept of WISE is widespread in the most of researched countries. Subsequently we discuss the concept of WISE in detail.

For this moment, in Lithuania exists a law defining legal status of WISEs – the Law on Social Enterprises of the Republic of Lithuania[520] (not to be confused with the above-mentioned Draft Law on Development of Social Business). The definition of social enterprise in this Law is defined narrower than one defined in the European Commission's documents. Social enterprise, as it is defined in Lithuanian legislation, can be called as only one of the possible social business models. Therefore, it is particularly important to establish a common legal concept of social business.

For example, the Law on Social Enterprises of the Republic of Lithuania links social enterprises only with the employment of people from specific social groups who have lost their professional and general capacity for work, are economically inactive and are unable to compete in the labour market under equal conditions, to promote the return of these persons to the labour market, their social integration as well as to reduce social exclusion. According to this Law, a social enterprise shall be a legal person who has acquired this status in accordance with the procedure laid down by this Law and fulfils all the conditions related to recruiting of certain social groups.

We know that traditional business, as a core driver of market economy cannot be exchanged by any alternative (including and social entrepreneurship). Social entrepreneurship, however, offers an additional option besides conventional business models or the corporate social responsibility (hereinafter – CSR), which can be exploited while seeking social goal (mission) and profit-generating sustainable action. Moreover, innovativeness of social entrepreneurship is unique because it not only pursues a social mission, but also it provokes creation of new forms of partnership between business and society. From such situation benefits not only target groups (to which social enterprise activity is usually directed), but also the entire society. *The main problem in this context is lack of legal certainty*. This legal uncertainty manifests itself whether in legal

520 "Lietuvos Respublikos socialinių įmonių įstatymas," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.EEC13A0B85BA/asr

non-recognition of social enterprise as such, or unclear rules and general legal environment for social entrepreneurship. Those aspects can be distinguished as main problem in the research area of legal preconditions of social entrepreneurship.

In developing this issue, it should be noted that from a legal point of view neither the definition of social entrepreneurship nor its special legal regulation is yet finally identified (or it can be stated that it varies greatly). Many countries still lack an enabling framework for encouraging the creation and development of social enterprises.

With respect to the novelty of the social entrepreneurship as the legal category and the lack of legal certainty, this category requires a thorough examination to define its legal preconditions. Considering the amount of such initiatives in the EU Member States, it is crucial to legally justify the phenomenon of social entrepreneurship, unify its categories, definitions, and concepts, analyse new legal institutes, which are emerging because of development of social entrepreneurship, and to analyse the legal preconditions of social entrepreneurship in the European Union.

The legislator in particular country should answer the question what the main legal approaches are to facilitate the creation of social enterprises. What kind of advantages or disadvantages have these models? These questions are especially important while establishing particular legal framework for social entrepreneurship in particular country.

Typically, business legal regulation serves for the general public purposes, enabling businesses (entrepreneurs) to increase profits and also create the benefit for the general society in easily measurable financial terms. Besides, however, there does exist another concept – business whose mission is not to make a profit, but to meet through its activities the social needs of society. Therefore, from the point of view of legal sciences, this phenomenon is interesting in the way the business law interacts with the legal aspects of social entrepreneurship, because both subjects have common points, but also have and conceptual differences. We study development of this phenomenon in detail.

We think that this research contributes to better analysis of the EU legislation and legislation of the particular European states. It also contributes to the definition of insufficiently defined legal categories and positioning of social entrepreneurship in the legal system of the EU, considering the wider legal context then only the EU company law. The results of the research can be useful improving the national legal framework on social entrepreneurship or social business, which is clearly insufficient in nowadays stage of rapid popularization of social entrepreneurship in Lithuania. Moreover,

such areas as social innovations and social entrepreneurship come and develop hand in hand. We can assume that social innovation and hybridity of social enterprise are inseparable parts of the paradigm of social entrepreneurship. Therefore, this research looks for the legal preconditions of social entrepreneurship and social innovation to clarify these definitions in the way that could be useful for further research and practical application.

**Research purpose and objectives**

The main purpose of this research is to determine legal preconditions of social entrepreneurship in the European Union as well as in the particular EU and European Free Trade Association (hereinafter – EFTA) Member States.

1. To implement the objectives of this research the following tasks are raised:

2. To find out whether the legal regulation of social entrepreneurship is adequate and identify potential weaknesses, differences, and contradictions of this legal regulation in the EU, the particular EU and EFTA Member States;

3. To determine main elements of the definition of social entrepreneurship or social business, (and related definitions) based on legislation, scientific literature, and our own observations;

4. To define the place of social entrepreneurship legal regulation in the legal system of the EU and particular countries;

5. To compare the regulatory relationship of social entrepreneurship with other regulatory areas in the context of legal system (social innovation, CSR, legal technology, and such global initiatives as the United Nations Sustainable Development Goals) in order to identify possibly best regulation practices and to estimate the potential of social entrepreneurship.

**Assumptions, limitations, and defensive statement**

This research looks for the legal preconditions of social entrepreneurship in the EU legislation and examines in comparative manner the legal preconditions of social entrepreneurship in several EU Member States (Austria, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, and Sweden) and States of the EFTA (Iceland, Norway, and Switzerland). From the literature review, we see that most of the academic texts

look into economic peculiarities of the functioning of social enterprise. However, from the legal point of view, there is a lack of studies evaluating legal preconditions for social entrepreneurship in the comparative manner.

It was quite difficult to start the research by defining one or several fundamental legal acts regulating this specific area, whereas there is a lack of such legislation in the EU. European Commission (hereinafter also – the EC; and – Commission) published in 2011 its Communication on Social Business Initiative (hereinafter also – SBI).[521] This Communication defines a social enterprise as an operator in the social economy whose main objective is to have a social impact rather than make a profit for its owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involving employees, consumers and stakeholders, which are affected by its commercial activities. It should be noted that the Communication does not emphasize any specific form of legal entity as a social enterprise.

Such definition of social enterprise is provided in the above-mentioned Communication. Although any communication of the EC is not an imperative legal act, but this Communication could be considered as a starting point for drawing the boundaries of the preliminary legal concept. However, this dissertation also covers broader evaluation of such for this research significant definition as social dimension of law, business, enterprise and entrepreneurship, social innovation, legal technology etc. Therefore, a dedicated chapter in this research evaluates all mentioned definitions and looks for the connections between them.

Summarising the definition of social enterprise provided in the SBI, we introduced so-called *operational definition (*which is partially based on the operational definition used in the SBI) of social enterprise that was used for the purpose of the research throughout this dissertation. Moreover, further in this dissertation we research the multiplicity of the elements, contained in this definition, and it is one of the aspects of original contribution of this research in order to achieve one of the goals of the dissertation. Within this operational definition, three dimensions can be distinguished: an entrepreneurial dimension; a social dimension; and a dimension related to governance

521 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative," COM (2011) 682 final, accessed 14 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-52011DC0682&from=EN

structure. All three dimensions are not isolated but interact in various combinations. These combinations matters most when identifying the boundaries of the social enterprise. An entrepreneurial dimension represents engagement in economic activity. A social dimension represents explicit and primary social aim. A dimension related to governance structure represents limits on distribution of profits and/or assets; organisational autonomy; and inclusive governance.

The *defensive statement* of this research argues that *there is a lack of legal certainty in the European Union and in particular countries in the field of regulation of social entrepreneurship, which could be tackled by the variety of legal (and possibly – not only legal) measures*. The defensive statement also argues that adapting of existing legal forms and exploiting different soft law measures, without necessarily introducing a dedicated legal form, could lead to effective development of social entrepreneurship as social phenomenon. Nowadays existing legal uncertainty causes additional difficulties for social enterprise development, which otherwise could be successfully exploited as an important and effective measure to address the social problems in society.

To verify the defensive statement this research dealt with the investigation of the European Union and the EU Member States' legislation and national legislation of other countries and evaluated the insights of other researchers on the problems related with the subject of this research. Focusing on the defensive statement, subject of the research can be considered as the legislation of the EU and several particular countries on the social entrepreneurship, its legal forms and ways of expression. The research also looked for preconditions for the legal reasoning of social entrepreneurship concept since there was insufficient legal regulation in this area.

The scope of the research covers the examination of the EU legislation regulating this area. It also covers the comparative analysis of social business legal regulation in selected EU Member States and states of the EFTA. The following logic is applied by selecting particular countries for comparative analysis. Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) were chosen as countries that have a long tradition of the welfare state, which includes a considerably higher rate of different social initiatives, and active community of non-governmental organizations. German-speaking Western European states (Austria, Germany, and Switzerland) were chosen to evaluate their experience in the light of their strong economies and to look what models are used in highly economically developed countries to tackle social problems. Baltic States (Estonia, Latvia, and Lithuania) were chosen as relatively young democracies and mar-

ket economies, to evaluate their level of development of such quite new concepts as social entrepreneurship, and to determine possible shortcomings in this area.

Structure of dissertation and chapters' overview

This dissertation can be described as having two main and parallel parts (although the content of dissertation holds in itself more detailed parts). These above-mentioned main parts are not strictly defined but have quite different approach to the topic. First of all, this research focuses on theoretical definition of different aspects (and not only in terms of legal sciences) of social entrepreneurship. This part of dissertation allows us to look at theoretical preconditions of different elements of the phenomenon that we call social entrepreneurship. Without the theoretical approach, this research could not cover thoroughly all aspects mentioned in the introduction, such as social innovation, CSR, legal technology etc.

The other large part of the dissertation covers the comparative analysis of the legal environment for social enterprises in particular countries (Austria, Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Sweden, and Switzerland). The quite large spectrum of countries from several European regions allows us to get a better view on the definition and legal framework of social enterprise and social entrepreneurship in countries and regions with different experience, social, and historical background.

We also evaluate legal framework of the EU and raise questions whether legal regulation on the EU level is adequate. Speaking in more detail, the comparative analysis covers such aspects of legal environment for social enterprises as existing legal framework, for social enterprises available legal forms of entities, legal status, and recognition of such business form etc.

**Main scientific approaches in literature**

Review of the literature that deal with different aspects (not only legal) of social entrepreneurship is important for several reasons. First, it gives a clearer view on aspects that are explored relatively good by other authors. On the other hand, it can show contradictions between different points of view. Therefore, by overviewing some main trends in literature dealing with social entrepreneurship we seek in this research

to show our original point of view, which may be different from that of other authors. In addition, in this way it is possible to highlight important elements of insights of different authors, which, by systematizing and adding our own insights, can qualitatively supplement the research in this field.

First, we have to stress that researchers usually deal with the problems of social entrepreneurship through the prism of economics. Individually we can mention such authors as J. Austin, J. Defourny, M. Nyssens, G. Lasprogata, M. Cotten, R. Martin, S. Osberg, and A. Nicholls etc., whose insights can be valuable for this research. Most of the above-mentioned authors consider that the definition of social entrepreneurship differs between different states and even continents (e.g., United States and the EU). However, the researchers agree that social entrepreneurship plays an important role in nowadays society and in the future, it will definitely become an important tool to tackle the social problems. Therefore, the justification of the concept of social entrepreneurship and definition of its legal framework and regulatory characteristics are also very important.

Although the research positions of some authors have been published several years ago, it should be borne in mind that an extensive search of the scientific literature was conducted during the study. We can state that there are relatively few literature positions on the research topic (especially – on the legal aspects). The above-mentioned, relatively older positions of literature are still very relevant. Therefore, this research, among other things, performs the function of systematizing the literature on the relevant topic, which contributes to a better dissemination of information about the researched problem.

**Research design and methodology**

Methodologically this research focuses on the subject – legal preconditions of social entrepreneurship in the European Union and particular EU Member States, and States of EFTA. The research argues that there is a lack of legal certainty in the countries in the field of regulation of social entrepreneurship. Such legal uncertainty causes additional difficulties for the further development of social entrepreneurship as social phenomenon, which can be important and effective measure to tackle social problems in society.

Theoretically, the dissertation uses some views from philosophical doctrine of

the realism. As the assumption of realism, we understand the idea that things in the world happen regardless of whether we observe them, or even know them. Objects have in the social world varying probabilities of coming into existence and causing new objects, which connect into identifiable structures. We investigate the social world in its context, which counts as evidence, concepts, measures, etc.[522] Bearing this in mind; the objectivity of this research depends on the context of the social life, which inevitably changes over time.

