

# A legal status for Irish social enterprise - an overlooked opportunity?

## Research Article

Sarah Hofmayer\*

*Interim Head of Social Enterprise - Associate Fund Manager at Rethink Ireland, Centre for Disability Law and Policy, University of Galway, Ireland*

**Abstract:** This paper argues that a dedicated legal status for Irish social enterprises - or the wider social economy - holds to date a mostly overlooked potential to increase clarity of what social enterprises are and for social enterprises themselves on governance. A legal status takes an agnostic approach towards the enterprise's legal form while offering certain incentives and privileges for those that meet the criteria. A review of recent trends across Europe points towards a legal status being the preferred approach in more recent years, with country reports pointing towards lessons learnt in terms of aiming to capture and support the sector holistically. This paper concludes that while promising as a concept, further research is needed to validate the potential in the Irish context.

**Keywords:** *Social enterprise; social economy; legal status; regulation; policy*

© Sciendo

## INTRODUCTION

This paper explores the potential of a legal status for Irish social enterprise. It argues that such a status holds overlooked potential in the current discussion of the need for and implications of a dedicated legal form. While research has been carried out on a legal form for social enterprises (Lalor and Doyle, 2020), this paper differs from said research in two regards: firstly, and most importantly, it does not investigate an additional legal form but rather what can be described as a regulated accreditation scheme and secondly it focuses on an approach that could be open to the entire sector while not implying the need for a uniform approach towards company set-up.

Understanding the legal structure and the form it can potentially take is important for the wider sector and the development of social enterprise as it can provide increased clarity, awareness and transparency. A legal framework provides safeguards to funders and public authorities when supporting them via policies and targeted measures. Social enterprises themselves are provided with a clear framework for their management, governance and compliance requirements as well as providing them with an appropriate business model, accommodating their unique nature.

It is the author's belief that such an approach can and should capture the wider social economy – as has been done in Slovakia already (see the European Developments Section on this) and would be aligned with the new EU Social Economy action plan. This has also been suggested by Dolan in the Irish context (Dolan, 2020). However,

\* E-mail: [sarah@rethinkireland.ie](mailto:sarah@rethinkireland.ie)

much of the discussion and legislation on legal status has to date centered around social enterprises, which will therefore have to inform this paper.

A legal status, which is frequently also referred to as legal label, accreditation, qualification, or certification (e.g., Grigus, Fridenberga, Ulande, Aps, Virpalu, Bach. and Andreassen 2017), provides a legal recognition for social enterprise, where they comply with the criteria set out by the relevant legislation. Such a legal status is separate from the legal form the business operates under. It is therefore transversal in nature and allows for a pluralism of legal forms, taking an agnostic approach towards legal form. A legal form on the other hand requires a particular set-up, touching upon the fundamental structures of a company and has been described as the ‘primary legal building block’ of an enterprise (ESELA, 2015). It must be stated here that, as will be shown, while a legal status can address several challenges currently faced by the Irish social enterprise sector, it cannot overcome obstacles inherent to the existing legal forms available and should not be seen as a substitute for a dedicated legal form, if a clear need for such were to be identified.

## METHODS

This article builds primarily on desk-based research. A closer examination of the recent study regarding a legal form for Irish social enterprises (Lalor and Doyle, 2021) against European trends, as shown in country reports and policy documents, was the starting point of this exploratory research. A review of legal and policy-focused literature was conducted, with a particular focus on European comparative studies, examining factors enabling and hindering legal status approaches regarding the support of a thriving social economy ecosystem. Outstanding examples were investigated in some more detail, based on individual country reports, newspaper articles and academic papers and presentations. Finally, given the limited amount of literature and engagement with the topic in an Irish context and academia more generally, the author conducted four interviews with key stakeholders to assess the implications for the Irish ecosystem throughout the second half of 2021. These interviews were conducted virtually and were of an unstructured nature, while providing prompts. They were conducted to complement and test the information gathered regarding questions of legal form and status during the literature review and as part of a PhD research with 27 semi-structured interviews and another (unpublished) research project. Participants for this research were selected based on their academic or practical engagement with the implications of a legal status.

This paper, drawing on legal, regulatory and policy information, follows an approach of policy learning, as direct transfers of approaches are not considering the respective national cultural, institutional, and historical context (Stone, 1999). Instrumental policy learning looks to examine the viability of a particular instrument or approach and may result in policy innovation, transfer, or termination, depending on the outcome of the assessment (May, 1992). It is therefore important to also look at countries like Belgium, who have recently taken a step back from a comprehensive legal status approach.

This research focused solely on the European Union (EU) context, which was deemed the most relevant due to the higher comparability of any finding and the EU’s work in the area, impacting regulation via harmonization approaches and funding availability, as reflected most recently in the Social Economy action plan (European Commission, 2021).

Finally, it is important to note the limitations of this paper. The concept of a legal status has not been discussed widely with social economy actors on the ground, which was beyond the scope of this research. Resource constraints have also meant that a full regulatory analysis of the implications resulting from introducing such a legal status, including the need for a regulatory authority, has not yet been undertaken.

## BACKGROUND

Legal status for social enterprise is a relatively new and consequently still an under-researched topic (Krlev, Pasi, Wruk and Bernhard 2021), which has to date been discussed frequently only in conjunction with questions of legal form and social enterprise legislation more generally (e.g. Borzaga, Galera, Franchini, Chiomento, Nogales and Carini, 2020). In some cases this section therefore has to rely on wider discussions to set the scene. Legal recognition and regulation of the sector has however gained increasing attention at regional and international level

over recent years. This can be seen by the number of dedicated reports published, as well as the inclusion in recommendations and wider reports.

