



Research Article

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Social Enterprises in Albania: Analysis of Albanian Legislation over the Years

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Doi: 10.36941/mjss-2019-0203

Abstract

Pursuant to Law no. 65/2016 "On social enterprises in the Republic of Albania", the Albanian lawmakers have aimed to regulate the exercise of the profitable activities of non-profit organizations by providing a legal solution and improving the regulatory framework of the so-called, in some countries, the third sector (which is not included neither in state-owned nor in private commercial entities). The law hereof aims to regulate the exercise of non-profit commercial activities, by limiting the types of entities allowed to be non-profit organizations, and therefore leaving the trading companies out of scope. Regarding the object of the law, in order to protect and socially include the vulnerable groups, its scope is limited to employment, provision of employment opportunities, provision of goods and services and economic and social integration for the vulnerable groups, therefore it has set some restrictions on the legal notion of social enterprise. Despite the great legislative work and the good will to finally regulate and stimulate an innovative sector such as the social enterprise, in the de iure condito debate it was mentioned that there is still room for improvement in this part of the legislation, which has not given any or has given only a few effects in practice. Therefore, by analyzing the Albanian legislation in the sector, we aim to provide an explanatory description of Law no. 65/2016 but at the same time, de iure condendo, to ask for a better addressing of the problems that have arisen in practice, in the light of the European and foreign legislation, jurisprudence and doctrine in this field.

Keywords: Social enterprise, economic activity, trading company, European legislation

1. Introduction

Social enterprise is a new concept of doing business, and in the last ten years it has been developed considerably. In a wider perspective, it is an "enterprise", which on one hand organizes the production factors in order to exercise an economic activity, and on the other hand it is characterized by the "social" dimension, as it follows the general objective of a philanthropic and not profitable nature. Developments in the last decade in the field of economics have placed social enterprise in the magnifying glass of many scholars, who have tried to give a definition and an adjustment to the concept of social enterprise by labeling it as a successful formula which combines capitalism with philanthropic social mentality of the *non-profit* sector.

The development of social enterprises as a model of success brought the need for its legal

regulation within the paradigms of commercial law in the narrow sense, and also in the sector of non-profit entities, from where this concept originates. This has led to the development of new legal categories in legislations for the definition and regulation of social enterprise, which in our opinion remains an enterprise regardless of the social nuances or legal form of the entities exercising it. In the legal field, it is accepted the transitioning of concepts from one field to another, the borrowing of notions and definitions or the dynamic reference to the consolidated norms in a certain sector.

To turn our attention to the social enterprise, we shall first take a look at the lexical interpretation of the phenomenon, by defining it as an enterprise which is subject to general market rules and relevant legislation, then analyzing and understanding its importance as a social enterprise, thus the facilities and advantages that can be granted to this form of doing business within the commercial law without conflicting with its principles regarding fair competition. Regarding the latter, it is important to understand the logic of balancing opposite principles, whether the establishment, within our legal framework, of the concept of social enterprise can enjoy various facilities or state aid, and where is the meeting point between fair competition and the pursuit of the social objective.

In the European Union, the concept of social enterprise has been in the focus of the Commission for several years, due to the diversity of national legislations, which have different regulation on the notion of social enterprise within the Member States. Thus, the European Commission declares that the social enterprise “combines social goals with an entrepreneurial spirit” and aims at “achieving wider social, environmental or community objectives”. Therefore, the focus of the EC is to create an appropriate economic and legal environment in order for these enterprises to be competitive with normal commercial operators in the same sector¹.

Our lawmakers, also driven by civil society organizations in the capacity of interest groups, have provided the regulation of social enterprise upon Law no. 65/2016 and bylaws issued for its implementation. This intervention has started since the beginning of activity in the field of social business by civil society stakeholders in our country since 2012². The concept of social business has been known in Albania since 2011, and the first steps were taken to promote this new form in order to promote and support social business in Albania. Pursuant to Law no. 10376 dated 10/02/2011 “On the establishment of companies ‘Promoting Social Business’ j.s.c” and DCM no. 391 dated 01/06/2011 “On the approval of the statute of the company ‘Promoting Social Business’ j.s.c”, as amended, the first steps have been taken to promote the establishment of social businesses. This is a state-owned company, financed by the state capital and its object of activity is the sustainable economic and social development, by promoting the development of sustainable, balanced and cohesive social businesses through the support and promotion of social businesses and micro-finance.

Thus, in the Albanian legal reality there are some enterprises which function as social enterprises and which are registered as profitable persons in the form of ltd. but also as non-profit entities, such as associations or foundations which do not enjoy any additional facilities regardless of their social mission³. However, in the past the Albanian lawmakers have been attentive to make legal regulations and to make additions to business law with new legal forms of activity which tend to go towards the social forms, such as agricultural cooperation companies⁴ in the field of

¹ See EC website https://ec.europa.eu/groeth/sectors/social-economy/enterprises_en (last entry 09/07/2020). The EU has launched the so called Social Business Initiative since 2011 with the aim of intervening, regulating and improving the situation regarding the social enterprise.

