

Tax law in the light of civil law : a positive and prospective study of the Belgian income taxation for social enterprises

Sabine GARROY

6th EMES-CNRS-COST International Training School

Group 3 – SE at the international level

21 JUNE 2018 – Marseille, France

Plan

1. Research question(s)
2. Theoretical framework
3. Research plan
4. Methodology
5. Findings
6. Questions / issues

1. Research questions

A. Starting point

B. Defining research questions

A. Starting point

- Europe 2020 : european strategy and the central role of social entrepreneurship
- + OECD: “appropriate *legal* framework” appears necessary
 - “if social enterprises (**SEs**) are taxed like commercial enterprises, this can, in the long run, threaten their viability”
- Direct taxation = last lever remaining at the disposal of the member States for the regulation of their economy (see *infra*)
- Starting hypothesis: system of income taxation must associate social enterprises & lower tax burden in comparison with other enterprises (= “appropriate *fiscal* framework”).
- Study of the Belgian case: does this framework exist? If not, how could it be implemented?

A. Starting point

- "appropriate *fiscal* framework" = required
- Value judgement...
- ... not personal
- Methodological Orientation: Theories of Law
 - *i.a.* N. Thirion, « Que peut la doctrine en droit des sociétés (et ailleurs) ? », *R.P.S.*, 2017, liv. 1, pp. 3-4.

B. Defining research questions

- Taxation is not alone
- « Interdependence of all branches of law » (E. Krings)
 - Dependence/independence
 - Principle : Tax law is grafted onto institutions of civil law
 - Exception: Tax law deviates from institutions of civil law
 - Interdependence
 - Tax law can also influence civil law
- Our study = illustration of interactions between ***civil law*** and ***tax law***

2. Theoretical framework

- Social enterprise
- Civil law
- Tax law
- Reference standards

- ***SOCIAL ENTERPRISE*** =?

- EU “operational definition” (EMES network & European Commission)

- Belgian social enterprises= ?

- Tools:

1. Mapping exercises
 - two belgian reports (2014 and 2016)
2. Barometer of social enterprises (2016)

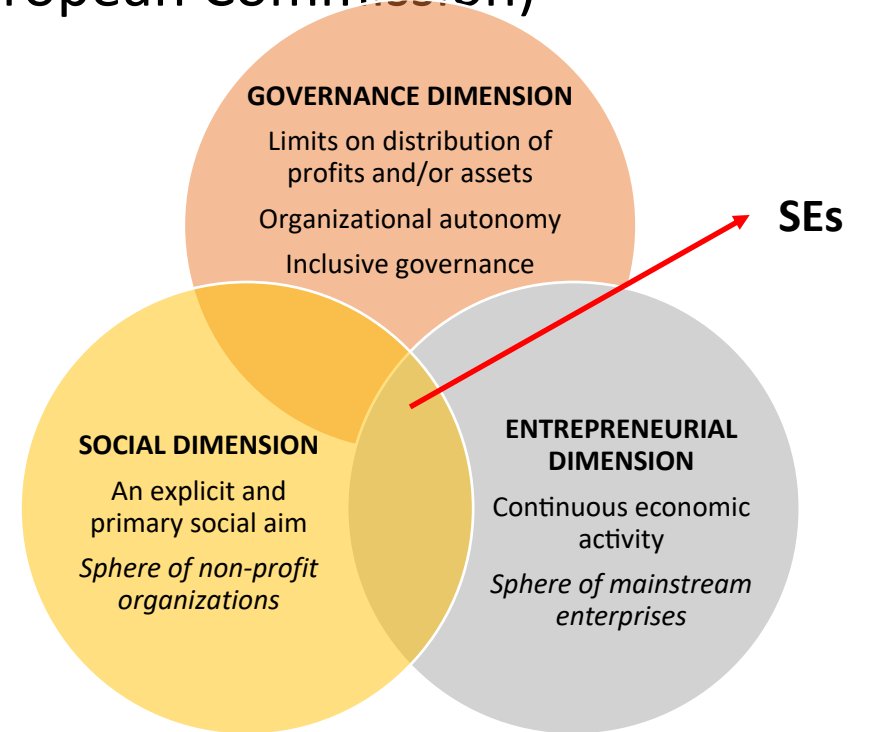
- Chosen social enterprises :

NON PROFIT
ASSOCIATIONS

ACCREDITED
COOPERATIVES

SOCIAL PURPOSE
COMPANIES

FOUNDATIONS



- ***CIVIL LAW***

- “Legal speciality principle” : legal restrictions on the capacity of the legal entity (through activities or/and purposes)
- “key elements” of civil law – link between legal speciality principle and the three dimensions of EU definition

- ***TAX LAW***

- Attention drawn to the income taxation system for the operating SE (see slide 4)
- ><indirect taxation (value added tax – hereafter VAT –, registration fees, inheritance taxes)
- ><incorporation and liquidation of the entity (except: allocation of the liquidation bonus)

- **Reference standards**

Civil law

1) Can the social enterprise carry out an economic activity?