In addition to general philosophical doctrine of the realism, the research uses some ideas of the legal realism (more particularly – the new legal realism).[523] The starting point of the realist account of law is its critique of a purely doctrinal understanding of law. Law is going institution (or set of institutions) caused by the tensions: between power and reason, and tradition and progress and a social process is not something that can happen at a certain date. Legal realists insist that legislators should use social developments and new cases as triggers for rethinking the doctrine's conventional understanding. According to legal realism, the main roles of doctrinal categories are to consolidate people's expectations and to express ideas of law with respect to distinct types of human interaction.[524]

The legal problems that this research examines are closely related with the economic aspects. Therefore, it is important to emphasize the importance of interdisciplinary aspect of this research, which allows exploring the problematic of the issue across the boundaries of one particular sphere of social sciences.

Pioneer of political economy Adam Smith formed a well-known assertion that free market competition leads the public to better economic results and the general public welfare. However, he also pointed out that people's behaviour often leads to a feeling of sympathy for other people. In his work "Theory of Moral Sentiments", author formulates the idea that people often feel sorrow looking at the sorrow of others. According to Smith, we have no immediate experience of what other people feel we can form no idea of the way they are affected, but by conceiving what we ourselves should

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522 Gayle Letherby, John Scott, and Malcolm Williams, "Social Objects and Realism," in *Objectivity and Subjectivity in Social Research* (London: SAGE Publications Ltd., 2013), http://dx.doi.org./10.4135/9781473913929.n6.

523 Although the general ideas of legal realism from the first half of the 20th century are considered to be outdated, we believe that most of those ideas are also relevant nowadays. Moreover – the new legal realism is helping to return some of the philosophical values of legal realism.

524 Dagan Hanoch, "Doctrinal categories, legal realism, and the rule of Law," *University of Pennsylvania Law Review* 163 (2015): 1891, 1897.

feel in the like situation.[525]

In the light of above-mentioned thoughts of Adam Smith, the legal perspective of the topic of this research methodologically falls into the interdisciplinary area of research of the behavioural law and economics. The task of behavioural law and economics is to explore the implications of human behaviour for the law. Because taking into account understanding of how people behave can cast a different light on how or whether a particular rule will achieve its intended goals. Sometimes it turns out that legal rules that would seem efficient or effective from a law and economics perspective (based on hypothetical assumptions on human behaviour) are inefficient when dealing with real people.[526]

In addition, the concepts of A. Smith, the pioneer of political economy, and other concepts mentioned and developed in the work were chosen deliberately and, in the author's opinion, were related to the research topic and problem, highlighting the interdisciplinary aspect of the research. The connection between the classical theories of both political economy (A. Smith) and law (legal realism) with the research topic shows the depth of the research problem (showing that the possible beginnings and assumptions of the topic were formed much earlier than the concept of social business itself). In addition, it provides opportunities to develop these interfaces in further research.

**Research instruments, data, and analysis limitations**

This research mostly utilizes a set of qualitative research methods that are used interchangeably throughout the whole research. The *textual analysis method* is used to examine closely the content and meaning of legal texts and other documents, as well as they structure and disclosure.[527]

To define the place of the examined legal norms in the legal system, also to define the relationship between the legal norms and their relationship to the general principles of law a *comparative method* is used. This method also helps to define the relationship between the European Union and the EU Member States' and other

525 Adam Smith, *The Theory of Moral Sentiments* (New York: Penguin Books, 2009): 13.

526 Julie De Coninck, "Behavioural Economics and Legal Research," in *Methodologies of Legal Research,* edited by Mark Van Hoecke (Oxford: Hart Publishing Ltd, 2011): 262-3.

527 Sharon Lockyer, "Textual Analysis," in *The Sage Encyclopedia of Qualitative Research Methods,* edited by Lisa M. Given (Thousand Oaks, CA: SAGE Publications, Inc., 2008): 865-67. http://dx.doi.org/10.4135/9781412963909.n449.

countries legislation. This method also comes in hand while determining the possible regulatory shortcomings. Comparative method is probably the mostly useful for this research because this method allows isolating factors or variables that explain patterns. Separately can be mentioned *historical method*, which concentrates on the analysis of historical data to study the development of the EU legislation related to the subject of this research. Two basic strategies are usually distinguished in comparative research: (1) study events or groups that differ in many ways but have something in common; and (2) study events or groups that are similar but differ in one or several important respects.[528] This research tries to apply both of these strategies. The comparative method also allows the implementation of the research on different levels, starting from the comparison of different cultures, and going into the comparison of different aspects within the concrete case.[529] The comparative legal research contains in itself several types of methods, such as the functional method, the structural method, law-in-context method, etc.[530] All the above-mentioned methods constitute together the whole toolbox for comparative research.

Closely related to the comparative method in this study is the *case study method*. It is used for the in-depth analysis of particularly selected states with the advanced legal frameworks regarding the social entrepreneurship. Moreover, written documents may be searched for clues to understanding the culture of organizations, the values underlying policies, and the beliefs and attitudes to the issue.[531] With this regard, the case study method contributes to this research.

Although, the *method of generalization* in qualitative research tends to be criticized, in this research, however it serves for exploring patterns in particular societies, because qualitative research might produce moderate generalizations, depending on levels of cultural consistency (such as rules, customs, etc.) in the social environment.[532]

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528 "Comparative Method," in *Dictionary of Statistics & Methodology*, 3rd ed., edited by W. Paul Vogt (Thousand Oaks, CA: SAGE Publications, Inc., 2005): 52-53. http://dx.doi.org/10.4135/9781412983907.n327.

529 Uwe Flick, *Designing Qualitative Research* (London: SAGE Publications, Ltd., 2007): 39-40. http://dx.doi.org./10.4135/9781849208826.

530 Mark Van Hoecke, "Methodology of Comparative Legal Research," *Law and Method 12* (2015): 8. http://dx.doi.org/10.5553/rem/.000010.

531 Helen Simons, *Case Study Research in Practice* (London: SAGE Publications, Ltd., 2009): 63. http://dx.doi.org/10.4135/9781446268322.

532 Malcolm Williams, "Generalization/Generalizability in Qualitative Research," in *The SAGE Encyclopedia of Social Science Research Methods*, edited by Michael S. Lewis-Beck, Alan Bryman and Tim Futing Liao (Thousand Oaks, CA: Sage Publications, Inc., 2004): 421-22. http://dx.doi.org/10.4135/9781412950589.n367.

The examination of legal environment using the above-mentioned methods constitutes the core of this research. The research also examines the scientific literature: monographs and studies, analyses some other data.

Besides the core methods, mentioned above, several *expert interviews* were performed. Typically, in legal studies, the interview-related methods are not so commonly used. However, considering the interdisciplinary aspects of the researched subject, the valuable information on the problematic aspects of the regulation, also broader context of the legal framework can be retrieved from expert interviews. In this regard, several interviewing methods were combined together. In correlation with the overall in-depth interview principles, more customised and adapted for legal studies interviewing methods were exploited. Generally, in-depth interviews are used to help researchers to understand their interviewees' views of processes, norms, decision making, belief systems, mental models, interpretations, motivations, etc., that provide richness of qualitative data.[533] In this context, the combination of active interviewing and key informant interview were used. In the typology of interview methods, these two techniques are tended to be less structured, on the one hand, and quite specific/narrow, on the other.

The whole research and writing process of this dissertation was divided into the following main steps:

1. Material collection and analysis;

2. Preparation of scientific publications on the subject of research. The scope of published articles was later expanded and updated in order to provide an up-to-date material for the concrete parts of the dissertation;

3. Preparation of the dissertation.

Material collection and analysis started with the building of the main "structural columns" of the research. Those main structural columns of the research in other words could be called as "theoretical" and "practical" parts of the research. The theoretical part of the research includes such elements as the history of the concept of social entrepreneurship, legal and economic links of social entrepreneurship. In addition, in this part, great amount of attention was paid to definitions (not only ones of the legal character but also economic, societal, etc.). Therefore, material for this part of the research was mainly collected while analysing scientific literature and not so often directly ana-

533 Greg Guest, Emily Namey, and Marilyn Mitchell, "In-depth interviews," in *Collecting qualitative data,* edited by Greg Guest, Emily Namey, and Marilyn Mitchell (London: SAGE Publications, Ltd): 17. http://dx.doi.org/10.4135/9781506374680

lysing the legal acts.

The practical part of the research, however, focuses more on the legal acts; therefore, the material collection in this part consisted mostly of the analysis of legal texts. Nevertheless, this part of the research also required some additional data (retrieved not only from the legal texts) to receive more universal set of data. This universal set of data includes such elements as studies, working papers and reports of different institutions. In addition, some valuable for this research pieces of information were retrieved from semi-structured in-depth interviews. The above-mentioned sets of data laid a foundation for the above-mentioned practical structural column of this research, which includes comparative analysis of legal preconditions of social entrepreneurship in particular countries as well as the legal regulation of social entrepreneurship on the EU-level.

The parallel work during the data collection and analysis steps was the preparation of the scientific articles. This exercise helped to systematically check the relevancy of the collected materials during the years of the conducted research and explore additional data sources. Finally, the stage of the preparation of dissertation included not only the thorough analysis of the data that was collected during the years of this research but also an exercise of the checking the relevance of collected data, which could possibly have changed over time.

This dissertation aims to look systematically into the social entrepreneurship-related legal institutes, relations between these institutes and their relationship with the primary EU law, the EU company law, and relationship between the EU and national regulation in the EU Member States and states of the EFTA.

With respect to the novelty of the social entrepreneurship as the legal category and the lack of legal certainty, which is the main problem investigated in this research, this category requires a thorough scientific examination to define its legal preconditions. Considering the amount of such initiatives in the EU Member States, this research contributes to thorough scientific justification of the legal elements of phenomenon of social entrepreneurship. The research also unifies its categories, definitions, and concepts, analyses new legal institutes, which are emerging because of development of social entrepreneurship. The research analyses the legal preconditions of social entrepreneurship in the European Union, which are not always directly noticeable. It also contributes to better analysis of the EU legislation and legislation of the particular European states. As well as it contributes to deeper analysis of the elements of definition

(not only in legal terms, positioning of social entrepreneurship in the legal system of the EU, considering the wider legal context then only the EU company law.

Among other things, this study performs the function of systematizing the literature on the relevant topic, which contributes to a better dissemination of information about the problem under study. The dissertation focuses on the theoretical issues of the phenomenon under study, including different theoretical approaches and definitions. This analysis is the author's original contribution to the theoretical formation (not just the definition) of understanding social business.

From the practical point of view, the results of the research could contribute to improvement of national legal framework on social entrepreneurship or social business, which is clearly insufficient in nowadays stage of rapid popularization of social entrepreneurship in Lithuania.

## CONCLUSIONS

After researching materials and applying other qualitative research methods in both – theoretical and practical parts of this research – we can argue that the defensive statement, which states that there is a lack of legal certainty in the European Union and in particular countries in the field of regulation of social entrepreneurship can be supported in the most cases by following arguments.

1. Legal preconditions of social entrepreneurship lay on the top of theoretical and philosophical foundation. Definition of legal good, which should be protected by the legislation in the field of social entrepreneurship, defines and elements of the definition of social entrepreneurship itself. Therefore, lack of legal certainty (with its weaknesses, differences, and contradictions) comes from weak foundation of conceptual legal philosophy. The socio-economic aspects of social entrepreneurship are primary reasons why social entrepreneurship exists *per se*. Legal preconditions derive from socio-economical preconditions and support the existence of the phenomenon of social entrepreneurship.

2. Definition of social entrepreneurship consists of multitude of elements, which not all of them can be directly observed from the legal regulation alone and are theoretically much more complex. Different elements of the social entrepreneurship framework (non-legal aspects) constantly interact with regulatory framework (legal aspects). Such situation determines the definition of social entrepreneurship overall. The current EU legislation does not form any concrete legal framework for social enterprises – it consists of several legally binding documents and several soft-law measures. Despite that, social enterprises are influenced by the economic and social conditions, which vary in particular country or region. However, in some concrete circumstances not legally binding definition (provided in the SBI) becomes legally binding (provided in directives) and affects not only supranational legislation, but also the legislation of the Member States. It is so far the only supranational legal effect on legal framework for social entrepreneurship.