² For more on the development of social business in Albania see E. Bedalli, *Doing business ..., but making it social in Monitor*, 20/04/2014. You can find it at <https://www.monitor.al/te-besh-biznes-por-social-2/> (last access 09/07/2020). The author makes a descriptive analysis of the forms of social business established in Albania and the important role of the Yunus Foundation in the development social businesses in the Balkan region.

³ A. Kule, *Social Enterprises and (non) development in Albania, 2019* can be found at <https://portavendore.al/2019/05/08/ndermarjet-sociale-dhe-mos-zhvillimi-i-tyre-ne-shqiperi/> (last access on 07/07/2020)

⁴ Pursuant to Article 3 of Law no. 38/2012 they are “a voluntary organization between natural or legal persons, in order to meet their needs or interests in the field of production, processing and marketing of agricultural and livestock products, but not only, through agreements or mutual cooperations between them and the companies

agriculture, which are regulated by Law no. 38/2012, or savings and loan associations and their unions⁵ in the financial field, regulated by Law no. 52/2016.

Despite this adjustment, the social enterprise sector does not seem to have taken the hoped-for moment for many reasons which we will analyze later on.

Whereas, in other cases, such as in Italy, the forms of exercising commercial activity in alternative schemes and the notion of traders, in the paradigm of exercising profitable activities, is known and consolidated in the forms of cooperatives. Also, in these countries the awareness and regulation of the so-called Third Sector is known earlier than the new concept of social enterprise.

2. Methodology of Research

In this paper we aim to study the Law no. 65/2016 on Social enterprise in Albania through a descriptive analyses of the legislation approved so far and also, combining with a comparative analyses with relevant EU legislation and pragmatic documents, gives some important insights on the notion of social enterprise in Albania as a new category. Methodologically we analyze the law that regulates the social enterprise, which is adopted by Albania in comparison with the EU relevant legislation and, at the same time, conduct a historical analyses on the changes made so far, the relation, in comparison, with the law on enterprises in general in Albania. Furthermore, the analyzes include a description of all relevant pieces of legislation and secondary legislation on social enterprise, as well as findings from administrative decisions of the Government or interdependent bodies such as the Commission for State Aids. The lecture that we offer is a consolidated comment on the entire legislation that regulates the topic in order to reach relevant conclusions if there is any room for improvements in the Law no. 65/2016 and in which direction the lawmakers shall intervene.

Our study has some limitations, as we not fully assess the impact of these pieces of legislation in practice and give findings from the courts rulings so far as well as to analyze a decision of approval for giving the status of a social enterprise to an entity. We will address these findings in future due to the fact that, actually, there is no ruling given by the Ministry on requests from entities under the Law no. 65/2016 provisions.

3. Legal Notion and Legal Regulation of Social Enterprise According to Law no. 65/2016 and Bylaws in Force

Law no. 65/2016 "On social enterprises in the Republic of Albania" stipulates to regulate the establishment, operation and certification of the business that seeks to achieve social objectives by not sharing profit according to the classic notion of the trader⁶ provided by Law no. 9901/2008 "On traders and trading companies". The law hereof, in many innovative aspects, includes in the Albanian legal system a new category of exercising commercial activities, and as such it has a considerable impact on the Albanian commercial legislation. However, many questions arise from the in-depth analysis of the regulatory framework regarding the law on social enterprise, whether we have a new form of commercial or social activity or this is a status given to an NGO for the

that provide services, goods or products of the agricultural or livestock sector, as well as through the promotion of their economic activities." Thus, the law in question approximates the Albanian legislation in part with European Council Regulation 1435/2003/EC "On the status of European Cooperative Societies". However, although it seeks to achieve certain social objectives, this law makes a dynamic reference to legal regulation, insofar as it does not regulate itself, in Law no. 9901/2008 "On traders and trading companies"

⁵ Pursuant to Article 2 of Law no. 52 dated 19/05/2016 "On savings and loan associations and their unions" they are a legal entity, based on the voluntary organization of members, who deposit their money in the company, which will be available for lending only to members of the savings and loan association, in order to meet the needs or interests of the members."

⁶ A. Malltezi, *The Albanian law on trading companies*, Mediaprint, Tirana, 2011; A. Malltezi, J. Rystemaj, L. Pelinku, *Aspects of business law in Albania*, Mediaprint, Tirana, 2013; B. Berberi, *Trading companies. Comments on Law no. 7638, dated 19/11/1992 "On trading companies (I, II, III)"*, Morava, 2004; IFC, *Corporate governance. Manual*, IFC World Bank Group, 2008

purpose of receiving subsidies from the State.

3.1 The legal notion of social enterprise

In a wider perspective, the social enterprise is an entity which combines social objectives with the entrepreneurial spirit, and has as the main goal the social impact and the exclusion of the purpose of profit. The concept of social enterprise is highly developed in the economic field, and its legal regulation in Albania is aimed to be provided by Law no. 65/2016.