Fici (2020) outlines four overarching categories, which, if combined, capture the identity of social enterprises, and therefore need to be at the foundation of any legal framework. While some countries have opted for more extensive lists, the criteria can overall be summarised as follows:

- (a) **The private nature of the enterprise:** This captures the foundation of a social enterprise's identity as separate from the public sector.
- (b) **The nature of the activities carried out:** This criterion distinguishes social enterprises from traditional for-profit companies. It is also commonly found in legal status or general social enterprise regulations.
- (c) **The way in which assets and profits are allocated:** There is no unanimous approach regarding the extent of an asset lock, which requires the reinvestment of profits into the social mission, ensuring that profit creation does not take priority over the mission. In some cases there is a full asset lock, in others a partial one, as the country studies will show.
- (d) **The forms of governance:** Governance criteria are not key to every national approach of legal status or legal form, however where such legislation exists, there are usually some elements relating to democratic and participatory governance involved, commonly reporting and stakeholder involvement requirements (Fici, 2020).

These criteria capture the EU's operational definition across its three key dimensions (Fici, 2020), with the addition of the particular emphasis on assets and profits as a standalone fourth category.

Fici then distinguishes between two main types of legislation: that of establishing a dedicated legal form, which emerged first but is used less frequently in newer legislations, and that of establishing a legal status, which is the emerging trend (Fici, 2020). The already mentioned transversal nature of a status has the potential to capture the sector more holistically when compared to a legal form. Some countries had established 'social economy statuses' which took a more traditional, less entrepreneurial approach towards the social economy, focusing on mutuals and cooperatives at the cost of more entrepreneurial elements (ESELA, 2015). Recent approaches towards capturing the social economy notably do not show these pitfalls, as will be shown in the section on Slovakia.

Triponel and Agapitova connect the need for legal frameworks to the desire to support and define social enterprises, which operate at the intersections of private and public sectors. They also consider legal frameworks to contribute to access to finance, as they reassure and attract investors. Furthermore, founders of social enterprises have a clearer framework to work under in countries with a dedicated legal label (Triponel and Agapitova, 2016).

Better Entrepreneurship – a platform developed by the OECD and the European Commission – connects their recommendations similarly to the need for clarity for those providing supports. Without a legal framework, it becomes difficult to distinguish between social enterprises and other actors, also leading to a lack of visibility. They furthermore strongly recommend opening existing legal forms, where no dedicated form exists, so as to promote a vibrant social enterprise sector. They describe the ideal legal and regulatory framework as a combination of opening existing legal forms up to social enterprises and a legal status they can avail of (Better Entrepreneurship Policy Tool).

Legal recognition, designated and tailored supports and access to finance are generally listed as the key benefits of a legal framework (EU Policy Learning Platform, 2021). Ultimately, this would result in an enhanced competitiveness of the sector (Addarii, 2012), as well as reducing conflation and confusion of overlapping and similar concepts (ESELA, 2015). In establishing a legal status – or generally a legal framework – trading restrictions of not-for profits can be fully redressed (ESELA, 2015). Contrary to a mere working definition, a legal status can also avoid the problem of free riders, as non-compliance with the criteria ultimately results in a loss of the accreditation. A legal definition is furthermore more resilient against frequent changes in government and policy (Triponel and Agapitova, 2016).

Concerns on the other hand centre around the way such a legal status would be designed and implemented. Some fear a loss of innovation and development for the sector (Addarii, 2012), while others point out the need to carefully plan bureaucratic requirements, such as registration fees and timeframes. Ultimately, any such legal status

would need to be carefully planned in the respective national context, with the involvement of the social economy sector, to ensure that incentives outweigh additional administrative costs (Triponel and Agapitova, 2016).

## THE CURRENT IRISH SITUATION

This section shall outline the current situation in Ireland, as it relates to a potential legal status. Given the absence of such a mechanism or a wider discussion about its potential, this paper must rely on information available on the sector more generally to understand the potential demand, steps towards trialing such an approach and stakeholder insights.

Ireland currently does not have any legislation on the social economy, including no legal form or status, contrary to most EU countries (Borzaga et al, 2020). The first National Social Enterprise Policy can however be seen as a milestone insofar as it provides a definition of social enterprise for the first time. This definition captures social enterprise across three dimensions as

*an enterprise whose objective is to achieve a social, societal or environmental impact rather than maximising profit for its owners or shareholders. It pursues its objectives by trading on an ongoing basis through the provision of goods and/or services, and by reinvesting surpluses into achieving social objectives. It is governed in a fully accountable and transparent manner and is independent of the public sector. If dissolved, it should transfer its assets to another organisation with a similar mission.* (Government of Ireland, 2018).

In many ways this definition covers the requirements for a legal definition. However, the governance dimension found in European documents, is notably absent. The no-profit redistribution rule, positions Ireland in the more restrictive field, as the European Union only requires a partial non-distribution rule. However, this definition is one solely grounded in policy. In the words of Dolan, social enterprise – just like the social economy – does not have any legal meaning in Ireland, leaving these businesses ‘legislatively lost’ between the traditional non-profit field and for-profit businesses, which results in barriers for the sector (Dolan, 2020).

In light of this, and building on research confirming in principle the need for a legal structure (Social Finance Foundation, DRCD, 2018), the Policy entails a commitment to carry out research into the topic as outlined in policy measure 19: ‘*Conduct further research and analysis on the operation of social enterprises within existing legal structures and assess the potential value of a distinct legal form for social enterprises.*’ (Government of Ireland 2018). In fulfilment of this measure, independent research was carried out and launched in October 2021 by Rethink Ireland and the Department for Rural and Community Development.