3. The supranational EU legislation of social entrepreneurship can be implemented only partially (placing an accent on the soft-low measures). Ideal (possibly superlative), or at least best-suitable European legal form of social enterprise is particularly difficult to develop and create considering very different legal and socio-economical

traditions of the development of social entrepreneurship in different countries. Before creating legal framework, societies must identify what kind of socio-economical relationship has to be defined legally and it is hardly implementable on the supranational level.

4. We can see the problem of legal uncertainty in the area of social entrepreneurship emerges whether in legal non-recognition of social enterprise as such, or unclear rules and general legal environment for social entrepreneurship. The question of legal forms is directly related with question of legal certainty. The situation may occur when social enterprise is legally not defined at all and operate only as regular company (entity), which socio-entrepreneurial identity cannot be spotted looking into its legal form. Despite that, some legal preconditions of social entrepreneurship exist in researched EU/EFTA countries. However, those preconditions cause a lot of legal unpredictability and not necessarily mean for social enterprise dedicated legislation. Often those preconditions are not even obvious and can be found only by systematically looking into the content of the legislation where features of operational definition of social enterprise can be identified.

5. In different societies, social entrepreneurship pursues different goals and depend on different level of welfare. In more developed societies, these goals are aimed at reducing exclusion, disadvantaged integration, etc. In less developed (or developing) societies, these goals are aimed at solving structural problems (access to education, health services, etc.). Since all researched countries are considered as developed countries most of social enterprises aimed at integration of disadvantaged (WISEs), however also range of other social problems is covered.

6. From the systematic evaluation of materials, we can state that social entrepreneurship, first of all, is an attitude, a point of view, a value system. It can be implemented by using different legal forms and other legal instruments. Social entrepreneurship could not exist *per se*. To be a social enterprise means not only obtain e.g., a dedicated legal status or legal form (which is strictly legal question). To be a social enterprise means to carry out a social mission (which is not a legal question or partially legal).

7. The place of social entrepreneurship legal regulation in the legal system of the EU and particular countries depends on the recognition of social good. Social good is usually recognized by society without a legal recognition of it. However, in the most cases it is impossible to cover the whole spectrum of social good fully, which has to be maintained on the state level. Therefore, countries prioritize some areas of social good

more than the other does. Then respective prioritized areas become a part of political agenda. The topics of political agenda are usually implemented by different legal instruments (laws, rules, conditions, etc.). It means that social enterprise performance is related with social good that is recognized on the state level as important.

8. We can state that any legal framework could not force natural development of societal relations if it is not accepted by society (such approach meets the view of legal realism). We assume if some social innovation (like, certain legal framework, CSR, legal technology, SDG's) in particular societies is more acceptable, in other societies it can be less welcome, or at least not correctly understood or poorly implemented. It means that performance of social enterprise is not related with its existence as a legal entity (legal form may not directly influence social performance of enterprise), but rather with evaluative aspect of its existence. However, we think that different legal forms provide different possibilities for action and therefore they indirectly influence social performance and social impact of particular social enterprise.

## RECOMENDATIONS

In most countries, it is possible to use an existing legal form specifically for purposes of a social enterprise, for example, by specifying a social purpose, limiting the means by which profits may be distributed and by specifying other 'social' features. We can state that even if a dedicated legal framework for social enterprises can be found not in all countries, the research showed that existing spectrum of legal forms also indirectly contributes to development of social entrepreneurship sector.

In the light of researched materials, we can state that a strict regulation of social enterprise legal forms in the most cases is not necessary, although possible (and – in exceptional cases – required). We can state this because the definition of social entrepreneurship is only partially legal category. It means that legal preconditions of social entrepreneurship can be flexible. The same or very similar results can be achieved by using different legal and policy instruments. Most of the feasible scenarios lead to the general goal of social life improvement. According to this, we have formulated the following recommendations.

1. Despite positive general tendencies, such aspects as awareness raising, better access to finance and overall legal conditions for social enterprises have to be created having in mind *de facto* social enterprises. It would be useful to create on the EU level some "proposed framework," which according to operational definition would help national legislators to distinguish *de facto* social enterprises in their jurisdictions.

2. Proposed framework could include best practices from countries that are more advanced in the social entrepreneurship legislation, also Commission's insights. It could become an operational tool for national legislators, which could choose from proposed options of social enterprise recognition. We also think that some good practice can be preserved and in the area of WISE regulation. This option of social enterprise has the right to exist and perform its social mission furtherly.

3. Particular legal forms, which fall within operational definition of social enterprise, can satisfy the need for social enterprise legal regulation in particular countries. It can be implemented with or without modifications in existing legal forms, depending on the level of flexibility in given legal regulation. Modifications of legislation within the company law rules (e.g. allowing stakeholder participation in the decision-making, clauses on assets lock etc.) or beyond (in the area of taxation regulation, accountability,

etc.) can be made, where social enterprises could have some benefits (which comply with the competition rules) for their contribution to social problem solving.

4. We can suggest that as a social policy implication, governments should take steps to introduce laws that encourage the entry of social enterprises in social services sectors, and the outsourcing of social services from public bodies to private social enterprises – a common feature of many European countries – should be further encouraged.

5. While developing legal frameworks for social enterprises in different countries (despite the variety of legal forms), some basic steps of harmonization could take place as it takes place in the case of limited liability companies (and some other legal forms) in terms of assessment, impact measurement, value orientation, stakeholder priority approach, etc. This research showed that societies that have many legal alternatives for operation of social enterprises by exploiting different existing legal forms (and this is the case in most European countries) must be aware of these available alternatives and avoid seeking of the new "universal" alternative because such universal alternative may not exist.

6. We think that social business development in the origin country of the author of this research should take place in the following two directions. Firstly, it could be involvement in dealing with social problems for the purposes of promoting social enterprise as private business initiative. Secondly, it could be application of business models, as well as social innovations, for the purposes of encouraging non-governmental organisations and companies of other legal structures to get involved in social entrepreneurship. Greater involvement of stakeholders in management of social enterprise could possibly have grater benefit in terms of quality of products/services that social enterprise provides, because involvement of stakeholders helps to elaborate better products/services. In addition, the niche of social services, which typically are provided by the state and/or municipalities, could be opened for local communities that could participate (through form of social enterprise) in solving of their local social problems.

7. Regulatory situation of social enterprise balances between strict regulation and self-regulation. Therefore, it cannot be directly recommended to multiply existing practices in different countries. Nevertheless, it can be recommended for legislators, when considering some concrete model as an example, to have in mind socio-economic and cultural environment in particular country. In this context, it is important to understand that future evolution of different types of social enterprises is inevitable.

Therefore, what we have researched here can be re-evaluated after several years and supplemented with aspects of constant change in society as well as in legal development. Nowadays solutions that suit in different cultural environment will inevitably shift, opening opportunities for continuing research.

8. Paying sufficient attention to the phenomenon of social entrepreneurship, in general, is also important for the development of the legal environment of this phenomenon. Therefore, it can be recommended to legislative bodies in particular countries to learn more about the concept of social enterprise while adopting different measures on the daily basis (e.g., amendments in business environment legal regulation) in order to respect interests of (potential) social enterprises. Second, national courts as well have to be familiar with the definition of social enterprise (whether it is defined in the national law or not) in the cases where questions of legal entities (sometimes *de facto* social enterprises) are disputed in various contexts. Third, legal scholars (especially specialising in the business law), whether they are interested in topic of social enterprise legal regulation or not, also have to be at least familiar with this concept in order to raise general awareness about this concept among other legal scholars.

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MYKOLO ROMERIO UNIVERSITETAS

**Tomas Lavišius**

# TEISINĖS SOCIALINIO VERSLO PRIELAIDOS: PERSPEKTYVOS PASIRINKTOSE EUROPOS VALSTYBĖSE IR EUROPOS SĄJUNGOS TEISINIAME REGULIAVIME

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# TEISINĖS SOCIALINIO VERSLO PRIELAIDOS: PERSPEKTYVOS PASIRINKTOSE EUROPOS VALSTYBĖSE IR EUROPOS SĄJUNGOS TEISINIAME REGULIAVIME

## SANTRAUKA

**Temos aktualumas**

Europos Sąjungoje (toliau taip pat - ES) bei atskirose Europos šalyse (ne tik ES valstybėse narėse) skirtingų socialinio gyvenimo sričių teisinis reguliavimas nuolat keičiasi atsižvelgiant į socialinius, ekonominius ir politinius pokyčius visuomenėje. Neišvengiamai keičiasi ir verslo santykius reglamentuojantys teisės aktai. Teisės mokslas siekia atsižvelgti į tokių pokyčių tendencijas ir ypatybes aktualiu laiku. Todėl tikslinga išnagrinėti pagrindines priežastis, kodėl tam tikra teisinė taisyklė vienaip ar kitaip vystosi, apibrėžti dabartinį vystymosi etapą ir numatyti galimą būsimo vystymosi kryptį, nustatyti privalumus ir galimas spragas reglamentavime ir pasiūlyti tokių spragų šalinimo būdus. Be to, svarbu išnagrinėti kokių tikslų yra siekiama įdiegiant naują teisinį reguliavimą. Iš kitos pusės, esant teisinio reguliavimo trūkumui, kuris gali atsirasti visuomenėje formuojantis naujam socialiniam reiškiniui, svarbu laiku apibrėžti ir problemas, kurios kyla dėl atitinkamo reguliavimo trūkumo.

Galime manyti, kad įstatymų leidėjas (tiek ES, tiek konkrečių valstybių) naują teisinį reguliavimą kuria ne atsitiktinai, o turėdamas konkretų tikslą - patenkinti visuomenės poreikius, kuriems reikalingas toks naujas teisinis reguliavimas. Vienas iš tokių palyginti naujų reiškinių šių dienų visuomenėje yra socialinio verslo samprata. Pastaraisiais metais vis daugiau galima išgirsti apie socialinio verslo iniciatyvas. Mokslininkai visoje Europoje ir kituose žemynuose (ypač JAV) pateikia skirtingus šio reiškinio apibrėžimus. Kadangi verslo santykiai neišvengiamai patenka į konkrečią reguliavimo sritį, galima manyti, kad socialinis verslas (arba socialinis verslumas) taip pat patenka (arba turėtų patekti) į specifinio teisinio reguliavimo sritį.

Kelerius pastaruosius metus socialinis verslas tapo svarbia tema Europos ir nacionalinėse politinėse darbotvarkėse. Nuolat auga supratimas, kad socialinis verslas kuria tvarų ir įtraukų visuomenės vystymąsi ir skatina socialines naujoves.[534] Nenuostabu, kad dėmesys žmonėms, o ne pelnas (kas būdinga socialiniam verslumui), ugdo socialinio „bendrumo" jausmą ir prasmę bei skatina solidarumą ir bendrą gerovę. Vis dėlto, socialinė ekonomika negali natūraliai vystytis. Norėdami labiau išplėsti socialinę ekonomiką, turime sukurti jai pritaikytą aplinką.

Šis tyrimas parodo, kad socialinio verslo (socialinės verslininkystės)[535] sampratos pagrindimas, jos teisinės sistemos ir reguliavimo ypatumų apibrėžimas yra svarbus kiekvienai valstybei atskirai. Lietuva taip pat pradeda savo kelią link nacionalinio socialinio verslumo apibrėžimo ir jo teisinės sistemos. Šiame etape reikėtų apsvarstyti skirtingus teisinius požiūrius, siekiant apibrėžti, kokios teisinės formos yra prieinamos, siekiant palengvinti teisinį socialinių verslų statusą ir sampratą. 2015 m. Lietuvos Respublikos ūkio ministerija priėmė Socialinio verslo koncepciją, kuria buvo siekiama apibrėžti pagrindinius socialinio verslo principus, nustatyti problemines sritis ir iškelti bendras užduotis socialinio verslumo plėtrai skatinti. Dokumente dar nebuvo apibrėžta konkreti socialinio verslo (ar socialinio verslo įmonės) teisinė forma, tačiau juo buvo siekiama įvertinti kitų Europos šalių geriausią praktiką socialinio verslo teisiniame reglamentavime.[536] Vėliau, 2019 m., Lietuvoje buvo bandoma priimti naują Socialinio verslo plėtros įstatymą, tačiau šis įstatymo projektas buvo gražintas rengėjams tobulinti.[537]

Šiame kontekste matome, kad egzistuoja daugybė iššūkių, susijusių su teisiniu socialinio verslo apibrėžimu. Matome kelias tokios situacijos priežastis. Reikėtų paminėti, kad Europos Komisija socialinio verslo sampratą labiau sieja su socialinio verslo veiklos turiniu, o ne su konkrečia juridinio asmens forma. Tačiau kai kuriose šalyse galioja specialūs teisės aktai, apibrėžiantys specialias juridinių asmenų formas.