In different legal realities, the social enterprise has an historical background dimension of its own, such as the case of cooperatives in the Italian legal system. For 10 years, European lawmakers have launched a campaign aimed at the development of social enterprises⁷, as key stakeholders in the economy and social innovation, by giving special importance to the debate on the 3 main topics: facilitating the granting of funds to social enterprises, increasing visibility and establishing more appropriate legal regulations for social enterprises⁸ in order to give the latter equal opportunities to other enterprises operating in the same economic sector⁹.

After many requests and under the influence of civil society organizations, Law no. 65/2016 comes as a complete regulation that provides a complete legal framework regarding the social enterprise sector in Albania.

For the Albanian lawmakers, social enterprise is a status which is obtained in accordance with certain conditions and criteria that an entity must meet¹⁰. Furthermore, Article 3 of the law hereof limits the possibility of obtaining the status of social enterprise only for legal entities which create the "appropriate conditions for employment of marginalized individuals in the labor market" by excluding from this category the natural persons engaged in commercial activities. Also, in the subjective aspect, Article 12 limits the status of social enterprise only to the legal forms of non-profit organizations established according to Law no. 8788 dated 07/05/2001 "On non-profit organizations" as amended, thus for associations, centers and foundations.

Moreover, in terms of the relationship between the State and the enterprise regarding the obtained status or determinations that fall within the scope of this law such as appeals against inspection bodies, rejection or revocation of status, imposition of fines are considered as administrative contraventions and the law refers the administrative appeal according to the Code of Administrative Procedures and for judicial settlement of disputes related to status and law enforcement is subject to the jurisdiction of Administrative Courts pursuant to Law no. 49/2012 "On the organization and functioning of administrative courts and settlement of administrative disputes."¹¹ This is an important element in defining the social enterprise as a public-administrative legal qualification and not as a new form of exercising commercial activity in the Republic of Albania.

3.1.1 Social enterprise and its relationship with the State

In the legal regulation it offers, the State limits its activity only to the purpose of protection and social inclusion of vulnerable groups through "a) employment, in the framework of the fundamental rights of individuals to have sufficient sources of livelihood, in accordance with human dignity; b)

⁷ See *Social Business Initiative started in 2011 upon final Com (2011) 682 of the European Commission, dated 25/10/2011 "Social Business Initiative – Creating a favorable climate for social enterprises, key stakeholders in the social economy and innovation"*

⁸ See the programmatic aspect of EU intervention in https://ec.europa.eu/growth/sectors/social-economy/enterprises_en. Thus, these objectives will be met by intervening in the regulation of social enterprises in relation to market access, access to funds, improvement of the regulatory framework, internationalization (Last accessed on 09/07/2020)

⁹ For the EU, despite the many differences, social enterprises operate in 4 main areas: Integration in work, social services, local development of disadvantaged areas, others (mainly innovative businesses with environmental or cultural impact)

¹⁰ Article 1 of Law no. 65/2016

¹¹ Article 28 of Law no. 65/2016

providing employment opportunities for persons whose age, health and marital status do not allow them to be actively available in the labor market; c) providing goods and services in diverse and good quality forms, by providing appropriate and accessible opportunities for individuals with special needs, as well as marking an essential step towards gender equality, as these services facilitate the participation of women in the labor market; ç) economic and social integration of vulnerable groups, by promoting the sense of responsibility, solidarity and social cohesion in the community.¹² Thus, in achieving the public interest for the protection and inclusion of vulnerable groups, lawmakers define only a few areas of action which, despite being broad, are listed in a taxing and exhaustive manner in law, by limiting the scope of activity of these enterprises in a commercial way which fulfills the following main goals: employment, employment opportunities, provision of goods and services and social and economic integration of vulnerable groups.

Also, the State, through central and local government units, undertakes a promotional role by taking informative and support measures related to the development of social enterprises in Albania, where a key role is played by the Ministry responsible for social affairs in order to support the drafting of the necessary documentation, by giving advice, introducing new ideas or identifying opportunities for social enterprises, and by providing public services or stimulating them to participate in public procurement procedures¹³.

Chapters V and VI of the law define the ways of state control and the eventual support that social enterprises receive from the State. Thus, Article 21 imposes an *ex lege* obligation on social enterprises to report periodically to the Ministry responsible for social affairs regarding their activity in favor of the public interest and regarding the categories of employed individuals, regardless of whether they are beneficiaries of state aids or no. Except the reporting of the entity, in order to maintain the qualification as a social enterprise, the Ministry must also exercise controls on the subjects of law by monitoring compliance with legal provisions, and it also has the right to ascertain and fine in cases of administrative offenses under Article 23 when it finds violations of economic criteria, social criteria or abuses on behalf of the entity. This relationship with the Ministry is regulated by bylaws¹⁴.