This research, while identifying several barriers connected to the legal form challenge, concluded that the threshold of need for a dedicated legal form had not been reached. Research participants, which were mostly from social enterprises themselves, were, while generally in favour of a legal form (66.9% out of the over 150 participants), not in consensus about its advantages, characteristics, and implications. Furthermore, the report highlights that several of the topics addressed in relation to legal form, are not directly linked to a legal form. One example is the lack of visibility of the sector, especially those social enterprises that are not registered charities. Charitable status, which is an example of a legal status, was repeatedly discussed. Concerns related to the risk for their business reputation, both if choosing to avail or not avail of charitable status. Those concerned about acquiring the status, feared not being seen as trading, professional businesses, while those worried about the implications of not applying for said status were concerned about losing public trust attached to a charitable status. Other factors were the perceived requirement to have charitable status to avail of funding as well as tax exemptions. Overall, the findings showed a mixed attitude towards this option (Lalor and Doyle, 2021). Arguably, a dedicated legal status for social enterprises could offer a meaningful alternative here, avoiding concerns regarding public perception of a charitable social enterprise, while providing security to funders and certain fiscal incentives.

The alternative of a legal status was however not investigated by the report or brought up by participants. This can partially be explained by the research questions focusing the research on a legal form, rather than wider legislative and regulatory options, such as a legal status (Lalor and Doyle, 2021). Arguably, a legal status is thus an overlooked opportunity in the Irish context, as can also be seen from the absence of literature and wider discussion of such a status in the Irish context. While it cannot rectify challenges inherent to the existing legal forms available,

a legal status could potentially address some of the barriers identified by the legal form research, which are not necessarily directly linked to a legal form.

In the current setting social enterprises can essentially avail of any legal form available to businesses. However, there is a strong focus on Companies limited by Guarantee (CLGs) across several stakeholders. While there is no requirement to be a CLG to obtain funding *per se*, social enterprises repeatedly report that funders do show a strong preference for the same. Lalor's and Doyle's report indicates that this is due to wider regulations and the lack of suitable mechanisms to secure the social enterprise's mission and funding obtained via accreditation mechanisms outside the charitable status (Lalor and Doyle, 2021). Cooperatives are particularly critical of the emphasis on CLGs, highlighting the potential of other models regarding a participatory, democratic element. Some have opted for hybrid models, such as the Urban Co-op, which operates as a CLG with a cooperative structure (Urban Co-op, 2022).

Arguably a social enterprise legal status could redress this challenge to a considerable extent. While certain aspects, such as asset locks, might still dictate a choice within a smaller pool of legal form options, a more agnostic approach can be promoted, as the legal status itself would provide certain guarantees, for instance relating to directors' remuneration and mission lock, opening up the field to other legal forms, e.g. Designated Activity Companies.

In the absence of a regulatory scheme, some social enterprises avail of privately run accreditation schemes. Internationally most prominent is the "B Corp" Certification, which is operated by B Lab, a non-profit. B Lab evaluates organisations against the metrics of community, environment, governance, and workers and certifies those that meet the required standard (Moroz, Branzei, Parker and Gamble, 2018). At the time of writing, nine companies with headquarters in Ireland were certified B Corps (B Lab, 2022). Social Impact Ireland are currently trialing a 'Social Enterprise Mark', which essentially functions like a privately run status, which they operate in cooperation with an international accreditation body. This Social Enterprise Mark is an international, independent accreditation guaranteeing that a business is operating as a social enterprise and is awarded by Social Enterprise Mark CIC in partnership with Social Impact Ireland. They have decided to follow an open-discovery approach and a consultation process, looking to see where the journey will take them rather than with a particular goal or outcome in mind. Participating social enterprises operate under a range of legal forms, including DACs and CLGs operating under cooperative principles (Social Impact Ireland, 2021). This trial could hold important insights into how a legal status would need to be conceptualised to cater for the Irish sector, to provide a set of criteria and a regulatory framework that caters for a range of legal forms and builds on the needs and support of the social enterprise sector itself, to ensure a strong uptake of the status.

Stakeholders with an interest in legal form and status questions, were consulted during the exploration stages of this research. Stakeholder 1, an Irish academic who had conducted research regarding related questions, argued that a legal form would not add anything significant to the existing options, suggesting to instead modify the existing frameworks. However, she was strongly in favour of a legal status. In her opinion it was needed to address gaps and avoid the push towards charitable status. A legal status would add visibility and understanding to the sector; however, it needs to be built on a legal foundation and to be administered by a public authority. She furthermore argued that such a legal status needs to capture the wider social economy, amongst which she saw cooperatives playing an increasingly important role.

Stakeholder 2, who works as a freelancer as part of a social enterprise, was also leaning towards endorsing the idea of a legal status. He saw the idea as a natural next step from the legal form research, noting again the need to redress the current situation in relation to charitable status. He referenced the Social Enterprise Mark as a good idea, but not sufficient. In his opinion, the success of a mark or status hinges on how it is adopted, and compliance assured. A clear legitimacy of the implementing actor would be needed, which can be found only in public bodies. The status would have to be linked to the CRO and carried by them for transparency and legitimacy. For social enterprises, mechanisms are needed to link sufficient incentives for social enterprises to a compliance control, to avoid free rider challenges. He saw potential in funders enforcing such a requirement consistently, as well as positive tax incentives.

More critically, while not opposed to the idea of a legal status, Stakeholder 3, who works for a representative organisation, voiced concerns regarding the exclusionary logic within the nature of any regulation. By determining who is eligible for a status and linked supports, one consequently puts those that do not meet the criteria at a disadvantage. This would need to be carefully approached and set out objectively in legislation. Stakeholder 3



agreed that for a legal status to work, it would have to include benefits, which would make an important difference to the sector as there is currently no entrepreneurial benefit connected to being a social economy enterprise in Ireland.