Taigi kyla klausimas, kaip teisiškai apibrėžti socialinį verslą, jei nėra konkreči-

534 "Social Enterprises and the Social Economy Going Forward. A Call for Action from the Commission Expert Group on Social Entrepreneurship," GECES, published 31 October 2016, accessed 14 January 2021, http://ec.europa.eu/growth/content/social-enterprises-and-social-economy-going-forward-0_en

535 Šio darbo kontekste socialinio verslo ir socialinės verslininkystės sąvokos yra naudojamos sinonimiškai, nebent atskirose tyrimo vietose pažymima, kad šios sąvokos naudojamos skirtinga reikšme.

536 "Socialinio verslo koncepcija, patvirtinta Lietuvos Respublikos ūkio ministro 2015 m. balandžio 3 d. įsakymu Nr. 4-207," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/353c1200d9fd11e4bddbf1b55e924c57/asr

537 "Lietuvos Respublikos socialinio verslo plėtros įstatymo projektas," e-seimas, https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/1ec626406a6e11e99684a7f33a9827ac?jfwid=-1c703921t9

os teisinės formos arba esama teisinė forma yra per siaura ir neapima visų socialinio verslo formų? Esant tokiai situacijai reikia rasti ir apibrėžti tam tikras *teisines prielaidas - ką konkrečiai būtų galima laikyti socialiniu verslu ar socialiniu verslumu.* Daugiausia socialinis verslas veikia teikdamas viešąsias paslaugas. Tuo tarpu tokio verslo teisinė forma gali būti ribotos atsakomybės bendrovė arba kita privataus (ar kartais viešo) juridinio asmens teisinė forma. Teisiškai (savo teisine forma) tokia įmonė dažniausiai yra pritaikyta pelno siekiančių įmonių valdymui ir jos akcininkų gerovės didinimui. Tokia dichotomija turi būti nuodugniai ištirta, siekiant suteikti daugiau aiškumo ir teisinio tikrumo socialinio verslo teisiniame reguliavime. Turime pažymėti, kad į šią situaciją įstatymų leidėjai reaguoja įvairiai, tačiau bendrus bruožus galima nustatyti ir jie gali būti naudingi kaip geriausios praktikos pavyzdžiai. Arba bent jau tokią praktiką būtų galima modeliuoti iš skirtingų elementų (tiek teorinių, tiek praktinių), kurie šiuo metu egzistuoja skirtingose šalyse.

Tokie autoriai kaip Antonio Fici, Giulia Galera ir Carlo Borzaga dalijasi įžvalgomis, kad bendrovių teisė buvo sukurta siekiant reglamentuoti akcininkų pelno didinimo institutą. Grynai pelno nesiekiančio juridinio asmens teisinės formos arba teisinės formos, skirtos grynai pelno siekiantiems juridiniams asmenims neužtenka, kad šios formos būtų pritaikytos tokio reiškinio kaip socialinis verslas poreikiui.[538] Reikia pabrėžti, kad socialinio verslo įmonės daro įtaką teorinei įmonės sampratai apskritai: įmonių, kaip organizacijų, atstovaujančių išskirtinai jų savininkų interesus, samprata kvestionuojama atsiradus įmonėms, teikiančioms visuomeninės svarbos paslaugas ir prekes, vadovaujantis principu, kad maksimalus pelnas nebėra esminė sąlyga.[539] Atsižvelgdami į minėtą poziciją galime sutikti, kad ši mokslinių tyrimų sritis yra tikrai plati ir apima įvairius teisinio reguliavimo aspektus - nuo bendrovių teisės iki viešųjų pirkimų, konkurencijos teisės ir kt. Šiame tyrime atkreipiamas dėmesys ne tik į teisines socialinio verslo prielaidas, bet ir siekiama atsakyti į tokius klausimus, koks yra socialinis gėris, kuriam daugiausia dėmesio turi būti skiriama socialinį verslą reglamentuojančiuose teisės aktuose.

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538 Antonio Fici, "Recognition and Legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective," Euricse Working Papers, 82 (2015), https://dx.doi.org/10.2139/ssrn.2705354

539 Giulia Galera and Carlo Borzaga, "Social enterprise: An international overview of its conceptual evolution and legal implementation," *Social Enterprise Journal*, 5(2009): 224, doi: 10.1108/17508610911004313.

**Tyrimo naujumas ir problemos reikšmingumas**

Šiandien sparčiai besikeičiančioje visuomenėje ir pasaulinėse tendencijose teisinės socialinio verslumo prielaidos yra sudėtinga tema, kurią nėra lengva nagrinėti. Šios disertacijos pavadinime apibrėžimas „teisinės prielaidos" pasirinktas neatsitiktinai. Paprastai kalbėdami apie dalykus, susijusius su teise, galime nagrinėti teisinį reguliavimą, kuris referuoja į skirtingus teisės aktų tipus. Tai yra konkrečiausias dalykas atliekant teisinius tyrimus. Greta minėtų konkrečių teisinių nuostatų, galime kalbėti ir apie platesnę teisinę aplinką ar teisinę bazę, kuri parodo teisinę sistemą kaip visumą. Tai taip pat yra vienas iš svarbių kriterijų, siekiant įvertinti socialinio verslumo sritį teisiniu požiūriu. Šalia to, papildomai galime kalbėti ir apie teisines prielaidas. Šis terminas pasirinktas naudoti šiame tyrime dėl kelių priežasčių. Visų pirma, jis yra platesnis. Ši termino savybė yra naudinga turint mintyje socialinio verslo ne tik kaip teisinės kategorijos, bet ir kaip platesnio fenomeno ypatumus. Šio reiškinio tyrimuose gali būti ir yra derinamos skirtingos socialinių mokslų sritys. Todėl šiame tyrime remiamasi tarpdisciplininiu požiūriu vertinant socialinio verslo teisinį statusą ir kitas skirtingas teisines socialinio verslo prielaidas kartu su tokiais pagal savo pobūdį neteisiniais aspektais kaip socialinio verslo tikslas ir poveikis, socialinės inovacijos, tvarus vystymasis ir keletas kitų neteisinių aspektų.

Taigi, šiame tyrime visų pirma yra keliami teisiniai klausimai, tačiau, kita vertus, ne visi tyrime keliami klausimai yra teisinio pobūdžio. Tokiu būdu tyrime priartėjama prie kitų socialinių mokslų sričių. Todėl manytina, kad į teisinių socialinio verslo prielaidų nagrinėjimą turėtų būti įtraukti ir aspektai, susiję su tyrimais, kaip teisinis reguliavimas konkrečioje srityje koreliuoja su tos veiklos formos (šiuo atveju - socialinio verslo) sėkme, populiarumu, naudingumu ir pan. Be to, manome, kad šis tyrimas yra naudingas ir ieškant kitokio požiūrio kampo socialinio verslo teisinių prielaidų srityje. Todėl šiame tyrime aptariamos ir tokios naujovės kaip teisinės technologijos. Jos vertinamos bandant atsakyti į tokius klausimus, kaip teisinės technologijos veikia socialinį verslą.

Pažymėtina, kad šia disertacija nesiekiama pabrėžti konkrečios šalies problemų. Tačiau galima pateikti ir konkrečių problematiką išryškinančių pavyzdžių iš šio tyrimo autoriaus šalies. Dėl mažo socialinio verslo suvokimo jis Lietuvoje dažnai tapatinamas tik su tam tikrų visuomenės grupių integracija į darbo rinką užsiimančių įmonių (socialinių įmonių, toliau – SĮ) veikla. Tyrime taip pat atskleidžiame, kad SĮ koncepcija yra

plačiai paplitusi daugumoje tiriamų šalių.

Šiuo metu Lietuvoje egzistuoja įstatymas, apibrėžiantis SĮ teisinį statusą - Lietuvos Respublikos socialinių įmonių įstatymas[540] (neturėtų būti painiojamas su tyrime aptariamu Socialinio verslo plėtros įstatymo projektu). Šiame įstatyme nustatytas SĮ apibrėžimas yra siauresnis nei socialinio verslo įmonė apibrėžta Europos Komisijos dokumentuose. SĮ, kaip ji apibrėžta Lietuvos įstatymuose, gali būti vadinama tik vienu iš galimų socialinio verslo modelių. Todėl ypač svarbu nustatyti bendrą teisinę socialinio verslo sampratą.

Pavyzdžiui, Lietuvos Respublikos socialinių įmonių įstatymas susieja SĮ tik su konkrečių socialinių grupių žmonių, praradusių profesinį ir bendrą darbingumą, ekonomiškai neaktyvių ir negalinčių konkuruoti darbo rinkoje, įdarbinimu vienodomis sąlygomis, skatinant šių asmenų grįžimą į darbo rinką, jų socialinę integraciją ir mažinant socialinę atskirtį. Pagal šį įstatymą SĮ yra juridinis asmuo, įgijęs šį statusą šio įstatymo nustatyta tvarka ir atitinkantis visas su tam tikrų socialinių grupių įdarbinimu susijusias sąlygas.

Mes žinome, kad tradicinis verslas, kaip pagrindinis rinkos ekonomikos variklis, negali būti keičiamas jokia alternatyva (įskaitant ir socialinį verslą). Vis dėlto, socialinis verslas yra papildomas pasirinkimas be įprastų verslo modelių ar įmonių socialinės atsakomybės (toliau - ĮSA), kurį galima panaudoti siekiant socialinio tikslo (misijos) ir pelną kuriančių tvarių veiksmų. Be to, socialinio verslo novatoriškumas yra unikalus, nes toks verslas ne tik vykdo socialinę misiją, bet ir skatina kurti naujas verslo ir visuomenės partnerystės formas.

Iš tokios situacijos naudos gauna ne tik tikslinės grupės (į kurias paprastai nukreipiama socialinio verslo veikla), bet ir visa visuomenė. Pagrindinė problema šiame kontekste yra teisinio tikrumo stoka. Šis teisinis neapibrėžtumas pasireiškia teisiniu socialinių verslų nepripažinimu, ar neaiškiomis socialinio verslo taisyklėmis ir nevienareikšmiška bendra teisine aplinka. Šiuos aspektus galima išskirti kaip pagrindinę problemą socialinio verslo teisinių prielaidų tyrimo srityje.

Plėtojant šį klausimą, reikia pažymėti, kad teisiniu požiūriu nei socialinio verslo apibrėžimas, nei jo specialus teisinis reguliavimas dar nėra galutinai nustatytas (arba galima teigti, kad jis labai skiriasi skirtingose jurisdikcijose). Daugelyje šalių vis dar trūksta palankių sąlygų skatinti socialinio verslo įmonių kūrimąsi ir plėtrą.

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540 "Lietuvos Respublikos socialinių įmonių įstatymas," TAR, accessed 14 January 2021, https://www.e-tar.lt/portal/lt/legalAct/TAR.EEC13A0B85BA/asr

Atsižvelgiant į socialinio verslo kaip teisinės kategorijos (ar fenomeno) naujumą ir teisinio tikrumo trūkumą, šį fenomeną reikia nuodugniai išnagrinėti, kad būtų apibrėžtos jo teisinės prielaidos. Atsižvelgiant į skirtingų iniciatyvų kiekį ES valstybėse narėse, labai svarbu teisiškai pagrįsti socialinio verslo reiškinį, suvienodinti jo kriterijus, apibrėžimus ir sąvokas, išanalizuoti naujus teisinius institutus, kurie atsiranda dėl socialinio verslo plėtros ir išanalizuoti teisines socialinio verslo prielaidas Europos Sąjungoje.

Įstatymų leidėjai konkrečiose šalyse turėtų atsakyti į klausimą, kokie yra pagrindiniai teisiniai modeliai, padedantys kurti socialinio verslo įmones. Kokie šių modelių pranašumai ar trūkumai? Šie klausimai yra ypač svarbūs kuriant tam tikrą socialinės verslininkystės teisinę sistemą konkrečioje šalyje.

Paprastai verslo teisinis reguliavimas tarnauja plačiajai visuomenei, suteikdamas verslui (verslininkams) galimybę padidinti pelną ir taip pat sukurti naudą visai visuomenei lengvai išmatuojamais finansiniais terminais. Be to, egzistuoja dar viena samprata - verslas, kurio misija yra ne pelnas, o visuomenės socialinių poreikių tenkinimas. Todėl teisės mokslo požiūriu šis reiškinys yra įdomus žvelgiant iš perspektyvos, kaip verslo teisė sąveikauja su teisiniais socialinio verslo aspektais, nes abi sitytis turi bendrų taškų, tačiau turi ir konceptualių skirtumų.