On the other hand, besides the supervising the functioning of social enterprises, the State also undertakes to provide state aids for social enterprises. Thus, in Article 24, for the purpose of exercising the activity, the following are identified as financial resources: income derived from the sale of goods and fees of services, public subsidies, private donations, and other lawful income.

Law no. 65 provides for, in the section of resources and state aid, that the fiscal regime of these enterprises will be the normal regime of the category of taxpayers to which they belong¹⁵, thus to the category of non-profit organizations; this norm is pleonastic in itself given the fact that the legal form in which social enterprises can be organized is that of non-profit organizations. As such it can be considered, on the one hand, an easy way of doing business because the tax liabilities of these organizations have more benefits than for taxpayers which have the trader status regardless of the type of activity they exercise. Apparently, lawmakers have limited the right of conducting social business in favor of the legal forms of non-profit organizations, in order to

¹² Article 2 of Law no. 65/2016

¹³ Article 5 of Law no. 65/2016

¹⁴ *The control of social enterprises will be performed by the Ministry responsible for social affairs through the inspectorate responsible for these issues in order to respect the legal obligations set out in Law no. 65/2016 under the Decision of the Council of Ministers no. 716 dated 01/12/2017 "On determining the procedures for conducting controls on the social enterprise activities" in accordance with the law on inspection in the Republic of Albania. (Law no. 10433 dated 16/06/2011). As a rule, inspections are notified in advance except for cases of off-schedule inspections, which are performed when the social enterprise has not submitted periodic annual reports according to the Instruction of the Ministry of Health and Social Protection no. 677 dated 27/07/2018 "On determining the forms, deadlines and ways of periodic reporting, for the activities exercised and the categories of persons employed by the social enterprise". This report according to the above Instruction should contain in detail: the field of activity of the organization and the vision; enterprise information; employee profiling; the purpose of reporting; social challenges that are solved by the enterprise; financial resources and their use; financial reporting.*

¹⁵ Article 25 of Law no. 65/2016

facilitate categorization in relation to other areas of legislation such as that of taxation. However, in our opinion, as we will analyze in the following chapters, the opportunity to optimally regulate the social business sector is lost.

Regarding the aid that the State undertakes to provide to social businesses in Albania, this intervention at the legal level is made on different parts.

Firstly, aid is given in the direct form of subsidizing the enterprise itself or the employees in these enterprises¹⁶. This programmatic norm is detailed by bylaws regarding the forms of aid, especially by decision of the Council of Ministers¹⁷¹⁸ which passes the preliminary evaluation to the State Aid Commission¹⁹. The latter guarantees the impact that direct forms of subsidy will have on the free market in relation to fair competition by assessing whether the subsidy measure is necessary to achieve social objectives and to what extent this intervention should be allowed in free market²⁰.

Likewise, Article 26 (3) of the law makes a dynamic reference regarding other forms of direct support other than the subsidy when it states that "other forms of support and facilities are regulated by the legislation on state aid, tax and non-profit organizations."

Secondly, part of the legal facilities, which derive from the limited legal form that social enterprises can obtain, is the right of social enterprises to participate in the procedures of awarding public contracts which are objectively limited to health, social and cultural services. However, social enterprises do not enjoy the convenience of a favorable position because according to Article 27 (2) "Procedures for awarding these contracts must be performed in accordance with applicable public procurement legislation and in compliance with the general principles of public procurement."

In the organization and functioning of social enterprises, the law establishes some basic principles which must be followed in order to fulfill its social function for the benefit of the

¹⁶ Article 26 of Law no. 65/2016

¹⁷ Direct state aids through subsidies were approved by DCM no. 789 dated 26/12/2018 "On the creation of the fund in support of social enterprises and forms of aids through subsidies for social enterprises" and it was re-emphasized by DCM no. 882 dated 24/12/2019 "On the mechanism of inter-institutional work coordination for referral for employment of individuals and members of active working age of families receiving economic assistance" upon which the National Exit Program for economic assistance scheme beneficiaries was approved. For the years 2019-2021 the Fund will be in the amount of ALL 249,760,000, of which ALL 37,000,000 for creating new vacancies, ALL 7,776,000 for compulsory social and health insurance of employees of social enterprises belonging to vulnerable groups and the remaining amount for their activity, by presenting a business plan for the social enterprise.

¹⁸ Council of Ministers, upon DCM no. 789 dated 26/12/2018, in the establishment of the Social Enterprise Support Fund, has determined to subsidize the following activities of these enterprises (cost of machinery and equipment, qualification and training of employees from marginalized categories, coverage up to 50% of minimum salary for employees from these categories), creating new vacancies for marginalized groups or the payment of social and health insurance of these categories of employees by first evaluating the business plan submitted by the applicant entity. The conditions for receiving subsidy are as follows: to have the status of a social enterprise; to have a business plan or project and the proposed activities which will be implemented in a timely manner; hire at least 3 new employees from the categories of marginalized groups within 12 months of receiving the subsidy. DCM sets a maximum amount of subsidy received that can not exceed ALL 14 million for a period of 3 years per entity.