Stakeholder 4, an Italian academic, who had spent some time in Ireland and the UK, saw the potential of a legal status as holding positive potential, based on his insights from other countries and in the absence of a legal framework for social enterprise in Ireland.

Interestingly, recurring themes throughout these consultations mirror the questions observed in the social enterprise legal form research regarding the need for a full ban on profit distribution and directors' remuneration, when considering the need to attract talent and investors (Lalor and Doyle, 2021).

## EUROPEAN DEVELOPMENTS

This section provides an overview of the current state regarding a legal status in the context of the European Union. Given the little amount of literature on the topic, country studies are used to set the scene for the discussion of emerging trends and lessons to date. It is not the aim to provide a comprehensive legal overview but rather to focus on points which are unique to a country or provide insights into what works. Before diving into the relevant national contexts, an overview of the EU's role will build the case for an engagement with the topic.

### European Union

The European Union had originally set out to develop an EU-wide status for social enterprises which has, to date, not been realised (European Commission Communication, 2011). While recent reports showed an agnostic stance on legal frameworks in Member States (Borzaga et al, 2020), a publication from 2021 emphasises the benefits of a legal and regulatory framework. The brief recommends action at EU and regional level to provide clarity on definitions and legal status of social enterprises (EU Policy Learning Platform on SME Competitiveness, 2021).

Social Economy Europe's policy document ahead of the European Social Economy action plan built the case for a legal framework accommodating the existing diversity of legal forms, developed in cooperation between the EU and its Member States, supplemented by national conferences and technical supports for the Member States (Social Economy Europe, 2021). The Mannheim Declaration, which was launched at the European Social Economy Summit ahead of the upcoming Social Economy action plan, recommended similarly as the first measure that the EU provides legal and regulatory guidance to promote a coherent understanding of the sector, while being mindful of national specifics (European Social Economy Summit, 2021).

The Social Economy action plan itself addresses the question of a legal framework under Section 3 'Creating the Right Framework for the Social Economy to Thrive'. It describes legal and policy frameworks as an essential element of a supportive ecosystem and points to the need for the general frameworks to be adapted to the needs of the sector. This must be done in a holistic manner, revising any regulations impacting the sector. In doing so, it is important to be mindful of the 'diversity of legal forms', which set out different objectives and modes of operating for social economy enterprises (European Commission Communication, 2021).

Speaking to the question of a legal status more specifically, the action plan points out its potential to facilitate access to supports and inclusion in relevant policies. The European Commission commits to a study regarding national accreditation schemes and labels (European Commission, 2021). What can be said, based on the action plan, is that the European Commission is committed to an approach that is respectful and supportive of the plurality of legal forms comprising the social economy and points towards the unique form and potential of several options throughout the policy. However, it also becomes clear that an accreditation scheme, which gives better access to a supportive legal framework, is seen favourably and might receive increased attention and support from the EU over the coming years (European Commission, 2021).

### Italy

Italy has a longstanding tradition of engaging with social enterprises from a legal angle, dating back to the 1990s, when social cooperatives were introduced in response to the growing prevalence of social enterprise approaches. However, despite the success of the model, it did not capture the entire sector, resulting in the introduction of a legal status in 2005. It allows for any private legal entity, to avail of the status, if it meets the criteria (Borzaga, 2020).

The criteria require:

- A private legal entity

- Which carries out entrepreneurial activities
- And acts for the common interest (Borzaga, 2020).

The law originally stipulated that profits had to be fully reinvested into the main statutory goal or into increasing the company assets, to increase public trust. Public trust and visibility were seen as the main benefits of the legal status. The uptake of the legal label remained initially low. The main reason for the lack of success was attributed to the mixture of additional costs and restrictive requirements, including permitted fields of activity, combined with a lack of (fiscal) incentives. The no-profit-distribution rule was criticised as limiting access to investors (noting that the Italian social enterprise sector relies on a relatively low amount of public funding and grants) (Venturi and Zandonai, 2012).

These obstacles were addressed in 2016 as part of an overall third sector reform. The 2005 legislation was repealed, and social enterprises were included in the Third Sector Code and further elaborated on in dedicated decrees. The 2016/17 legislation includes further tax incentives and liberalises the social enterprise regulations in several aspects: permitted fields of activities were broadened, further finance options introduced, public sector organisations were given permission to become members of a social enterprise and finally profits can be distributed to a certain degree. Social enterprises are now allowed to distribute up to 50% of their net profits to their shareholders, or alternatively to increase their free capital. Only the reinvested profits are tax exempt. Regarding access to finance, the new legislation introduced a fund for the promotion and finance of social enterprises and the opportunity to use crowdfunding (Salatino, 2018).

To better understand the impact of these recent developments for the social economy in Italy and its applicability in other countries, a consultation with an Italian researcher, with connections to Ireland was carried out. Stakeholder 4 stated, like the research reports, that it was still too early to fully understand the impact of the legal amendments for the sector. He saw its strength in the fact that it connected social enterprises better to the wider third sector, contextualising them and putting an increased emphasis on the ethos of these enterprises, thus deterring free riders. He saw the Italian definition as striking a good balance, offering a clear definition while being open to innovation and the evolving nature of the sector, while admitting that any definition is per nature prone to exclusion. However, the overall Italian system, offering both a legal form and a legal status, offered sufficient room for organisational diversity. Finally, asked about the change in legislation allowing for limited profit distribution, Stakeholder 4 did not voice any concerns. He saw this change as necessary, as it promoted access to investors, while ensuring these were the right investors via the distribution cap, which deterred those solely interested in profit maximisation from investing. Risks were further mitigated by the not-for-profit legal forms of most social enterprises.

