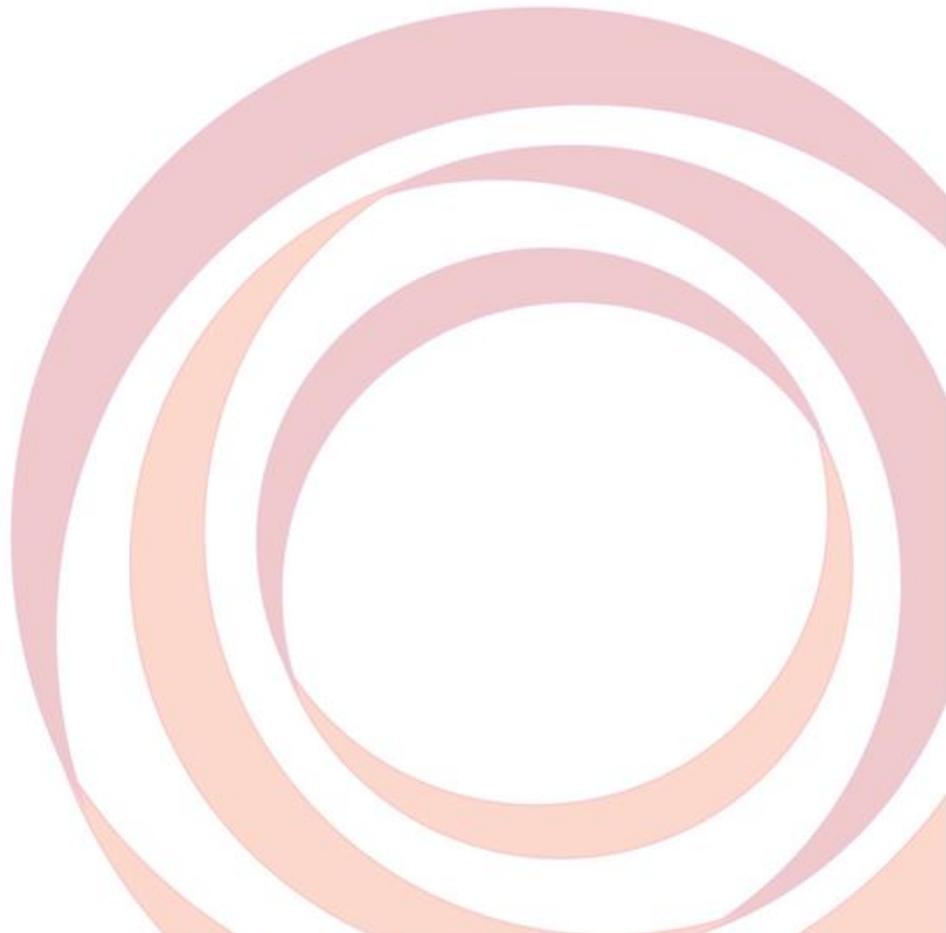




MALTA CO-OPERATIVE FEDERATION



Recommendations and comments
on the White Paper and the proposed
Social Enterprise Act





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Preface

Co-operative societies serve a social function. Article 20 of the Constitution of Malta recognises this and in fact the State encourages their development. Co-operative societies are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others. Co-operative societies have seven principles by which they put their values into practice. (ICA).

Social enterprise principles are practically identical to co-operative society principles. In addition, social enterprises **pursue social goals** by generating a substantial portion of income through **trade**. Profits or surpluses are **mainly reinvested** to better support the society's mission. The legal form that social enterprises are permitted to take is insignificant as long as they satisfy all the social enterprise principles.

Notwithstanding the similarities between social enterprise principles and co-operative society principles, the proposed legislation uses the limited liability company model as its "preferred" form of social enterprise. Creating a 'preferred' form of social enterprise, as the White Paper and accompanying Social Enterprise proposed Bill does, is discriminatory and may also be counter-productive. The White Paper does not explain the rationale behind the inequitable and discriminatory manoeuvre *in favour of* limited liability companies and *against* other legal forms of social enterprise. The Federation cannot but disagree with the decision to have any "preferred" type of social enterprise at all. The Act should comprehensively contemplate ALL legal forms of social enterprise and should treat them in the same manner.

The White Paper and the proposed Bill presented for public consultation are incomplete. This because the Regulations for limited liability companies are comprehensively considered, yet the Regulations that the Minister may prescribe, which may or may not allow **social co-operative enterprises** to be considered as social enterprise organisations are not included in the documentation provided. Because of this, the Federation was not in a position to comment comprehensively on the proposed legislation. Since the Act separates limited liability companies from all other forms of social enterprise, then as a minimum the enabling proposed subsidiary legislation regulating all other forms of social enterprise should have formed an integral part of this White Paper for scrutiny by stakeholders and interested parties.



It must be pointed out that the Federation's co-operative society members have long been discussing the issues at hand and therefore the comments being put forward in this document are the result of mature and thorough deliberation. Many of the Federation's contributors to this document are experienced co-operators who, through their work over many years have had hands-on experience with co-operative societies and social co-operative enterprises.