¹⁹ The State Aid Commission has defined it as a state aid and has authorized the creation of a fund for social enterprises, which is approved by the Council of Ministers with Decision no. 85 dated 25/06/2018 stating that "in the meaning of state aid legislation (Law no. 9374 dated 21/04/2005 "On State Aid", as amended), any economic entity engaged in an economic activity (provision of goods and services in a given market) is considered an enterprise, regardless of the legal form or method of financing. Thus, social enterprises are considered as enterprises engaged in an economic activity."

²⁰ ANC upon decision no. 85 dated 25/06/2018 defines the social enterprise as an enterprise that can affect a certain market regardless of the purpose it fulfills and consequently the subsidies that it can benefit are considered state aid which may jeopardize the competition, and at the same time, it approves the provision and manner of providing this assistance according to a certain scheme as it affects the achievement of state social objectives.

community, such as transparency²¹, sustainability²², autonomy and accountability²³, collective dimension²⁴ and effectiveness²⁵.

Firstly, Article 17 stipulates that social enterprises may not distribute profits directly or indirectly²⁶ in favor of members, employees or associates, but must use the profits to develop and expand its business. Monitoring of the compliance with this legal restriction, which is part of the legal notion of social enterprise, remains under the responsibility of the Ministry responsible for social affairs. Its income is taxed according to the fiscal legislation in force without any facilities in this regard.

Secondly, Article 16 of the law distinguishes the decision-making bodies and the executive bodies, just as it does with other forms of organization of the legal person, but with the specification that decision-making bodies must include in decision-making other stakeholders identified as employees²⁷, volunteers²⁸, users of services and buyers of goods, local government bodies and any other interested stakeholders. Article 19 states for a collective participation in decision-making, especially in terms of programmatic and strategic decision-making, which should be performed not only based on the general principles mentioned above but also by "providing the necessary information, which enables employees and beneficiaries of activities to give their opinion and contribution in making decisions related to the general management, especially on issues related to working conditions, as well as ensuring the quality of goods and services provided by the enterprise."

In order to update Chapter IV regarding the organization and functioning of social enterprises, the law imposes an obligation on the Ministry responsible for social affairs to adopt a standard

²¹ Article 4 (1) letter (a) of Law no. 65/2016 states that "social enterprises and their decision-making bodies act in a transparent and predictable manner, promoting participation and accountability"

²² Article 4 (1) letter (b) of Law no. 65/2016 states that "the founders of social enterprises undertake the risk of financial sustainability and plan prudently to earn income, in cooperation with members and employees"

²³ Article 4 (1) letter (c) of Law no. 65/2016 states that "social enterprises exercise their activity based on the decisions of the governing bodies, which take decisions on the organization, functioning and administration of the entity autonomously and without being influenced by state bodies, even though they benefit from public subsidies. Public bodies have the right to supervise the use of funds that social enterprises benefit from public subsidies.

²⁴ Article 4 (1) letter (ç) of Law no. 65/2016 states that "social enterprises maintain and promote the collective dimension, including in membership and decision-making other stakeholders, such as employees, volunteers, service users and buyers of goods, local government bodies and any other interested actor to contribute to the achievement of the local development project "

²⁵ Article 4 (1) letter (ç) of Law no. 65/2016 states that "social enterprises plan and use financial resources effectively, ensuring the maximum possible social benefit"

²⁶ Article 17 (4) of Law no. 65/2016 considers indirect profits: a) remuneration of members, directors and associates, in amounts greater than those provided in enterprises operating in the same or similar sectors and conditions, when this remuneration exceeds by more than 20 percent rewards received as reference; b) the salaries of employees, in any position, which exceed more than 20 percent the salaries provided by contracts or agreements for special jobs, in similar sectors, unless the benefit is related to specific professional work, performed for a certain period of time.

We believe that in practice, the determination of indirect profits, in relation to wages or bonuses, will encounter difficulties as in the market the value of similar payments in different sectors of the economy has a fluctuation which can hardly be determined. It is impossible to carry out an accurate analysis and a subsequent check regarding the accurate determination of salaries and bonuses in similar sectors.

²⁷ Given that some of them may come from marginalized categories, Article 18 guarantees them some specific rights such as adequate social protection, equal economic and legal treatment, as provided for in the Labor Code or in the applicable collective agreements, the right to be informed and to give their opinion or to decide on strategic decision-making, which is defined in the internal regulations of the social enterprise or in the agreement between the employees and the administrative body of the enterprise. Here the lawmaker goes beyond the guarantees of the employees in trading companies, where they have the right to have representatives or to establish their employees' councils according to Articles 19 et seq. of Law no. 9901/2008.