## Belgium

While Belgium appears to have a thriving social enterprise sector and dedicated legislation, it must be stated from the outset that it has not succeeded in capturing the entire sector by means of legislation.

The Belgian social economy can avail of a range of legal forms but there is no dedicated legal form for social enterprises. The predominant type are associations, whose entrepreneurial nature was strengthened by legal amendments in 2019. In the past, social economy entities could apply to become a social purpose company, a legal status introduced by the Law of 13 April 1995 amending the Law on Commercial Companies Consolidated on November 30, 1935. Its aim was to provide an adequate legal framework for the sector at the time by adapting legal structures to their needs (Sebarh, 2017). However, the social purpose company was abolished with the passing of The Code of Companies and Associations by Parliament on 28 February 2019. Instead, an accreditation scheme was introduced for cooperatives, making them the only legal form which can avail of such a status. This also resulted in a lack of overall visibility, tax exemption and incentive schemes for the sector. Some schemes exist at regional level (Nyssens and Huybrechts, 2020).

What is of interest for comparative purposes are the 9 eligibility criteria the new legislation sets out for cooperatives wanting to avail of the accreditation. The conditions are:

1. A social purpose as the objective
2. Clear description of the social goals
3. A limited profit distribution with clear limits grounded in legislation
4. A winding up clause, stating the redistribution of profits to a similar organisation
5. A cap at nominal value for shareholder pay-outs
6. No remuneration of board members
7. A cap on votes for multiple shareholders in the general assembly

8. The dividend paid to shareholders can only be calculated after reserving what is necessary or useful for the achievement of the social purpose (condition 1)
9. The publication of an annual report against their social goals (condition 2), which is however not required to be a full social impact report (Nyssens, Huybrechts, 2020).

These criteria are interesting insofar as they provide a more extensive list than the three key criteria set out by Italian Law. Since none of them are specific to cooperatives, they could easily inform the regulation of a legal status more generally.

There had been a considerable amount of debate regarding the repeal of the social purpose company as outlined in Sebarrrh's 2017 thesis. This step had been taken when revising the overall company law with a view to simplifying and aligning it further with international expectations, which included the removal of limitations of economic activities for not-for-profit organisations. It was thought by the government that a social purpose company was therefore, especially given the existence of the cooperative model, not needed anymore. Critics, including the Legal Network for Impact Lawyers (ESELA), pointed out that this decision had been made without consulting and involving the social economy sector, which did not stand unified behind this move. It was also pointed out that such an approach was based on a traditional corporate understanding, not considering recent developments as found for instance in the social finance sector. Furthermore, such a move is against current trends across Europe (ESELA, 2016). Some went as far as officially calling this move 'bizarre' as it goes against the move towards legal recognition of social enterprises, calling for a reform rather than abolition (Sebarrrh, 2017). The long-term implications of the abolition and whether new steps towards legal recognition will be made is yet to be seen.

## Denmark

Denmark has recently developed and implemented a legal status for social enterprises via its Act on Registered Social Enterprises 711/2014. Social enterprises have been able to register under this legislation since 2015. A study showed that 260 had availed of this option by June 2018 (Hulgard and Chodokoff, 2020). There is not one predominant legal form in Denmark, with social enterprises mostly registering as foundations, associations and limited liability companies but availing of, in total, 14 legal forms (Dupain, Pilia, Hoffman, Scharpe, Mair, Raith and Bosma, 2021).

The following criteria must be met in order to become registered as a social enterprise:

- (a) The primary purpose must be of a social nature
- (b) Commercial activities must account for a significant amount of the overall income
- (c) Independence from public authorities in both management and operations
- (d) Inclusive and responsible governance
- (e) Profits must be reinvested in the objectives or the social enterprise's funds or other social enterprises or charities. A certain, limited amount can however be paid to investors or owners (Law on Registered Social Economy Enterprise (2015) Denmark).

Early research into the uptake showed that while 50% of social enterprises thought the status was useful, 29% did not think so. This was related to a need for improvements, with the majority in favour of keeping the legal status despite these initial challenges. Improvements were primarily suggested in relation to providing sufficient public resources to promote the status as well as to perform full compliance control of all the registered enterprises rather than just randomised checks. By doing so, social enterprises hope to gain an increase in public trust and awareness (Duplain et al, 2021).

The Danish legislation, while not yet providing insight beyond the above points into its effectiveness and success in capturing the entire sector, holds some interesting learnings. The legislation builds on a pre-existing understanding of social enterprises and builds on the recommendation of the (since discontinued) National Committee on Social Enterprise. Their recommendation led to the legislation being adopted within only 9 months. The main challenge identified to date relates to holding those social enterprises who registered accountable to the five key criteria following their certification, while ensuring the status remains rewarding (Hulgard and Chodokoff, 2020). These



challenges and learnings hold important insights regarding the need to build on pre-existing understanding of the sector and a well-designed regulatory framework, which shall be picked up on again in the discussion.

## Slovakia

While in many ways their approach of a public register is similar to the Danish model, what is of interest is that Slovakia introduced the registration option as part of their Act on the Social and Solidarity Economy, which entered into force in 2019, taking a wider approach towards the sector. The aim of the Act is to capture the wide range of de facto social enterprises which had been identified; its success in doing so is yet to be seen. The status is open to commercial and not for profit legal entities alike and includes even sole proprietors, therefore going beyond the EU's approach (Polackova, 2020).

The legislation includes several incentives to avail of the accreditation scheme, mostly in the form of it being a precondition to avail of supports, social finance, and fiscal incentives. An important aim of the Slovakian legislation is to increase the understanding of social enterprise and the wider social and solidarity economy which to date has been limited to work integration social enterprises (Polackova, 2020).