Manome, kad šis tyrimas padės geriau susipažinti ir išanalizuoti ES ir konkrečių Europos valstybių teisės aktus atitinkamoje reguliavimo srityje. Taip pat manome, kad šis tyrimas prisideda apibrėžiant nepakankamai apibrėžtas teisines kategorijas ir socialinio verslo pozicionavimą ES teisinėje sistemoje, atsižvelgiant į platesnį teisinį kontekstą ir neapsiribojant tik ES bendrovių teise. Tikime, kad šio tyrimo rezultatai gali būti naudingi tobulinant nacionalinę socialinio verslo teisinę bazę, kuri šiame socialinio verslo greito populiarėjimo Lietuvoje etape yra akivaizdžiai nepakankama. Be to, svarbūs yra ir tokie aspektai, kaip socialinio verslo bei socialinių inovacijų sąsaja. Galime manyti, kad socialinės inovacijos ir socialinio verslo hibridiškumas yra neatskiriamos socialinio verslumo paradigmos dalys. Todėl šiame tyrime ieškoma teisinių prielaidų socialiniam verslui ir socialinėms inovacijoms, siekiant paaiškinti šiuos apibrėžimus tokiu būdu, kuris galėtų būti naudingas tolesniems tyrimams ir praktiniam pritaikymui.

**Tyrimo tikslas ir uždaviniai**

Pagrindinis šio tyrimo tikslas yra nustatyti teisines socialinio verslo prielaidas Europos Sąjungoje, taip pat konkrečiose ES ir Europos laisvosios prekybos asociacijos (toliau - ELPA) valstybėse narėse.

1. Siekiant įgyvendinti šio tyrimo tikslus, keliami šie uždaviniai:

2. Išsiaiškinti, ar socialinio verslo teisinis reguliavimas yra pakankamas, ir nustatyti galimas šio teisinio reguliavimo silpnybes, skirtumus ir prieštaravimus ES, bei pasirinktose ES ir ELPA valstybėse narėse;

3. Nustatyti socialinio verslo (ir susijusius apibrėžimus), vadovaujantis teisės aktais, moksline literatūra ir remiantis mūsų pačių pastebėjimais;

4. Apibrėžti socialinio verslo teisinio reguliavimo vietą ES ir konkrečių šalių teisinėje sistemoje;

5. Palyginti socialinio verslo reguliavimo santykį su kitomis reguliavimo sritimis teisinės sistemos kontekste (socialinės inovacijos, ĮSA, teisinės technologijos ir tokios pasaulinės iniciatyvos kaip Jungtinių Tautų darnaus vystymosi tikslai), siekiant nustatyti galimą geriausią reguliavimo praktiką ir įvertinti socialinio verslo potencialą.

**Prielaidos, tyrimo ribos ir ginamasis teiginys**

Šiame tyrime ieškoma teisinių socialinio verslo prielaidų ES teisės aktuose ir lyginamuoju būdu nagrinėjamos teisinės socialinio verslo prielaidos keliose ES valstybėse narėse (Austrijoje, Danijoje, Estijoje, Latvijoje, Lietuvoje, Suomijoje, Švedijoje ir Vokietijoje) ir ELPA valstybėse (Islandijoje, Norvegijoje ir Šveicarijoje). Iš literatūros apžvalgos sužinome, kad daugumoje akademinių tekstų nagrinėjami ekonominiai socialinio verslo veikimo ypatumai. Tačiau teisiniu požiūriu trūksta tyrimų, kuriuose būtų lyginamosios socialinio verslo teisinės prielaidos.

Pradėti tyrimą apibrėžiant vieną ar kelis pagrindinius teisės aktus, reglamentuojančius šią konkrečią sritį, buvo gana sunku, nes ES tokių teisės aktų trūksta. Europos Komisija 2011 m. paskelbė Komunikatą dėl socialinio verslo iniciatyvos (toliau - SBI).[541] Šiame Komunikate socialinio verslo įmonė apibrėžiama kaip juridinis asmuo,

541 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative," COM (2011) 682 final, accessed 14 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-52011DC0682&from=EN

veikiantis socialinės ekonomikos srityje, kurio pagrindinis tikslas yra socialinis poveikis, o ne pelnas siekimas savininkams ar akcininkams. Tokia įmonė veikia teikdama prekes ir paslaugas rinkai dažniausiai inovatyviu būdu, o savo pelną pirmiausia naudoja socialiniams tikslams pasiekti. Socialinis verslas valdomas atvirai ir atsakingai, visų pirma į šiuos procesus įtraukiant darbuotojus, vartotojus ir suinteresuotuosius subjektus, kuriems šio socialinio verslo komercinė veikla daro įtaką. Pažymėtina, kad Komunikate nėra akcentuojama jokia konkreti juridinio asmens, kaip socialinio verslo įmonės, forma.

Toks socialinio verslo įmonės apibrėžimas naudojamas minėtame Komunikate. Pažymėtina, kad Europos Komisijos komunikatas *per se* nėra imperatyvus teisės aktas, tačiau šį Komunikatą galima laikyti pradiniu teisinės socialinio verslo koncepcijos ribų nubrėžimo tašku. Kita vertus, šioje disertacijoje taip pat pateikiamas ir platesnis šiam tyrimui reikšmingų apibrėžimų, tokių kaip socialinė teisės dimensija, verslas, verslumas, socialinės inovacijos, teisinės technologijos ir kt., vertinimas. Atitinkamame šio tyrimo skyriuje įvertinami visi minėti apibrėžimai ir ryšius tarp jų.

Apibendrindami socialinio verslo įmonės apibrėžimą, pateiktą SBI, šioje disertacijoje įvedame vadinamąjį *darbinį socialinio verslo (ar socialinio verslo įmonės) apibrėžimą* (kuris iš dalies pagrįstas SBI naudojamu apibrėžimu), kuris yra naudojamas šio tyrimo tikslais visoje disertacijoje. Be to, toliau šioje disertacijoje nagrinėjame šiame apibrėžime esančių elementų įvairovę, kad pasiektume vieną iš disertacijos tikslų ir tai yra vienas iš šio tyrimo sukuriamos originalios pridėtinės vertės aspektų. Teoriškai, pagal minėtą darbinį apibrėžimą galima išskirti tris dimensijas: verslumo dimensiją; socialinę dimensiją; bei dimensiją, susijusią su valdymo struktūra. Visos trys dimensijos nėra izoliuotos, bet sąveikauja tarpusavyje įvairiais deriniais. Šie deriniai (kurie paaiškinami tyrimo metu) yra labai svarbūs nustatant socialinės įmonės apibrėžimo ribas. Verslumo dimensija reiškia įsitraukimą į ekonominę veiklą. Socialinė dimensija reiškia aiškų ir apibrėžtą socialinį tikslą. Su valdymo struktūra susijusi dimensija atspindi pelno ir (arba) turto paskirstymo ribas; organizacinę autonomiją bei įtraukų valdymą.

*Ginamasis šio tyrimo teiginys teigia, kad socialinio verslo reguliavimo srityje Europos Sąjungoje ir konkrečiose šalyse trūksta teisinio tikrumo (apibrėžtumo), o ši problema galėtų būti sprendžiama taikant visumą teisinių ir ne vien teisinių priemonių.* Ginamuoju teiginiu taip pat pabrėžiama, kad esamų teisinių formų pritaikymas ir skirtingų neprivalomųjų teisinių priemonių panaudojimas, nebūtinai neįvedant tam skirtų atskirų teisinių formų, galėtų paskatinti efektyvų socialinio verslumo, kaip socialinio

reiškinio, vystymąsi. Šiandieninis teisinis neapibrėžtumas sukelia papildomų sunkumų toliau plėtojant socialinį verslą kaip socialinį reiškinį, kuris gali būti svarbi ir veiksminga priemonė socialinėms visuomenės problemoms spręsti.

Norint patikrinti ginamąjį teiginį, šiame tyrime nagrinėjami Europos Sąjungos ir ES valstybių narių įstatymai bei kitų šalių nacionaliniai įstatymai ir vertinami kiti šaltiniai. Tyrimo ribos apima šią sritį reglamentuojančių ES teisės aktų nagrinėjimą. Jos taip pat apima lyginamąją socialinio verslo teisinio reguliavimo analizę pasirinktose ES valstybėse narėse ir ELPA valstybėse. Analizuojamų konkrečių šalių pasirinkimui buvo taikoma tam tikra logika. Šiaurės šalys (Danija, Islandija, Norvegija, Suomija ir Švedija) buvo pasirinktos kaip šalys, turinčios senas gerovės valstybės tradicijas, kurios turi žymiai didesnį įvairių socialinių iniciatyvų rodiklį ir aktyvų nevyriausybinių organizacijų judėjimą. Vokiškai kalbančios Vakarų Europos valstybės (Austrija, Šveicarija ir Vokietija) buvo pasirinktos, siekiant įvertinti jų patirtį atsižvelgiant į jų stiprią ekonomiką ir išsiaiškinti, kokie modeliai naudojami gerai ekonomiškai išsivysčiusiose šalyse sprendžiant socialines problemas. Baltijos šalys (Estija, Latvija ir Lietuva) buvo pasirinktos kaip palyginti jaunos demokratijos ir rinkos ekonomikos šalys, kad įvertinti tokių gana naujų reiškinių kaip socialinis verslas išsivystymo lygį ir nustatyti galimus trūkumus šioje srityje.

**Disertacijos struktūra ir skyrių apžvalga**

Ši disertacija gali būti apibūdinta kaip turinti dvi pagrindines ir lygiagrečiai svarbias dalis (nors disertacijos turinys pats savaime yra sudarytas iš daugiau struktūrinių dalių). Šios aukščiau paminėtos pagrindinės dalys nėra griežtai apibrėžtos, tačiau jos skiriasi tuo, kad į nagrinėjamą temą yra žvelgiama iš skirtingų perspektyvų. Visų pirma, šiame tyrime pagrindinis dėmesys skiriamas teoriniam skirtingų socialinio verslo aspektų (ne tik teisinių) apibrėžimui. Ši disertacijos dalis leidžia pažvelgti į skirtingų reiškinio elementų, kuriuos bendrai mes vadiname socialiniu verslu, teorines prielaidas. Be teorinio požiūrio šiame tyrime nebūtų galima išsamiai apimti ir išnagrinėti tokių aspektų kaip socialinės inovacijos, ĮSA, teisinės technologijos ir kt.

Kita didelė disertacijos dalis apima Socialinio verslo įmonių teisinės aplinkos lyginamąją analizę tam tikrose šalyse (Austrijoje, Danijoje, Estijoje, Islandijoje, Latvijoje, Lietuvoje, Norvegijoje, Suomijoje, Švedijoje, Šveicarijoje ir Vokietijoje). Gana didelis įvairių Europos regionų šalių spektras leidžia mums geriau suprasti Socialinio

verslo įmonių ir socialinio verslumo apibrėžimą bei teisinę sistemą šalyse ir regionuose, turinčiuose skirtingą patirtį, socialinę ir istorinę aplinką.

Mes taip pat vertiname ES teisinę sistemą ir keliame klausimus, ar teisinis reguliavimas ES lygmeniu yra tinkamas. Kalbant išsamiau, lyginamoji analizė apima tokius socialinio verslo teisinės aplinkos aspektus kaip esama teisinė sistema, socialiniam verslui prieinamos teisinės formos, teisinis statusas, teisinis verslo formos pripažinimas ir kt.

**Pagrindinės mokslinės pozicijos literatūroje**

Literatūros, kurioje nagrinėjami įvairūs (ne tik teisiniai) socialinio verslumo aspektai, apžvalga yra svarbi dėl kelių priežasčių. Pirma, tai suteikia aiškesnį požiūrį į aspektus, kuriuos kiti autoriai nagrinėja palyginti gerai. Kita vertus, tai gali parodyti prieštaravimus tarp skirtingų požiūrių. Todėl apžvelgdami kai kurias pagrindines literatūros, susijusios su socialiniu verslumu, tendencijas, šiame tyrime siekiame parodyti savo pirminį požiūrį, kuris gali skirtis nuo kitų autorių požiūrio. Be to, tokiu būdu galima išryškinti svarbius skirtingų autorių įžvalgų elementus, kurie, sisteminant ir pridedant mūsų pačių įžvalgas, gali kokybiškai papildyti šios srities tyrimus.