²⁸ Pursuant to Article 20 of Law no. 65/2016 they are the "persons who contribute voluntarily with their work, according to the legislation in force on volunteering" who may also have the status of a member in the enterprise, offer their contribution free of charge and are registered in the register of social enterprises and they cannot constitute more than half of the total number of members.

regulation on the functioning of social enterprises²⁹ which must be approved by the decision-making bodies of each enterprise. This regulation approved by the responsible Ministry in 2018 has not properly grasped the sense and implementation of the law regarding the participation of other stakeholders in decision-making according to the provisions of Articles 16, 18, 19 of Law no. 65/2016. Thus, the regulation does not define special forms of participation in decision-making, the establishment of consultative councils, mandatory involvement of interest groups in decision-making bodies, etc. Therefore, it remains in the autonomy of the governing and decision-making bodies to include in the regulation of their functioning, certain forms in order to better involve other groups in the decision-making processes.

The regulation states in Article 5 that “the organization and functioning of social enterprises is based on the principle of collectivity according to which social enterprises include in membership and decision-making other stakeholders such as employees, volunteers, service users and buyers of goods, local government and any other stakeholders” and in Article 6, which, among other things, states that the task of the highest decision-making body is to “promote participation and accountability” or “to set general policies, short-term objectives, medium-term and long-term”.

In our opinion, this regulation is not sufficient to address the framework of the law, and starting from the legal training capacities of the entities that are allowed to conduct social business, it will create problems in practice for the way the entities are going to address these legal criteria, which are one of the essential elements in order to be considered a social enterprise and to maintain this status.

3.1.2 *Criteria for obtaining and maintaining the social enterprise status*

Obtaining the status of a social enterprise, according to Chapter II of Law no. 65/2016, is subject to the fulfillment of certain criteria of economic and social nature which are detailed in the bylaws. Thus, Article 8 stipulates that the economic criteria that must be met are: “1. A social enterprise shall conduct a continuous activity in the field of goods production and/or provision of services; 2. At least 20 percent of the revenue after the second year of activity and at least 30 percent of the revenue after the third and subsequent year of activity must be carried out by the activities provided for in Article 10 of this law (which are detailed in defined areas of activity and by decision of the Council of Ministers are determined the concrete activities that can be exercised); 3. In its activity, the social enterprise, in addition to the contribution of volunteers, must necessarily include, at least, 3 paid employees” These criteria are from the economic aspect to justify the special nature of the social enterprise by re-emphasizing in point 4 of article 8 the obligation of the social enterprise to use its income for the purpose of continuous expansion of their activity.

In determining the activities that can be exercised by social enterprises, the lawmakers do not exclude the possibility of carrying out other activities that are closer to the legal nature of the enterprise as NGOs and generating income from these activities, but it should be done by respecting the quantitative economic criteria following the year third, at least 30% of the income to be from activities in the fields of “a) social services; b) employment mediation; c) youth employment; ç) protection and promotion of health; d) education services; dh) environmental protection; e) promotion of tourism, culture and cultural heritage; ë) sports activities, with the purpose of entertainment and socialization; f) promoting the development of local communities”.

In order to meet the social objectives, it is up to the Council of Ministers to determine the concrete activities that can be exercised by the social enterprise, which are currently defined in DCM no. 16 dated 12/01/2018 “On the approval of the list of activities exercised by social enterprises”, aiming at meeting the social objectives of the enterprise such as the inclusion of vulnerable categories, encouraging volunteer work, inclusion of young people, innovative entrepreneurial activities that address social, economic and environmental problems³⁰.

²⁹ *Approved by the Ministry of Health and Social Protection with Ministerial Decree no. 636 dated 03/09/2018 “On the approval of the regulation on social enterprises functioning”*

³⁰ *Pursuant to DCM no. 16 dated 12/01/2018 the activity of social enterprises is limited to the fields of social services (activities related to social care services, which are provided in residential centers, day care centers, at*

Furthermore, this DCM stipulates that trade activities of goods or services can also be carried out but by limiting this activity to “trade activities of goods or services, offered by activities of other social enterprises, products for marginalized individuals, products of small producers from remote areas or environmentally unfavorable areas, as well as other activities in support of other social enterprises”³¹, whereas in the field of production it limits the activity of social enterprises to activities related to the handicrafts production of a wide range goods and products that serve the community, and in particular, products that are intended to create facilities for marginalized individuals”³².

Along with economic criteria, Article 9 provides for two social criteria such as: “1. Social enterprise aims to promote social objectives in a well-defined field of activity. 2. At least 30 percent of the employees employed in the social enterprise should belong to the category of socially and economically marginalized groups provided for in Article 11 of this law.” Marginalized groups, which are individualized as “groups with problems of extreme poverty, social exclusion due to discrimination, long-term unemployment, difficulties due to being prosecuted or addicted to drugs and alcohol, and displaced persons”³³ and categories³⁴, which benefit from social enterprises employment or services are described in the relevant bylaws.