## DISCUSSION

The purpose of this section is to discuss the lessons drawn from the country overviews, against the backdrop of the current Irish situation, as already outlined, so as to assess the potential of a legal status and propose potential next steps. While further, in-depth research is needed to recommend one clear approach, it is the author's belief that the topic holds to date overlooked potential to address challenges the Irish sector faces and which a legal form would not be able to redress sufficiently. Based on the literature and policy review undertaken here, the following high-level observations regarding success factors of a legal status can be made.

- Legal statuses offer legal recognition and can enhance awareness of the wider sector and increase credibility of the individual enterprise. This, in turn, can increase access to a range of supports (Better Entrepreneurship Policy Tool). Legislation can include a reporting mechanism on social impact, as shown by the Belgian example, which could further increase transparency and public trust.
- A legal status does in general not require a change of legal form (with the notable exception of the recent Belgian approach and usually unincorporated businesses), taking an agnostic stance towards choice of legal form as long as the criteria are met. Where the legal form is compatible with the requirements of the legal status, reincorporation would therefore not be required, making transitions easier for social enterprises.
- Incentives are key to ensuring uptake of a legal status and to outweigh additional burden and limitations of entrepreneurial freedoms required from social enterprises, as the Italian legislation has shown. These incentives frequently take the form of fiscal incentives. One such incentive could be tax exemptions, like those provided to Irish registered charities, as highlighted as important in Lalor and Doyle's (2021) research. Other incentives could include for instance access to funding and social finance options. Finally, success hinges also on the regulator's ability to promote the tool and having the resources to administer it meaningfully, as the Danish experience has shown.
- Successful examples of legal status frameworks were recently developed frequently as part of a wider third sector or social economy reform or clearly connected to these (legal) ecosystems. This approach allows for the required review of the entire legal framework as it applies to social enterprise, to ensure a consistent approach which is favourable to the sector's growth.
- A legal status requires a clear legal foundation and a registrar administering the status, if designed as a public tool. Only a regulatory regime can ensure full buy-in and legitimacy by holding social enterprises accountable and providing sufficient incentives as the Danish example has shown. Arguably, the Irish registrar would best be located separate from the Charities Regulator, to further emphasise the entrepreneurial nature of social enterprises, a point which was strongly emphasised by all the stakeholders engaged as well as in Lalor and Doyle's (2021) research. However, further research, supported by the State and informed by the currently ongoing census (Government of Ireland 2022) will be required to inform the development and design of such a framework and regulator.

This paper has shown that a legal status is not a one-size-fits-all approach that can be applied to the Irish context directly from another country. Neither can it be seen as the answer to every challenge, a replacement for

a legal form, or a guaranteed success. The Belgian example has shown that some countries have for the moment taken a step back from offering a sector-wide framework, while the Italian experience shows that even long-standing traditions of regulating the sector are not yet fully refined. Nevertheless, the Italian case study has also shown that a first attempt at legislating for a legal status does not need to be seen as the final, permanent approach but that learnings and sector development may at times require amendments as happened in 2016. Some of these mistakes can be avoided by consulting with or engaging an expert working group, as has been the case in Denmark.

A minimum consensus can be identified within the four categories as outlined by Fici and discussed in the Background Section (Fici, 2020). While some criteria might not be found as a prominent, separate category yet – most notably the governance dimension – they are found predominantly within the social economy sector and found increasingly reflected in newer, top class legislation and regulation. The Belgian status – while only open to cooperatives – provides a detailed, yet not overly restrictive, outline of what sets the sector apart from related actors and how this could be reported on (Nyssens and Huybrechts, 2020). If such a report would suffice for other reporting requirements, e.g. for state grants, then it could also redress the reporting burden reported by Lalor and Doyle (2021).

The European developments have also shown that while questions are recurring, there is not yet a clear answer to some of them across jurisdictions. This can be seen prominently in the context of profit redistribution, which has been discussed in the Irish legal form research, showing the wide range of opinions from needing to attract investors to securing the mission for public trust. Recent moves in Europe lean towards a limited rather than a full reinvestment prohibition, along the lines of the EU's approach. The Italian experience shows a move towards a less restrictive approach, providing tax incentives for reinvestment of profits, while allowing for limited profit distribution to attract investors, an approach which appears similar under the Belgian accreditation scheme.

Furthermore, several key insights regarding the demands of the Irish social enterprise ecosystem exist already. The legal form research report has clearly outlined existing challenges and prevailing questions connected – albeit not always directly attributable to – a legal framework, such as a lack of understanding within society of the nature of social enterprises, how they are distinct from registered charities and a lack of accreditation and thus public trust (Lalor and Doyle, 2021).

An increased focus on the potential of a legal status would also be aligned with the focus of the EU action plan, which shows an emphasis on fully understanding and supporting the multitude of organisational and legal forms, as well as a commitment to provide guidelines on supportive legal frameworks and finally a commitment to explore the potential of labels and accreditation schemes (European Commission, 2021).

## CONCLUSION

In conclusion, this paper has outlined the concept and potential of a legal status for Irish social enterprises, based on emerging European trends, drawing lessons from their experiences to date and Irish stakeholder insights. In essence, its potential lies in the following points:

- A legal status is open to a variety of legal forms, thus in most cases and depending on the exact framework, not requiring a change of legal form.
- It can add legitimacy and transparency to social enterprise and the wider social economy, enhancing public trust in certified social enterprises, thus addressing one key challenge identified in recent research (Lalor and Doyle, 2021).
- Such legislation could embed the social economy in the Irish legal system, while not requiring a reincorporation.
- It could act as an alternative to charitable status, avoiding confusion about a dual business and charity nature and adding clarity to the eligibility of social economy actors to business supports.
- A legal status, tied to a registrar for registration and reporting, could act as a precondition to a range of supports and incentives, which was described as the key ingredient for success by stakeholders.
- Legislation could include an effective control mechanism regarding governance, asset and profit distribution, with a de-accreditation mechanism where conditions are not met.