The Federation is participating in this consultation because it is committed to strengthening the Maltese legislation affecting co-operative societies and to supporting the creation and expansion of co-operative societies in all sectors in Malta, including the social economy. To this end, we look forward to participating in any meetings where social enterprise organisations are considered, in order to put forward the Federation's viewpoint and ideas.

The Federation has prepared this comprehensive document notwithstanding the discriminatory lack of funding from the Central Co-operative Fund since 2012. The Federation is indebted to all co-operators, Council Members and friends of the Federation who have generously and voluntarily made their invaluable contributions through discussion, research and ideas. This document is being made available also to the general public.

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1 Abolishing the ‘preferred’ Social Enterprise Company

1.1 Privileged class division between social enterprise organisations

The proposed Social Enterprise Act (SEA) **separates** limited liability companies from all other types of legal entities. Art. 18(3) of the proposed Act differentiates between the *social enterprise company* “SC” and *all other possible social enterprise organisations* “SO”. The White Paper does not give the rationale behind the need for this differentiation. However, this needlessly creates a division between a privileged (preferred) class and all other types of social enterprise.

The Malta Co-operative Federation (Federation) is objecting to the creation of a privileged class of social enterprise. From the moment it comes into force the Act should place the Regulator in a position to establish, in an unequivocally transparent way, whether or not *any* legal entity has the necessary qualifications to carry the Social Enterprise *label*.

The MCF recommends that the proposed Act do away with the preferred social enterprise *company* and should, throughout the whole text of the legislation, consistently consider social enterprise *organisations*, all of which should have an identical distinctive mark (i.e. SO).

1.2 Discrimination against already-existing social enterprises

The process required for the registration of a SC established prior to the coming into force of the SEA is laid out in Art. 6 while that for SOs is set out in Art. 7.

In the main, the same registration procedure exists for already-established potential SCs as for already-established potential SOs. However, unlike for SCs, Art. 7(4) imposes an *additional* registration procedural step for SOs, which, in the opinion of the Federation, is uncalled for. Subsidiary legislation would establish the additional registration procedure for SOs, which additional legislation has not been provided in this White Paper and therefore cannot be commented upon. The same registration procedure should apply to all already-established, potential social enterprise organisations.



Limited liability companies are governed by the Companies Act Cap 386. In a similar manner, co-operative societies are governed by the Co-operative Societies Act Cap 442. If the intention of the SEA is to facilitate the creation of genuine, *regulated* social enterprises, then, as a minimum, the main legislation (not the subsidiary legislation) must also cater for the registration and regulation of social *co-operative* enterprises. This must also include the elimination of the above-mentioned discriminatory additional registration procedural step for SOs.

1.3 Discrimination against potential social enterprises established after the coming into force of the SEA

The White Paper and the proposed SEA do not contain the Regulations the Minister may issue from time to time to allow social co-operative enterprises and other legal forms of organisations established after the relevant date, to be registered as social enterprise organisations, whereas in the case of SCs the proposed SEA pre-establishes registration conditions in the main legislation.

The SEA discriminates against all legal forms other than limited liability companies. The Social Enterprise Regulations for limited liability companies are clearly established in the SEA but the Regulations for co-operative societies and other legal forms of organisations are not similarly contemplated.

The Federation cannot comment on legislation which was not provided for public consultation. The Act should have the necessary legislative provisions for co-operatives societies as it has for limited liability companies. These should be enshrined in the main legislation and not in any subsidiary legislation which the Minister *may* amend at will.

In principle, the Federation is not in favour of different or ‘preferred’ types of social enterprises.



1.4 Proposing *one* Register for *all* Social Enterprises

Part VI of the proposed Act (Register of Social Enterprises) should in fact consider the Register of *all* social enterprises, yet the wording in the proposed Act deals solely with the method by which the Regulator shall maintain the data of SCs. Maintaining SO data is not contemplated.

The Articles in the SEA should deal with all types of social enterprises using the same method of data collection and retention of the same *single* register.

1.5 Legislative advantage for SCs to the detriment of SOs

Art. 8 of the proposed legislation gives SCs an advantage over SOs. For a social enterprise *company*, the Government, government departments, public agencies and entities controlled by government shall require *only* a Certificate of Registration issued by the Regulator as evidence of the SC's status and shall not require any further evidence of its existence or status when dealing with such a social enterprise *company*.

Art. 8 completely ignores the existence of SOs. The lack of specific regulation for SOs and in particular social *co-operative* enterprises may give rise to discrimination and abuse and is totally unacceptable to the Federation.



2 The internal consultation process of the White Paper

2.1 Co-operative societies and the White Paper document (June 2015)

Annex 1 of the White Paper document (June 2015) issued by the Ministry for the Economy, Investment and Small Business accompanying the Social Enterprise draft Bill deals with a number of issues concerning co-operatives, the Co-operative Societies Act Cap 442 and co-operative principles and values. At no stage was the Malta Co-operative Federation consulted during the internal consultation process which led to the drafting of this White Paper and the draft Bill.