In the light of the foregoing, the lawmakers set out in detail in the law some criteria to differentiate social enterprises and the objectives they must follow, from the rest of the NGOs which also meet social objectives but which do not have such a specific and defined objective. Besides the legal regulations, it is left up to the government bylaws to define in detail the areas of intervention or promotion of social protection for marginalized groups by detailing the areas that will be promoted for the establishment of the social enterprise and, consequently, and that may be eligible to receive direct subsidies from the State.

Secondly, in a cumulative reading of the two criteria that must be met and the areas of activity in the socio-economic aspect where social enterprises can exercise their activity, it is noted an objective restriction (despite the generated income of up to 30%) regarding the free initiative that social enterprises can have in the market. Mostly, this legal and administrative regulation creates a secondary market in itself which has meeting points with the market in general, but which remains

home and in the community, according to the relevant legal provisions), health (activities for the protection and promotion of health, physical activities and amateur sports, for the purpose of socialization and entertainment), cultural and educational (activities related to art, cultural heritage and other activities of this nature), promotion of tourism (services in the bar-restaurants-hotels, tourist guides and social tourism services for people who do not have the opportunity to visit tourist attractions due to health or living conditions) and environmental protection (activities related to protecting the environment from pollution and damage from human activity and economic activities, to guarantee a healthy environment for citizens) and trainings and qualifications for employment (activities for the promotion of vocational training, educational and employment mediation activities for persons included in the categories of marginalized groups).

³¹ Point 5 of DCM no. 16 dated 12/01/2018

³² Point 6 of DCM no. 16 dated 12/01/2018

³³ Article 11 (2) of Law no. 65/2016

³⁴ DCM no. 56 dated 31/01/2018 “On determining the concrete categories of marginalized groups”. Marginalized groups are defined in a list by this bylaw which highlights the following categories: beneficiaries of economic assistance and disabled individuals who are in an active working age; unemployed individuals for a long period of at least 12 months; individuals who are up to 24 years old or those who have completed higher education studies of not more than two years and have not started a job; any head of household who lives alone or is single, who has at least one child in his care; persons belonging to the age over 50 years; persons who become addicted or formerly addicted to drugs, alcohol or other psychotropic substances; persons who have not had their first job paid regularly since the beginning of serving a sentence of imprisonment, alternative punishment or any other type of criminal punishment; women living in rural areas where the average unemployment rate exceeds 50% of the national average for at least two calendar years or where female unemployment is above 150% of the average male unemployment rate for at least two of the three calendar years; women and girls victims/potential victims of trafficking, exploitation and domestic violence; disabled individuals; refugees, as defined by the law on asylum; asylum seekers; individuals with supplementary protection; individuals with temporary protection; refugee family members; family members of an individual who has been granted supplementary protection status; stateless individuals; homeless individuals; former prisoners; individuals with different gender identities and different sexual orientations.

to some extent isolated and without much interest to generate capital from market actors.

Thus, by setting clear and detailed criteria, the lawmakers follow well-defined social goals and limit the freedom and economic initiative of the entity that aims to conduct social business.

3.1.3 *Obtaining, maintaining and losing the status of social enterprise*

Social enterprise, as we mentioned above, takes a new place in the Albanian legislative framework as a new form of social business. Chapter III of the law defines its special status in the Albanian legal system. Thus, Article 12 stipulates that social enterprises are non-profit organizations and at the moment they receive the status of social enterprise, after meeting the relevant criteria, they have the obligation to bear, in addition to the name of the organization, the title "Social Enterprise".

The social enterprise status is obtained after being recognized as such by the Ministry responsible for social affairs upon a decree of the Minister. As such, the procedure for obtaining the status is a strictly administrative procedure that starts with the application of the interested entity to the responsible Ministry, according to the instruction of the Minister that determines the necessary procedures and documentation³⁵.

Firstly, this entity must be a legal personality, according to the definition of Article 13 (2) that "the application for obtaining the status is made after the entity is registered in the competent authority and obtains a license, in case the social enterprise exercises activities for which a license is required".

The procedure for obtaining the status initiates with the request of the organization itself, which must submit its current activity and how it will meet the economic and social criteria pursuant to Law no. 65/2016³⁶. The administrative discretion of the evaluation body³⁷, thus the relevant Ministry, extends to the evaluation of the fulfillment of the requirements of Law no. 65, and has the right to request additional documents at their discretion and to conduct, if deemed necessary, an evaluation visit to the premises of the organization³⁸. This procedure must take place within a period of 30 calendar days³⁹ from the submission of the request and ends upon the decree of the Minister granting the status of "Social Enterprise" or rejecting the request. Cases of status rejections are taxonomically provided for in Article 13 (4) of Law no. 65/2016 when the subject does not meet the legal requirements, it has not submitted the documentation according to the procedure and requirements of the MHSP Instruction no. 602 dated 01/08/2018 or when the entity has submitted false information or documentation.