It is important to emphasise that a legal status is not suggested as a standalone solution for the current challenges experienced by the sector. As noted in literature, such an attempt would need to be accompanied by other measures, ensuring that the existing legal forms are accessible for the sector, for instance by developing model constitutions (Better Entrepreneurship Policy Tool).

Furthermore, a high-level engagement of existing literature and information cannot provide sufficient detail on the intricacies of implementing such an approach in the Irish ecosystem and legal framework. It appears that further engagement with the topic and research is required to explore questions such as how (and within whose remit) to set up a registrar, reporting requirements and which Acts would need to be partially amended to ensure a consistent approach. Conducting research into this topic has already been recommended in 2015 by ESELA.

Arguably, the EU action plan as well as the findings from the recent legal form research hold valuable input for the next National Social Enterprise Policy, seeing how the current policy ends by the end of 2022. An exploration of a legal status, grounded in the EU's approach and as a next step from the commitment to explore a legal form in the first policy, would be timely and could build at a later stage on the guidelines for legal frameworks which are currently being developed by the EU in collaboration with the OECD.

Overall, this paper concludes that a legal status for Irish social economy enterprises holds initially promising potential and recommends a thorough research of its implications for the existing Irish legal framework and potential uptake of such an offering. The range of approaches taken across Europe shows the need to strike a delicate balance between requirements and incentives, which indicates that a tailored, country-specific approach will be required.

## BIO-NOTE

**Dr. Sarah Hofmayer** is the Interim Head of Social Enterprise at Rethink Ireland. She also teaches Independent Living Law and Policy at the Centre for Disability Law and Policy at the University of Galway. She completed her PhD in 2021, which explored the potential of social enterprise to further inclusive employment for persons with disabilities in accordance with international human rights law. Her research interests lie in disability and minority human rights as well as legal and regulatory foundations of social enterprise. She has published in a range of journals on these topics, most recently in the *Business and Human Rights Journal*.

## ACKNOWLEDGEMENTS

Sarah Hofmayer would like to thank Rethink Ireland, in particular Eoghan Ryan, for supporting her in this research and letting her undertake it as part of her workdays. She would also like to thank Oran Duffy for his critical review of the final draft.

## References

- Addarii, F. (2012). 'There are Three Potential Problems with a Social Enterprise Label for Europe', *The Guardian*, 26 October 2012, <https://www.theguardian.com/social-enterprise-network/2012/oct/26/social-enterprise-label-europe> (accessed 1 February 2023).
- B Lab (2022). <https://www.bcorporation.net/en-us/find-a-b-corp> (accessed 29 July 2022).
- Better Entrepreneurship Policy Tool (2021). Guidance Note: Legal and Regulatory Framework, <https://betterentrepreneurship.eu/en/node/52> (accessed 19 October 2021).
- Borzaga, C. (2020). *Social Enterprises and Their Ecosystems in Europe: Country Report Italy*. European Commission, <https://ec.europa.eu/social/BlobServlet?docId=16380&langId=en> (accessed 1 March 2023).
- Borzaga, C., Galera G., Franchini B., Chiomento S., Nogales R., and Carini, C. (2020). *Social Enterprises and Their Ecosystems in Europe: Comparative Synthesis Report*. European Commission. <https://ec.europa.eu/social/BlobServlet?docId=22304&langId=en> (accessed 1 March 2023).
- Dolan, P. (2020). *Is a New Legal Form Required for Social Enterprise in Ireland?*, unpublished LL.M. thesis, Dublin City University.
- Dupain, W., Pilia, O., Wunsch, M., Hoffman, P., Scharpe, K., Mair, J., Rath, M. and Bosma, N. (2021). *The State of Social Enterprise in Europe - European Social Enterprise Monitor 2020-2021*. Euclid Network. <https://euclidnetwork.eu/portfolio-posts/european-social-enterprise-monitor-esem/> (accessed 1 March 2023).