Pirma, turime pabrėžti, kad tyrėjai socialinio verslumo problemas dažniausiai sprendžia per ekonomikos prizmę. Atskirai galime paminėti tokius autorius kaip J. Austinas, J. Defourny, M. Nyssensas, G. Lasprogata, M. Cottenas, R. Martinas, S. Osbergas ir A. Nichollsas ir kt., Kurių įžvalgos gali būti vertingos šiam tyrimui. Dauguma aukščiau paminėtų autorių mano, kad socialinio verslo apibrėžimas įvairiose valstybėse ir net žemynuose (pvz., JAV ir ES) skiriasi. Tačiau mokslininkai sutinka, kad socialinis verslumas vaidina svarbų vaidmenį šiuolaikinėje visuomenėje, o ateityje tai tikrai taps svarbia priemone sprendžiant socialines problemas. Todėl taip pat labai svarbus yra socialinio verslumo ir socialinio verslo sampratos pagrindimas bei jos teisinės sistemos ir reguliavimo ypatybių apibrėžimas.

Papildomai pažymėtina, kad tyrimo metu buvo atlikta plati mokslinės literatūros paieška. Galima teigti, kad literatūros pozicijų tiriama tema (ypač teisiniais aspektais) yra palyginti nedaug. Todėl šis tyrimas, be kita ko, atlieka literatūros atitinkama tema sisteminimo funkciją, o tai prisideda prie geresnės informacijos apie tiriamą problemą sklaidos.

**Tyrimo planas ir metodika**

Metodiškai šiame tyrime pagrindinis dėmesys skiriamas socialinio verslo teisinėms prielaidoms Europos Sąjungoje ir konkrečiose ES valstybėse narėse bei ELPA valstybėse. Tyrime teigiame, kad šalyse trūksta teisinio apibrėžtumo socialinio verslo reguliavimo srityje. Toks teisinis neapibrėžtumas sukelia papildomų sunkumų toliau plėtojant socialinį verslą kaip socialinį reiškinį, kuris gali būti svarbi ir veiksminga priemonė sprendžiant socialines visuomenės problemas.

Teoriškai disertacijoje naudojamos kai kurios filosofinės realizmo doktrinos pažiūros. Kaip realizmo prielaidą mes suprantame mintį, kad įvykiai pasaulyje vyksta neatsižvelgiant į tai, ar mes juos stebime, ar net žinome. Objektai socialiniame pasaulyje turi skirtingą egzistavimo tikimybę. Šie objektai gali egzistuoti ir formuoti naujus objektus, kurie jungiasi į atpažįstamas struktūras. Mes tiriame socialinį pasaulį jo kontekste, kuriuo laikomi įrodymai, sąvokos, apbrėžimai ir kt.[542] Turint tai mintyje, šio tyrimo objektyvumas priklauso nuo socialinio gyvenimo konteksto, kuris neišvengiamai kinta laikui bėgant.

Be bendros filosofinės realizmo doktrinos, tyrime naudojamos kai kurios teisinio realizmo idėjos (tiksliau - naujas teisinis realizmas).[543] Realistinio teisės tyrimo atspirties taškas yra grynai doktrininio teisės supratimo kritika. Teisė yra institucija (arba institucijų grupė), kurią sukuria įtampos, egzistuojančios tarp valdžios ir proto argumentacijos, tradicijos ir pažangos. Be to, socialinis procesas nėra tai, kas vyksta konkrečiu metu. Teisiniai realistai primygtinai reikalauja, kad įstatymų leidėjai turėtų naudoti socialinius pokyčius ir naujus atvejus kaip pagrindą permastyti įprastą doktrininį supratimą. Remiantis teisiniu realizmu, pagrindiniai doktrininių kategorijų vaidmenys yra įtvirtinti žmonių lūkesčiuose ir išreikšti teisės idėjose atsižvelgiant į skirtingus žmonių sąveikos tipus.[544]

Šiame tyrime nagrinėjamos teisinės problemos yra glaudžiai susijusios su ekonominiais aspektais. Todėl svarbu pabrėžti šio tyrimo tarpdisciplininių aspektų

542 Gayle Letherby, John Scott, and Malcolm Williams, "Social Objects and Realism," in *Objectivity and Subjectivity in Social Research* (London: SAGE Publications Ltd., 2013), http://dx.doi.org./10.4135/9781473913929.n6.

543 Nors bendros XX amžiaus pirmosios pusės teisinio realizmo idėjos laikomos pasenusiomis, manome, kad dauguma tų idėjų aktualios ir šiais laikais. Be to, naujasis teisinis realizmas padeda sugrąžinti dalį teisinio realizmo filosofinių vertybių.

544 Dagan Hanoch, "Doctrinal categories, legal realism, and the rule of Law," *University of Pennsylvania Law Review* 163 (2015): 1891, 1897.

reikšmę. Tai leidžia nagrinėti problemą peržengiant vienos konkrečios socialinių mokslų sferos ribas.

Politinės ekonomijos pradininkas Adamas Smithas suformavo gerai žinomą teiginį, kad laisvosios rinkos konkurencija skatina visuomenę pasiekti geresnių ekonominių rezultatų ir visuomenės gerovės. Tačiau jis taip pat atkreipė dėmesį, kad žmonių elgesys dažnai sukelia simpatijos kitiems žmonėms jausmą. Savo darbe „Moralinių sentimentų teorija" autorius formuluoja mintį, kad žmonės dažnai jaučia liūdesį žiūrėdami į kitų liūdesį. Pasak Smitho, mes negalime tiesiogiai patirti, kaip jaučiasi kiti žmonės, tačiau galime juos suprasti, suvokdami kaip patys turėtume jaustis panašiose situacijose.[545]

Atsižvelgiant į minėtas Adamo Smitho mintis, šio tyrimo temos teisinė perspektyva metodologiškai patenka į tarpdisciplininę elgesio dėsnių ir ekonomikos (angl. *behavioural law and economics*) tyrimų sritį. Elgesio dėsnių ir ekonomikos teorijos užduotis yra ištirti žmogaus elgesio pasekmes įstatymui, nes atsižvelgiant į supratimą apie tai, kaip žmonės elgiasi, galima suprasti, ar tam tikra taisyklė pasieks numatytų tikslų. Kartais paaiškėja, kad teisinės taisyklės, kurios teisės ir ekonomikos požiūriu atrodytų veiksmingos (pagrįstos hipotetinėmis žmogaus elgesio prielaidomis), yra neefektyvios, kai yra taikomos realiems žmonėms.[546]

Taigi, tiek politinės ekonomijos pradininko A. Smitho, tiek ir kitos darbe minimos ir plėtojamos koncepcijos buvo pasirinktos sąmoningai ir, autoriaus nuomone, siejasi su tyrimo tema ir problema, išryškinant tarpdisciplininį tyrimo aspektą, bei leidžia įžvelgti, kad tiriamos temos galimos užuomazgos ir prielaidos susiformavo daug anksčiau nei paties socialinio verslo samprata. Visa tai suteikia galimybę plėtoti šias sąsajas tolesniuose tyrimuose.

**Tyrimo įrankiai, duomenų rinkimo ir analizės ribos**

Šiame tyrime daugiausia naudojami kokybiniai tyrimo metodai, kurie varijuoja ir persipina visame tyrime. Teksto analizės metodas naudojamas nagrinėti teisinių

545 Adam Smith, *The Theory of Moral Sentiments* (New York: Penguin Books, 2009): 13.
546 Julie De Coninck, "Behavioural Economics and Legal Research," in *Methodologies of Legal Research,* edited by Mark Van Hoecke (Oxford: Hart Publishing Ltd, 2011): 262-3.

tekstų ir kitų dokumentų turinį, prasmę ir struktūrą.[547]

Apibūdinant nagrinėjamų teisės normų vietą teisinėje sistemoje, taip pat apibrėžiant teisės normų tarpusavio santykį ir jų santykį su bendraisiais teisės principais, naudojamas lyginamasis metodas. Šis metodas taip pat padeda apibrėžti santykius tarp Europos Sąjungos ir ES valstybių narių bei kitų šalių teisės aktų. Šis metodas taip pat naudojamas nustatant galimus reguliavimo trūkumus. Šiam tyrimui labai naudingas lyginamasis metodas, nes šis metodas leidžia išskirti veiksnius ar kintamuosius, kurie paaiškina modelius. Atskirai galima paminėti istorinį metodą, kuris koncentruojasi į istorinių duomenų analizę, kad būtų galima ištirti ES teisės aktų, susijusių su šio tyrimo objektu, raidą. Lyginamuosiuose tyrimuose paprastai skiriamos dvi pagrindinės strategijos: (1) tyrimo įvykiai ar grupės, kurie skiriasi daugeliu atžvilgių, tačiau turi kažką bendro; ir 2) tyrimo įvykiai ar grupės, kurie yra panašūs, tačiau skiriasi vienu ar keliais aspektais.[548] Šiame tyrime bandoma pritaikyti abi šias strategijas. Lyginamasis metodas taip pat leidžia atlikti tyrimus skirtingais lygmenimis, pradedant skirtingų kultūrų palyginimu ir pereinant prie skirtingų aspektų palyginimo konkrečiu atveju.[549] Lyginamuosiuose teisės tyrimuose savaime yra keli metodų tipai, tokie kaip funkcinis metodas, struktūrinis metodas, „įstatymo konteksto“ metodas ir kt.[550] Visi minėti metodai kartu sudaro visą šio tyrimo įrankių rinkinį.

Šiame tyrime glaudžiai susijęs su lyginamuoju metodu yra atvejo tyrimo metodas. Jis naudojamas nuodugniai analizuojant pasirinktas valstybes, turinčias pažangias teisines socialinio verslo sistemas. Be to, rašytiniuose dokumentuose gali būti ieškoma užuominų, kaip suprasti organizacijų kultūrą, politikos vertybes, įsitikinimus ir požiūrį į šią problemą.[551]

Nors apibendrinimo metodas kokybiniuose tyrimuose yra kritikuojamas, tačiau šiame tyrime jis yra skirtas tam tikrų visuomenių modelių tyrinėjimui, nes kokybiniai tyrimai gali padėti suformuluoti nuosaikius apibendrinimus, priklausomai nuo

547 Sharon Lockyer, "Textual Analysis," in *The Sage Encyclopedia of Qualitative Research Methods,* edited by Lisa M. Given (Thousand Oaks, CA: SAGE Publications, Inc., 2008): 865-67. http://dx.doi.org/10.4135/9781412963909.n449.

548 "Comparative Method," in *Dictionary of Statistics & Methodology*, 3rd ed., edited by W. Paul Vogt (Thousand Oaks, CA: SAGE Publications, Inc., 2005): 52-53. http://dx.doi.org/10.4135/9781412983907.n327.

549 Uwe Flick, *Designing Qualitative Research* (London: SAGE Publications, Ltd., 2007): 39-40. http://dx.doi.org./10.4135/9781849208826.

550 Mark Van Hoecke, "Methodology of Comparative Legal Research," *Law and Method 12* (2015): 8. http://dx.doi.org/10.5553/rem/.000010.

551 Helen Simons, *Case Study Research in Practice* (London: SAGE Publications, Ltd., 2009): 63. http://dx.doi.org/10.4135/9781446268322.

kultūrinės ir socialinės aplinkos (taisyklių, papročių ir kt.) nuoseklumo.[552]

Teisinės aplinkos tyrimas naudojant minėtus metodus yra šio tyrimo esmė. Tyrimo metu taip pat nagrinėjama mokslinė literatūra: monografijos ir studijos, analizuojami kai kurie kiti duomenys.