2) What are the rules that limit the purpose that can be pursued??

3) Are there any asset-lock mechanisms?

Tax law

1) How is the economic activity exercised apprehended by the tax law ?

2) Does the purpose of the entity have an influence? ?

3) Does the existence of asset-lock mechanisms have an influence?

3. Research plan

- A. Initial plan
- B. Mandatory evolution of the plan
- C. Final plan

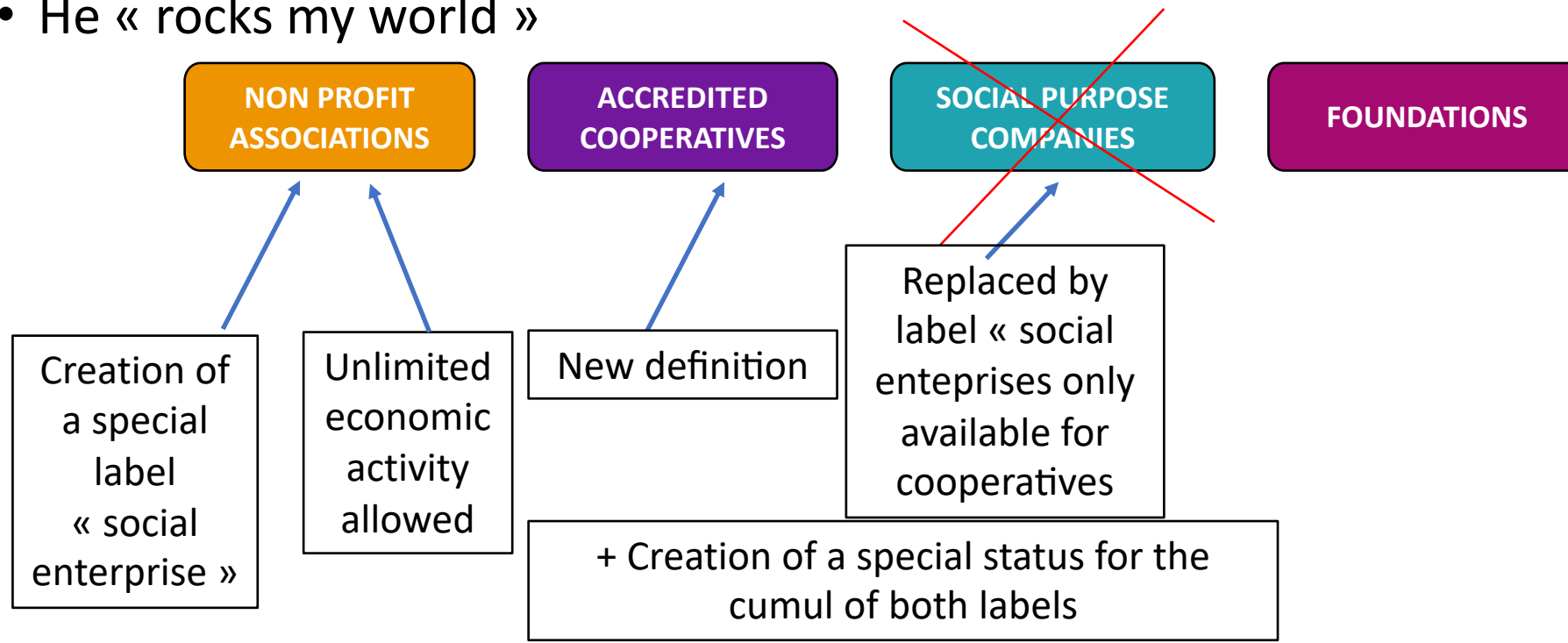
A. Initial plan

- Two parts (« à la française »)
 - Part 1: *de lege lata*
 - Does the appropriate fiscal framework exist in Belgium ?
 - Part 2: *de lege ferenda*
 - If not, how could it be implemented?