- ESELA, (2016). *News: Future of Social Purpose Company in Belgium*, 7 July 2016, <https://esela.eu/news/not-belgian-corporate-specialists-question-use-social-purpose-company-adequate-legal-status-social-business> (accessed 19 October 2021).
- ESELA, (2015). *Social enterprises in Europe. Developing Legal Systems which Support Social Enterprise Growth*, 25 September 2015 <https://policycommons.net/artifacts/1601380/social-enterprises-in-europe/2291149/> accessed 8 March 2023
- European Commission Communication (2011). *Social Business Initiative: Creating a Favorable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation*. SEC(2011) 1278 final of 25 October 2011. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0682:FIN:en:PDF> accessed 6 March 2023.
- EU Policy Learning Platform on SME Competitiveness (2021). *The Social Economy and Support to Social Enterprises in the European Union*, January 2021, [https://euagenda.eu/upload/publications/the\\_social\\_economy\\_and\\_support\\_to\\_social\\_enterprises\\_in\\_the\\_european\\_union\\_policy\\_brief.pdf.pdf](https://euagenda.eu/upload/publications/the_social_economy_and_support_to_social_enterprises_in_the_european_union_policy_brief.pdf.pdf) (accessed 1 March 2023).
- European Social Economy Summit (2021). *Mannheim Declaration on Social Economy*. <https://www.euses2020.eu/mannheim-declaration/#:~:text=The%20main%20output%20of%20EUSES,strengthened%20by%20its%20participatory%20approach> (accessed 19 October 2021).
- Fici, A. (2020). Social Enterprise Laws after the 2011 “Social Business Initiative”: A Comparative Analysis from the Perspective of Worker and Social Cooperatives. CECOP, December 2020, <https://cecop.coop/uploads/file/bzuQl79nF5yrrwoD-vUNUg47Ro7iaHA6wAxsV9yo.pdf> (accessed 1 March 2023).
- Government of Ireland (2022). Department of Rural and Community Development, ‘Minister Humphreys announces a National Census to establish key information about social enterprise in Ireland’ (13 May 2022) <https://www.gov.ie/en/press-release/873e7-minister-humphreys-announces-a-national-census-to-establish-key-information-about-social-enterprise-in-ireland/> (accessed 22 July 2022).
- Government of Ireland (2018). Department of Rural and Community Development, ‘National Social Enterprise Policy 2018-2022’.
- Grigus, O., Fridenberga, A., Ulande, M., Aps, J., Virpalu, I., Bach, P. and Andreasen, N. (2017) Social Entrepreneurship Certification and Labeling. Social Entrepreneurship Association of Latvia <https://sua.lv/wp-content/uploads/2018/03/SE-labeling-and-certification-Report-2017.pdf> accessed 8 March 2023
- Hulgard, L. and Chodokoff, L. (2020). *Social Enterprises and their Ecosystems in Europe: Country Report Denmark*. BE: European Commission, <https://ec.europa.eu/social/BlobServlet?docId=21200&langId=en> (accessed 1 March 2023).
- Krlev, G., Pasi G., Wruk D. and Bernhard M. (2021). ‘Reconceptualizing the Social Economy’, *Stanford Social Innovation Review*, 21 April 2021, [https://ssir.org/articles/entry/reconceptualizing\\_the\\_social\\_economy](https://ssir.org/articles/entry/reconceptualizing_the_social_economy) (accessed 19 October 2021).
- Lalor, T. and Doyle, G. (2021). *Research on Legal Form for Social Enterprises*, February 2021, <https://rethinkireland.ie/wp-content/uploads/2021/12/Research-on-Legal-Form-for-Social-Enterprises.pdf> (accessed 1 March 2023).
- Law on Registered Social Economy Enterprise (2015). Denmark. [https://www.socioeco.org/bdf\\_fiche-legislation-172\\_en.html](https://www.socioeco.org/bdf_fiche-legislation-172_en.html) accessed 6 March 2023
- May, P.J. (1992). ‘Policy Learning and Failure’, *Journal of Public Policy*, 12(4), 331-354.
- Moroz, P.W., Branzei, O., Parker S.C. and Gamble, E.N. (2018). ‘Imprinting with Purpose: Prosocial Opportunities and B Corp Certification’, *Journal of Business Venturing*, 33, 117-129.
- Nyssens, M. and Huybrechts, B. (2020). *Social Enterprises and their Ecoystems in Europe: Country Report Belgium*. BE: European Commission, <https://ec.europa.eu/social/BlobServlet?docId=22454&langId=en> accessed 1 March 2023.
- Polackova, Z. (2020) *Social Enterprises and their Ecoystems in Europe: Country Report Slovakia*. BE: European Commission, <https://ec.europa.eu/social/BlobServlet?docId=22453&langId=en> accessed 8 March 2023
- Salatino, G. (2018). ‘A Spotlight on Italy: The New Regulation of the “Social Enterprise”’. *The Philanthropist*, 20 August 2018, <https://thephilanthropist.ca/2018/08/a-spotlight-on-italy-the-new-regulation-of-the-social-enterprise/> (accessed 1 March 2023).
- Sebarrh, Y. (2017). *The Belgian Social Purpose Company: Maintain, Adjust or Abandon?*, Master Thesis, Belgium: Catholic University of Leuven.

- Social Economy Europe, (2021). *Codesigning the Action Plan for the Social Economy: for an Economy that Works for the People and the Planet*, March 2021, [https://www.socialeconomy.eu.org/wp-content/uploads/2021/03/SEE\\_Policy-Paper\\_SE-ACTION-PLAN\\_2021\\_EN.pdf](https://www.socialeconomy.eu.org/wp-content/uploads/2021/03/SEE_Policy-Paper_SE-ACTION-PLAN_2021_EN.pdf) (accessed 1 March 2023).
- Social Finance Foundation DRCD (2018). *Social Enterprise in Ireland: Research Report to support the development of a National Social Enterprise Policy*, Social Finance Foundation Department of Rural and Community Development, <https://www.gov.ie/en/publication/5545b1-se-research-report/> (accessed 1 March 2023).
- Social Impact Ireland (2021). <https://socialimpactireland.ie/social-enterprise-mark/> (accessed 18 October 2021).
- Stone, D. (1999). Learning Lessons and Transferring Policy across Time Space and Disciplines, *Politics*, 19(1), 51-59.
- Triponel, A. and Agapitova, N. (2016). *Legal Frameworks for Social Enterprise: Lessons from a Comparative Study of Italy, Malaysia, South Korea, United Kingdom and United States*, World Bank Group, <https://openknowledge.worldbank.org/handle/10986/26397> (accessed 1 March 2023).
- Urban Co-op (2022). <https://www.theurbanco-op.ie/legal-finance.html> (accessed 24 July 2022).
- Venturi, P. and Zandonai, F. (2012). *Social Enterprise in Italy: Plurality of Models and Contribution to Growth - Iris Network Report: Executive Summary of the Research*, [https://www.irisnetwork.it/wp-content/uploads/2010/04/exsum\\_reportiris\\_socent\\_1-ENG.pdf](https://www.irisnetwork.it/wp-content/uploads/2010/04/exsum_reportiris_socent_1-ENG.pdf) (accessed 25 May 2019).



Copyright of Irish Journal of Management is the property of Irish Journal of Management and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.