Be pirmiau minėtų pagrindinių metodų, buvo atlikti keli ekspertų interviu. Paprastai teisinėse studijose su interviu susiję metodai nėra taip dažnai naudojami. Tačiau atsižvelgiant į tiriamojo objekto tarpdisciplininius aspektus, vertingą informaciją apie probleminius reguliavimo aspektus, taip pat platesnį teisinės sistemos kontekstą galima gauti iš ekspertų interviu. Šiuo atžvilgiu buvo derinami keli interviu metodai. Koreliacijoje su visais kokybinių interviu principais buvo naudojami labiau tinkami teisinėms studijoms interviu metodai. Paprastai giluminiai/išsamūs interviu (angl. *In-depth interview*) naudojami norint padėti mokslininkams suprasti jų pašnekovų požiūrį į procesus, normas, sprendimų priėmimą, įsitikinimų sistemas, mentalinius modelius, interpretacijas, motyvaciją ir kt., kas iš esmės suteikia kokybinių duomenų gausą.[553] Šiame kontekste buvo naudojamas aktyvaus interviu ir pagrindinio informanto interviu (angl. *Key informant interview*) derinys. Kalbant apie interviu metodų tipologiją, šios dvi technikos, viena vertus, yra mažiau struktūrizuotos, kita vertus, gana specifinės / siauros.

Visas šios disertacijos tyrimo ir rašymo procesas buvo suskirstytas į šiuos pagrindinius žingsnius:

1. medžiagos rinkimas ir analizė;

2. mokslinių publikacijų rengimas tyrimų tema. Vėliau paskelbtų straipsnių apimtis buvo išplėsta ir atnaujinta, kad būtų pateikta naujausia medžiaga konkrečioms disertacijos dalims;

3. disertacijos rengimas.

Medžiagos rinkimas ir analizė buvo pradėta „statant“ pagrindines tyrimo „konstrukcines kolonas“. Tos pagrindinės struktūrinės tyrimo kolonos, kitaip tariant, galėtų būti vadinamos jau minėtomis „teorinėmis“ ir „praktinėmis“ tyrimo dalimis. Teorinėje tyrimo dalyje tiriami tokie elementai kaip socialinio verslo sampratos istorija, teisiniai

552 Malcolm Williams, “Generalization/Generalizability in Qualitative Research,” in *The SAGE Encyclopedia of Social Science Research Methods*, edited by Michael S. Lewis-Beck, Alan Bryman and Tim Futing Liao (Thousand Oaks, CA: Sage Publications, Inc., 2004): 421-22. http://dx.doi.org/10.4135/9781412950589.n367.

553 Greg Guest, Emily Namey, and Marilyn Mitchell, “In-depth interviews,“ in *Collecting qualitative data,* edited by Greg Guest, Emily Namey, and Marilyn Mitchell (London: SAGE Publications, Ltd): 17. http://dx.doi.org/10.4135/9781506374680

ir ekonominiai socialinio verslo ryšiai. Be to, šioje dalyje didelis dėmesys buvo skiriamas įvairiems apibrėžimams (ne tik teisinio pobūdžio, bet ir ekonominiams, socialiniams ir kt.). Todėl medžiaga šiai tyrimo daliai daugiausia buvo renkama analizuojant mokslinę literatūrą, ir mažiau – tiesiogiai analizuojant teisės aktus.

Praktinėje tyrimo dalyje daugiau dėmesio skiriama teisės aktams, todėl šioje dalyje medžiagos rinkinį daugiausia sudaro teisinių tekstų analizė. Nepaisant to, šiai tyrimo daliai taip pat reikėjo tam tikrų papildomų duomenų (paimtų ne tik iš teisinių tekstų), kad gautume universalesnį duomenų rinkinį. Šis universalus duomenų rinkinys apima tokius elementus kaip tyrimai, įvairių institucijų darbo dokumentai ir ataskaitos. Be to, kai kuri vertinga šio tyrimo informacija buvo gauta iš pusiau struktūrizuotų išsamių interviu. Minėti duomenų rinkiniai padėjo pamatą praktinei šio tyrimo struktūrinei daliai, kuri apima socialinio verslo teisinių prielaidų lyginamąją analizę tam tikrose šalyse, taip pat socialinio verslo teisinį reguliavimą ES lygmeniu.

Lygiagrečiai duomenų rinkimo ir analizės metu buvo rengiami moksliniai straipsniai. Šis pratimas padėjo sistemingai patikrinti surinktos medžiagos aktualumą per kelis metus besitęsusį tyrimą ir ištirti papildomus duomenų šaltinius. Galiausiai, disertacijos rengimo etapas apėmė ne tik išsamią duomenų, surinktų per šio tyrimo metus, analizę, bet ir surinktų duomenų tinkamumo tikrinimą, kadangi eilė duomenų laikui bėgant keitėsi.

Šia disertacija siekiama sistemiškai įvertinti su socialiniu verslu susijusius teisinius institutus, šių institutų santykius ir jų santykį su ES teise apskritai, ES bendrovių teise ir ES bei nacionalinio reguliavimo santykį ES valstybėse narėse ir ELPA valstybėse.

Atsižvelgiant į socialinio verslo, kaip teisinės kategorijos, naujumą ir teisinio apibrėžtumo trūkumą, kuris yra pagrindinė šiame tyrime nagrinėjama problema, ši kategorija reikalauja kruopštaus mokslinio nagrinėjimo, siekiant apibrėžti jos teisines prielaidas. Atsižvelgiant į tokių iniciatyvų skaičių ES valstybėse narėse, šis tyrimas prisideda prie išsamaus mokslinio socialinio verslo reiškinio teisinių elementų pagrindimo. Tyrime taip pat suvienodinamos kategorijos, apibrėžimai ir sąvokos, analizuojami nauji teisės institutai, kurie atsiranda dėl socialinio verslo plėtros. Tyrime išanalizuojamos teisinės socialinio verslo prielaidos Europos Sąjungoje, kurios ne visada yra tiesiogiai pastebimos. Tai taip pat padeda geriau išanalizuoti ES ir konkrečių Europos valstybių teisės aktus šioje srityje. Tyrimas taip pat tai prisideda prie gilesnės socialinio verslo apibrėžimo elementų analizės.

Be kita ko, šis tyrimas atlieka literatūros atitinkama tema sisteminimo funkciją, o tai prisideda prie geresnės informacijos apie tiriamą problemą sklaidos. Disertacijoje daug dėmesio skiriama teorinėms tiriamo reiškinio problemoms, įskaitant skirtingus teorinius požiūrius ir apibrėžimus. Ši analizė yra originalus autoriaus indėlis į teorinį socialinio verslo supratimo (ne tik apibrėžimo) formavimą.

Praktiniu požiūriu tyrimo rezultatai gali būti naudingi tobulinant nacionalinę socialinio verslo teisinę bazę, kuri šiandieniniame spartaus socialinio verslo populiarėjimo Lietuvoje etape yra akivaizdžiai nepakankama.

# IŠVADOS

Ištyrę medžiagą ir pritaikę kitus kokybinius tyrimo metodus, galime teigti, kad ginamasis teiginys, jog Europos Sąjungoje ir konkrečiose šalyse trūksta teisinio tikrumo (apibrėžtumo) socialinio verslo reguliavimo srityje, iš esmės gali būti paremtas žemiau pateiktais argumentais.

1. Teisinės socialinio verslo prielaidos remiasi ir priklauso nuo stipraus teorinio ir filosofinio pagrindo. Teisinio gėrio, kurį turėtų ginti teisinė aplinka socialinio verslo srityje, apibrėžimas nulemia ir paties socialinio verslo apibrėžimo elementus. Todėl, teisinio apibrėžtumo trūkumas (su iš to išplaukiančiomis silpnybėmis, skirtumais ir prieštaravimais) kyla iš silpno koncepcinio teisės filosofijos pagrindo. Socialiniai – ekonominiai socialinio verslo aspektai yra pagrindinė priežastis kodėl socialinis verslas egzistuoja *per se*. Iš socialinių – ekonominių prielaidų kylančios teisinės prielaidos ir palaiko socialinio verslo fenomeno egzistavimą.

2. Socialinio verslo apibrėžimą sudaro daug atskirų elementų, iš kurių ne visi gali būti pastebimi teisiniame reguliavime ir teoriškai yra gerokai kompleksiškesni. Įvairūs socialinio verslo sistemos elementai (neteisiniai aspektai) nuolat sąveikauja su reguliavimo sistema (teisiniais aspektais). Tokia situacija lemia socialinio verslo apibrėžimo specifiką apskritai. Dabartiniai ES teisės aktai nesudaro jokios konkrečios socialinio verslo teisinės sistemos, išskyrus keletą nedidelių išimčių tam tikrose srityse. Esama socialinio verslo ES teisinė sistema susideda iš kelių teisiškai įpareigojančių teisės aktų ir kelių neprivalomų „minkštosios teisės“ priemonių. Be to, socialinio verslo įmones veikia ekonominės ir socialinės sąlygos, kurios skiriasi konkrečioje šalyje ar regione. Kita vertus, tam tikromis konkrečiomis aplinkybėmis teisiškai neįpareigojantis apibrėžimas (pateiktas SBI) tampa teisiškai privalomas (numatytas direktyvose) ir turi įtakos ne tik supranacionaliniu lygmeniu, bet ir valstybių narių įstatymams. Kol kas tai yra vienintelė supranacionalinio teisinio reguliavimo poveikio nacionaliniam teisiniam reguliavimui išraiška aptariamoje srityje.

3. Supranacionalinis ES socialinio verslo teisinis reguliavimas gali būti įgyvendintas tik iš dalies (akcentuojant „minkštosios teisės“ priemones). Idealią (galbūt supranacionalinę) arba bent jau geriausiai tinkančią Europos lygmens teisinę socialinio verslo įmonės teisinę formą yra ypač sunku sukurti atsižvelgiant į labai skirtingas socialinio verslo plėtros tendencijas bei teisines, socialines ir ekonomines tradicijas

įvairiose šalyse. Prieš kurdamos teisinę bazę, visuomenės turi nustatyti, kokie socialiniai – ekonominiai santykiai turi būti teisiškai apibrėžti ir vargu ar tai yra įgyvendinama supranacionaliniu lygmeniu.

4. Matome, kad teisinio neapibrėžtumo problema socialinio verslo srityje pasireiškia arba socialinio verslo įmonių teisinio nepripažinimo, arba bendrai neaiškios socialinio verslo teisinės aplinkos forma. Teisinių formų klausimas yra tiesiogiai susijęs su teisinio tikrumo klausimu. Gali kilti situacijos, kai socialinio verslo įmonės teisiškai apskritai nėra apibrėžtos ir veikia tik kaip įprastos įmonės (ar kiti juridiniai asmenys), bei šių socialinio verslo įmonių tapatybės neįmanoma identifikuoti vien žvelgiant į jų teisinę formą. Nepaisant to, ištirtose ES / ELPA šalyse ir supranacionaliniu (ES) lygiu, egzistuoja tam tikros teisinės socialinio verslo prielaidos. Vis dėlto, šios prielaidos sukelia daug teisinio nenuspėjamumo ir nebūtinai pasireiškia per socialiniam verslui skirtus (pritaikytus) teisės aktus. Dažnai tos prielaidos net nėra akivaizdžios ir jas galima rasti tik sistemingai nagrinėjant teisės aktų turinį, kuriuose galima aptikti socialinio verslo veiklos apibrėžimo ypatybes, vadovaujantis šiame darbe pateiktu darbiniu apibrėžimu.

5. Skirtingose visuomenėse socialinis verslas siekia skirtingų tikslų ir priklauso nuo skirtingo gerovės lygio. Labiau išsivysčiusiose visuomenėse šiais tikslais siekiama mažinti atskirtį, skatinti nepalankioje padėtyje esančių asmenų integraciją ir kt. Mažiau išsivysčiusiose (arba besivystančiose) visuomenėse šie tikslai yra skirti struktūrinėms problemoms (galimybės gauti išsilavinimą, sveikatos priežiūros paslaugas ir kt.) spręsti. Kadangi visos tirtos šalys yra laikomos išsivysčiusiomis šalimis, daugumoje labiausiai yra paplitęs socialinių įmonių, skirtų nepalankioje padėtyje esančių asmenų integracijai (SĮ) modelis, tačiau egzistuoja ir įvairias kitas socialines problemas aprėpiantys socialiniai verslai.

6. Iš sisteminio medžiagos vertinimo galime teigti, kad socialinis verslas, visų pirma, yra požiūris, vertybių sistema. Jis gali būti įgyvendinamas naudojant įvairias teisines formas ir kitas teisines priemones. Socialinis verslas negali egzistuoti *per se*. Būti socialinio verslo įmone reiškia ne tik turėti specialų teisinį statusą ar teisinę formą (o tai griežtai teisinis klausimas). Būti socialine įmone reiškia atlikti socialinę misiją (kas iš esmės nėra teisinis ar yra tik iš dalies teisinis klausimas).