2.2 Social Co-operative Enterprises 'for-profit' or 'not-for-profit' nature

The arguments raised in Annex 1 in the White Paper are misleading.

The Co-operative Societies Act Cap 442, was intentionally designed to be flexible enough to allow for various co-operative structures that would meet the members' economic, social and cultural needs and aspirations, including employment – Art. 21 of Cap 442. In this context, co-operative enterprises can be established as *for-profit* or *non-profit* or *not-for-profit* organisations. The well-known John Hopkins University definition of not-for-profit fits the profile of co-operative societies whose statutes pursue specific goals rather than profits. Non-profit co-operatives have surplus distribution constraints in their principles and statutes.

Co-operative societies, and therefore potential social co-operative enterprises, are governed by a set of principles and a robust regulatory structure imposed by the Co-operative Societies Act Cap 442. This Act was enacted on the basis of the *asset lock* principle. Co-operative societies **may** distribute their net surplus as established in Articles 92(1), 93(1) and 94(1) of Cap 442. Co-operative societies may choose **not** to distribute all or part of their surplus. The committees of management of co-operative societies determine the level of distribution of the societies' net surplus every year. Any undistributed surpluses become asset locked and cannot be distributed in subsequent years. Cap 442 enables the co-operative society to block all or a percentage of the distributions to its members through clauses in the co-operative society's statute.



The Federation is of the opinion that if any ‘preferred’ legal form for social enterprise is going to be considered at all, this should be the *co-operative democratic* model rather than the *capital based company* model. This notwithstanding, the Federation believes that the social enterprise label should be awarded to a social enterprise organisation irrespective of its legal structure, and always using the same yardstick.

2.3 Co-operative enterprises are viable capital based sustainable businesses

The comments made in Annex 1 may mislead the reader of the White Paper about the way co-operative societies operate.

Co-operative societies are businesses operating along commercial lines and are not dependent on handouts for their existence. Co-operative societies are capital-based businesses that conduct viable economic activities – Art. 23 of Cap 442. Whereas the SEA considers the introduction of feasibility studies at the registration stage for any social enterprise, co-operative societies – unlike limited liability companies - are **already obliged** by Cap 442 to present to the Co-operatives Board a viable feasibility study as part of their registration process. This determines whether or not the co-operative society is planning to operate unequivocally at a profit.



3 Similarities between social enterprise and co-operative society principles

3.1 The social enterprise model

The White Paper quotes the European Parliament A6-0015/2009 which states that social economy enterprises can be defined by the characteristics and values that they share:

- primacy of the individual and the social objectives over capital;
- defence and implementation of the principles of solidarity and responsibility;
- coincidence of the interests of user members and the general interest;
- democratic control by members;
- voluntary and open membership;
- self-management and independence of public authorities;
- mobilisation of the bulk of surpluses in pursuit of the aims of sustainable development, the interests of services to members and the general interest.

3.2 The co-operative enterprise model

The Co-operative Societies Act Cap 442 obliges all registered co-operative societies to follow the seven principles of the International Co-operative Alliance adopted in 1995. These state that co-operatives must put their values into practice through:

i. Voluntary and Open Membership

Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

ii. Democratic Member Control

Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.

iii. Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property



of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

iv. Autonomy and Independence

Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

v. Education, Training and Information

Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public - particularly young people and opinion leaders - about the nature and benefits of co-operation.

vi. Co-operation among Co-operatives

Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

vii. Concern for Community

Co-operatives work for the sustainable development of their communities through policies approved by their members.

3.3 Limited liability company model lacks social enterprise principles

A comparison of the lists of principles in 3.1 and 3.2 clearly shows that the social enterprise model and the co-operative society model are practically identical. Yet there are hardly any similarities between the principles and characteristics governing limited liabilities companies – the “preferred” social enterprise throughout the White Paper - and those governing the social enterprise model. This leads the Federation to ask which of the social enterprise model characteristics and principles listed in 3.1 are also considered by the legislator to be shared by limited liability companies.



3.4 No democratic control principles required for social enterprises *companies*

The proposed SEA makes no specific reference to, or imposition of, any form of democratic control mechanism by members in a social enterprise company. Annex 1 states that this was in fact the deliberate choice of the legislator. Therefore SCs would be at liberty to operate undemocratically and to the detriment of their members' control and participation in the decision making process. This would not be in line with the definition of social enterprises of the European Parliament A6-0015/2009.

One of the characteristics of the social economy is that ownership rights are assigned democratically to the stakeholders rather than to investors. Significant emphasis is placed on democratic stakeholder involvement and participation. Social economy organisations tend to give precedence to people and labour over capital, thus preserving employment and quality of service through democratic decision-making processes (European Commission 2013: Andor, Barnier & Tajani).

The fact that this democratic principle has been set aside in the proposed legislation is of great concern. The Federation is against the decision to eliminate member democratic control in social enterprises because it is one of the major pillars upon which social enterprises are founded. This principle is in fact one of the international fundamental characteristics and values of social enterprises and should be a *sine qua non*.

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