B. Mandatory evolution of the plan



- But...Politic and legislative actuality
 - « Jump to the law of tomorrow »
 - Koen Geens as the new Napoleon
 - He « rocks my world »



C. Final plan

- Part 1: Descriptive - Does the appropriate fiscal framework exist in Belgium ?
⇒What are the interactions between the tax law and the civil law?
- Part 2: Hybrid - Will the appropriate fiscal framework be put in place « tomorrow »?
 - A. *Describe* the future civil law
 - B. *Imagine* the consequences on the current tax law (no tax reform in the pipeline)⇒What relations will be maintained between the tax law and the civil law?
- Part 3: Prospective - Scenario : belgian legislator wants to create « appropriate fiscal framework »
 - A. Propose several options to rebuild tax law
 - B. Highlight constraints to respect⇒ What relations could be maintained between the tax law and the civil law?

4. Methodology

- Preliminary part: theoretical framework – **economic literature**
- First part – Three stages :
 - A. *Describe* the current tax law (so complicated)
 - B. *Understand* the current tax law
 - **historical approach** (since the schedular system of 1919)
 - C. *Explain* the current tax law
- Second part:
 - Civil reform => No tax reform in the pipeline...
 -But civil reform can have consequences on tax law (because of the relations between both rules)

- Third part: What relations could be maintained between the tax law and the civil law?
 - Options
 - Option 1: links maintained => taxation considering affectation of ressources (>< sources in the current system)
 - Option 2: autonomy => comparison with Value Added Tax (distributive logic)
 - Constraints
 - Competences ;
 - Legality;
 - Equality and non discrimination;
 - Etc.

5. Findings

First part (1): Does the appropriate fiscal framework exist in Belgium ?

- NO

- Income taxes – 4 categories including :

- a tax on the total income of resident companies, called "corporate tax" (CT)
- a tax on incomes of legal persons other than companies, called "tax on legal entities" (TLE)

- For the selected entities, TLE applies in competition with CT

- Important notice : "one taxpayer, one tax" policy (>< mixed of/and partial liability for VAT)

- Big differences between these two tax regimes (*i.a.*) :

	CT	TLE	TLE versus CT
TAX BASE	active and passive income	only passive income	LIMITED BASE
RATES	Proportional rate: 29.58% (unless reduced rates)	Specific rate for each income (generally lower than CT rate)	LOWER RATES

- But : other features may make the TLE regime heavier than CT (*e.g.* no imputability of withholding tax for TLE taxpayers)

⇒ First conclusion: no appropriate framework because the current system cannot achieve this goal

First part (2): Does the appropriate fiscal framework exist in Belgium ?

- NO
- Since 1976, the logic is “same activity, same tax regime”
- No political will

⇒ Second conclusion: the current system can not achieve this goal because there is no will to put it in place

Second part: an appropriate fiscal framework for Belgium tomorrow ?

- NO :
- The conclusions for the actual regime stay valid:
 - No political will
 - No technical capacity
- The situation will be worse than ever :
 - Political will: fiscal neutrality
 - Practical result: more SEs submitted to CT, to a regime wanted as less favorable

Third part (unfinished): belgian legislator wants to create « appropriate fiscal framework »

- Focus on State aid law
 - Principle : national sovereignty for income taxation...But:
 - State aid law : specific tax measures are in principle prohibited
 - State aid law = application of equality and non-discrimination principle
 - Important for SEs : if SEs are *different* from other enterprises, they have to be treated *differently* !
 - Case law – ECJ, 8 September 2011, C-78/08 to C-80/08, n° 61 *Paint Graphos* (italian cooperatives)
 - *“In the light of those special characteristics peculiar to cooperative societies, it must therefore be held that producers’ and workers’ cooperative societies such as those at issue in the main proceedings cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies – provided, however, that they act in the economic interest of their members and their relations with members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance.”.*

6. Questions/Issues

- **Third part (unfinished):**

- **Next steps ?**

- Hypothesis : define specific public policy for SEs seems possible if *specificity* of social entrepreneurship is recognised

- Utility of comparative law

- Presence of definition, label,...

- ...conditioning « appropriate fiscal framework »...

- ...in other EU countries (facing the same EU constraints)?

- ⇒Countries ?

- ⇒Method ?

- ⇒Comparability (context)?

- **But : end of the PhD story**