Just like with obtaining, the maintaining of the status is closely related to the inspection of the respective Ministry and the fulfillment of the reporting obligations of the entity at the Ministry. In the absence of fulfillment of legal or statutory obligations, Article 14 of Law no. 65/2016 stipulates that, the entity loses its status "when the social enterprise, at its own initiative, is addressed to a motivated request to the ministry responsible for social affairs; b) significant and/or repeated irregularities are observed in the activity of the social enterprise; c) the status is acquired through fraud, threats, bribery, conflict of interest, counterfeiting or any other act which constitutes a criminal offense; d) the social enterprise has ceased its activity for a period longer than 6 months or has been disbursed."

The verification of these cases is performed by the periodic inspection of the Ministry and the revocation of the status is declared upon a Decree of the Minister, accompanied by the filing of this

³⁵ *Instruction of the Minister of Health and Social Protection no. 602 dated 01/08/2018 "On the procedures and documentation necessary for obtaining the status of social enterprise"*

³⁶ *The Ministry has also approved a guide with a call for applications, a standard application formulation form for the entity and some information regarding technical assistance in order to design a successful application.*

³⁷ *In 2019 upon Decree no. 326 dated 12/04/2019 of the MHSP. An Evaluation Commission has been set up to evaluate the applications of entities for obtaining the status of "Social Enterprise".*

³⁸ *Point 5 and 6 of the MHSP Decree no. 602 dated 01/08/2018*

³⁹ *However, this Instruction does not state whether in this case we are in the conditions of tacit approval at the end of the mentioned deadline.*

decree in the special national register of social enterprises⁴⁰ within 3 days, in order for the latter to deregister the entity

Furthermore, Article 14 (5) regulates the consequences in assets arising from the loss of status of the relevant entity, in order to preserve the public interest, and it states that after the liquidation of creditors, the assets created during the maintenance of the status should be used for public interest or should pass to other social enterprises. This definition is a bit vague in terms of interpretation because even after the loss of status, theoretically, entities that can conduct social business and remain non-profit organizations that pursue social objectives (associations, centers, foundations). In our opinion, at this point the lawmakers refer to the possible direct subsidies obtained from the State Budget while maintaining the qualification as a social enterprise. However, the norm requires clarification as it may encounter interpretation problems in practice.

4. Problems Related to the Social Enterprise and Its Place within the Commercial Legislation

This legal regulation provided by law no. 65/2016 has raised many criticisms regarding some legal aspects but also clarity in its effective implementation.

Thus, in the light of the foregoing, the restriction of entities that can create a social enterprise only in non-profit organizations, whereas as mentioned above some of the social enterprises (such in content) are registered as business; the list of activities is restrictive in law; this law can be abused by businesses that are not social; there are no concrete documents that must be submitted to prove the fulfillment of these criteria (if for some categories it is easier to find the proof document, for other categories it is more difficult, for example the proof document for individuals with different gender and different sexual orientation).

Moreover, in a detailed analysis presented to the government in February 2019, at the end of a conference attended by a large number of Albanian and international civil society stakeholders presented to the state a Statement of social enterprises and support organizations in the country, which included issues related to the regulation and clarification of the legislation on social enterprises by proposing: a) Expansion of the legal framework "On Social Enterprises in the Republic of Albania" by qualifying as such not only non-profit organizations, but also other existing forms that operate in compliance with the basic principles of social entrepreneurship; b) Establishing fiscal incentives to enable social enterprises to make a sustainable contribution to their social mission; c) Creating financing opportunities beyond the fund in support of social enterprises; d) Inclusion of social procurement as part of public procurement based on European practice, as a direct opportunity to support the services and goods provided by these enterprises; e) Review of limiting conditions related to economic and social criteria for the functioning of social enterprises.

5. Conclusions

From the above analysis, in our opinion the lawmakers have rushed to define and limit the legal notion of social enterprise at the moment that they have excluded companies from the right to qualify as a social enterprise. Furthermore, the lawmakers vaguely defines the objective aspect of the activity of the social enterprise and moreover have drafted the law in such a frame that the only benefits of the social enterprises are the funds that are transferred on a competitive basis from the state, but they have failed to grasp the essence of the notion of enterprise as such, in commercial terms, and then its ancillary dimension as social.

EU legislation in this field has not been approximated correctly and this has led to the above

⁴⁰ Pursuant to Article 15, the national register is a public register and is kept by the Ministry responsible for social affairs in accordance with the MHSP Instruction no. 22 dated 04/01/2019 "On the creation of the register of social enterprises and the rules for its maintenance" which determines that the register is kept in electronic form and is a public register which contains data related to the establishment of the entity as an NGO, legal representative, field of activity, contacts, date of obtaining status, the active or passive status. The initial registration is made by the Ministry itself, whereas for any subsequent changes it is the obligation of the entity to notify the Ministry of eventual changes.

issues not being addressed correctly.

Regarding the descriptive analysis above, it is clear that a rapid intervention of the lawmakers is needed in order to regulate this legislation.

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