7. Socialinio verslo teisinio reguliavimo vieta ES ir konkrečių šalių teisinėje sistemoje priklauso nuo konkretaus socialinio gėrio pripažinimo. Visuomenė paprastai pripažįsta socialinį gėrį be atskiro šio socialinio gėrio teisinio pripažinimo. Vis dėlto,

daugeliu atvejų neįmanoma visiškai aprėpti viso socialinio gėrio spektro, kuris turi būti palaikomas valstybės lygmeniu. Todėl šalys teikia pirmenybę kai kurioms konkrečioms socialinio gėrio sritims. Tada atitinkamos prioritetinės sritys tampa politinės darbotvarkės dalimi (uždaviniais). Politinės darbotvarkės uždavinius paprastai įgyvendina skirtingi teisiniai instrumentai (įstatymai, taisyklės, sąlygos ir kt.). Tai reiškia, kad socialinio verslo veikla yra susijusi su socialiniu gėriu, kuris valstybės mastu pripažįstamas svarbiu.

8. Galime teigti, kad bet kokia teisinė sistema negali dirbtinai paskatinti tam tikrų visuomenės santykių, jei visuomenė natūraliai to nepripažįsta (toks požiūris atitinka teisinio realizmo požiūrį). Jei tam tikros socialinės inovacijos (pvz., tam tikra teisinė sistema) tam tikrose visuomenėse yra priimtinos, kitose visuomenėse jos gali būti nepageidaujamos arba bent jau nesuprantamos. Tai reiškia, jog socialinio verslo veikla nėra susijusi su jo, kaip juridinio asmens, egzistavimu, bet greičiau su vertinamuoju jo egzistavimo aspektu. Vis dėlto, mes manome, kad skirtingos teisinės formos suteikia įvairesnes galimybes veikti, todėl jos netiesiogiai daro įtaką socialinio verslo veiklai ir konkrečios socialinio verslo įmonės daromam socialiniam poveikiui.

# REKOMENDACIJOS

Daugumoje šalių galima naudoti jau esamas teisines formas socialinio verslo tikslams, pavyzdžiui, nurodant socialinę įmonės paskirtį, ribojant pelno paskirstymo būdus ir parodant kitus „socialinius“ požymius. Galime teigti, kad net jei ne visose šalyse galima rasti specialią socialinio verslo įmonių teisinę bazę, tyrimas parodė, kad esamas teisinių formų spektras taip pat netiesiogiai prisideda prie socialinio verslumo sektoriaus plėtros.

Atsižvelgdami į ištirtą medžiagą, galime teigti, kad griežtas socialinio verslo įmonių teisinių formų reguliavimas daugeliu atvejų nėra būtinas, nors ir įmanomas (ir išskirtiniais atvejais – reikalingas). Taip galime teigti, kadangi socialinio verslo apibrėžimas yra tik iš dalies teisinė kategorija. Tai reiškia, kad teisinės socialinio verslo prielaidos gali būti lanksčios. Tų pačių arba labai panašių rezultatų galima pasiekti naudojant skirtingas teisines ir politines priemones. Dauguma įgyvendinamų scenarijų iš esmės veda prie bendro socialinio gyvenimo gerinimo tikslo. Atsižvelgdami į tai mes suformulavome šias rekomendacijas.

1. Nepaisant teigiamų bendrų tendencijų, informuotumo apie socialinį verslą didinimas, geresnės galimybės gauti finansavimą ir bendros teisinės sąlygos turėtų būti įgyvendinama atsižvelgiant į *de facto* socialinius verslus. ES lygmeniu būtų naudinga sukurti siūlomą „struktūrą“, kuri pagal darbinį apibrėžimą padėtų nacionaliniams įstatymų leidėjams atskirti jų jurisdikcijose *de facto* socialinius verslus.

2. Siūloma „struktūra“ galėtų apimti geriausios praktikos pavyzdžius iš šalių, kurios yra labiau pažengusios socialinio verslumo teisėkūroje, taip pat Europos Komisijos įžvalgas ir pasiūlymus. Tai gali tapti „darbiniu įrankiu“ nacionaliniams įstatymų leidėjams, kurie galėtų rinktis iš siūlomų socialinio verslo pripažinimo variantų. Mes taip pat manome, kad geroji praktika turi būti išsaugota ir SĮ srityje. SĮ forma gali ir toliau egzistuoti bei vykdyti savo misiją.

3. Konkrečios teisinės formos, patenkančios į socialinio verslo įmonės darbinį apibrėžimą, gali patenkinti socialinio verslo įmonių teisinio reguliavimo poreikį tam tikrose šalyse. Toks reguliavimas gali būti įgyvendinamas su esamų teisinių formų pakeitimais (pvz., įgalinant suinteresuotus asmenis dalyvauti įmonių valdyme ir sprendimų priėmime, nustatant taisykles dėl pelno paskirstymo apribojimų ir pan.) arba be

jų, atsižvelgiant į konkretaus teisinio reguliavimo lankstumo lygį. Tam tikri teisės aktų pakeitimai gali būti atlikti mokesčių reguliavimo, atskaitomybės ir kt. srityse, kur socialinio verslo įmonės galėtų turėti tam tikrą naudą (atitinkančią konkurencijos taisykles) už savo indėlį sprendžiant socialines problemas.

4. Siūlytina, jog vyriausybės, atsižvelgdamos į socialinę politiką, turėtų imtis priemonių, kad būtų priimti įstatymai, skatinantys socialinio verslo įmonių patekimą į socialinių paslaugų teikimo sektorius. Tokiu būdu turėtų būti skatinamas viešųjų paslaugų teikimo perdavimas privačioms socialinio verslo įmonėms (kaip būdinga tendencija daugeliui Europos šalių).

5. Kuriant socialinio verslo teisinę sistemą skirtingose šalyse (nepaisant teisinių formų įvairovės), galėtų būti atliekami kai kurie pagrindiniai derinimo žingsniai, kaip tai daroma ribotos atsakomybės bendrovių (ir kai kurių kitų teisinių formų) teisinio reglamentavimo atveju. Šie derinimo veiksmai galėtų apimti tokius aspektus kaip socialinio poveikio vertinimas, orientacija į socialinę vertę, prioritetinis požiūris į suinteresuotųjų šalių įtraukimą ir kt. Šis tyrimas parodė, kad visuomenės, kurios turi daug teisinių socialinio verslo veiklos alternatyvų, išnaudodamos įvairias esamas teisines formas (taip yra daugumoje Europos šalių), turi aktyviai išnaudoti šias alternatyvas ir vengti ieškoti naujos „universalios“ alternatyvos, nes tokios universalios alternatyvos gali ir nebūti.

6. Manome, kad socialinio verslo plėtra šio tyrimo autoriaus kilmės šalyje turėtų vykti šiomis dviem kryptimis. Pirma, tai galėtų būti privataus verslo iniciatyvų įtraukimas į socialinių problemų sprendimą, kaip socialinio verslumo skatinimo forma. Antra, tai galėtų būti verslo modelių, taip pat socialinių inovacijų taikymas siekiant skatinti nevyriausybines organizacijas ir kitų teisinių formų juridinius asmenis įsitraukti į socialinį verslą. Didesnis suinteresuotųjų šalių įsitraukimas į socialinio verslo įmonių valdymą gali turėti didesnės naudos kalbant apie socialinio verslo teikiamų produktų / paslaugų kokybę, nes suinteresuotųjų šalių įtraukimas padeda kurti geresnius produktus / paslaugas. Be to, socialinių paslaugų niša, kurią paprastai teikia valstybė ir (arba) savivaldybės, galėtų būti atverta vietos bendruomenėms, kurios galėtų dalyvauti (per socialinio verslo įmonės formą) sprendžiant savo vietos socialines problemas.

7. Socialinio verslo teisinio reguliavimo situacija balansuoja tarp griežto reglamentavimo ir savireguliacijos. Todėl negalime tiesiogiai rekomenduoti kartotinai dauginti esamos praktikos skirtingose šalyse. Nepaisant to, įstatymų leidėjams, svarstant konkretų modelį, galima rekomenduoti atsižvelgti į socialinę, ekonominę

ir kultūrinę aplinką konkrečioje šalyje. Šiame kontekste svarbu suprasti, kad ateityje skirtingų socialinio verslo formų raida yra neišvengiama. Todėl šiame darbe ištirti aspektai po kelerių metų gali būti iš naujo įvertinti ir papildyti naujais nuolatinių pokyčių visuomenėje ir teisinės raidos aspektais. Šiuo metu skirtingose kultūrinėse aplinkose tinkantys sprendimai ateityje neišvengiamai pasikeis ir atvers galimybes tęsti tyrimus.

8. Apskritai, pakankamas dėmesio skyrimas socialinio verslo fenomenui yra svarbus šio fenomeno teisinės aplinkos plėtrai. Todėl pirmiausiai, tam tikrų šalių įstatymų leidybos institucijoms gali būti rekomenduojama didinti informuotumą apie socialinio verslo sąvoką, kasdien priimamų sprendimų kontekste (pvz., priimant verslo aplinkos teisinio reguliavimo pakeitimus), tam, kad būtų atsižvelgta į (potencialių) socialinių verslų interesus. Antra, nacionaliniai teismai taip pat turi būti susipažinę su socialinio verslo apibrėžimu (nesvarbu, ar jis apibrėžtas nacionalinėje teisėje, ar ne) tais atvejais, kai juridinių asmenų (kartais *de facto* socialinio verslo įmonių) klausimai yra ginčijami įvairiais aspektais. Trečia, teisės mokslininkai (ypač besispecializuojantys verslo teisėje), nesvarbu, ar juos domina socialinio verslo teisinio reguliavimo tema, ar ne, taip pat turi būti bent jau susipažinę su šia koncepcija, kad didintų bendrą šios koncepcijos žinomumą tarp kitų teisės mokslininkų.

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LEGAL PRECONDITIONS OF SOCIAL ENTREPRENEURSHIP: PERSPECTIVES IN SELECTED EUROPEAN COUNTRIES AND IN THE EUROPEAN UNION LEGISLATION: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2022. 304 P.

Bibliogr. 220–241 p.

*This dissertation aims to determine legal preconditions of social entrepreneurship in the European Union as well as in the particular EU and European Free Trade Association. It seeks to determine whether the legal regulation of social entrepreneurship is adequate and identify potential weaknesses, differences, and contradictions of this legal regulation in the EU, the particular EU and EFTA Member States. The dissertation also tries to determine main elements of the definition of social entrepreneurship or social business, (and related definitions) based on legislation, scientific literature, and authors own observations; to define the place of social entrepreneurship legal regulation in the legal system of the EU and particular countries. Moreover, it provides a wide comparison of the regulatory relationship of social entrepreneurship with other regulatory areas in the context of legal system (social innovation, CSR, legal technology, and such global initiatives as the United Nations Sustainable Development Goals) in order to identify possibly best regulation practices and to estimate the potential of social entrepreneurship.*

*Šia disertacija yra siekiama nustatyti teisines socialinio verslo prielaidas Europos Sąjungoje, taip pat konkrečiose ES ir Europos laisvosios prekybos asociacijos valstybėse narėse. Tyrime keliami uždaviniai išsiaiškinti, ar socialinio verslo teisinis reguliavimas yra pakankamas, ir nustatyti galimas šio teisinio reguliavimo silpnybes, skirtumus ir prieštaravimus ES, bei pasirinktose ES ir ELPA valstybėse narėse. Siekiama nustatyti socialinio verslo (ir susijusius apibrėžimus), vadovaujantis teisės aktais, moksline literatūra ir remiantis autoriaus pastebėjimais; apibrėžti socialinio verslo teisinio reguliavimo vietą ES ir konkrečių šalių teisinėje sistemoje. Taip pat disertacijoje pateikiamas platus socialinio verslo teisinio reguliavimo santykio palyginimas su kitomis reguliavimo sritimis teisinės sistemos kontekste (socialinės inovacijos, ĮSA, teisinės technologijos ir tokios pasaulinės iniciatyvos kaip Jungtinių Tautų darnaus vystymosi tikslai), siekiant nustatyti galimą geriausią reguliavimo praktiką ir įvertinti socialinio verslo potencialą.*

Tomas Lavišius

LEGAL PRECONDITIONS OF SOCIAL ENTREPRENEURSHIP: PERSPECTIVES IN SELECTED EUROPEAN COUNTRIES AND IN THE EUROPEAN UNION LEGISLATION

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