

# THE INTEREST IN CREATING A NEW LEGAL CONCEPT: LIMITED LUCRATIVITY

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# The starting point of this study :

- Launched and supported by MGEN



- The original question : what does it mean to be non-profit-making or not-for-profit under european union law ?

# 1) The concept of « non-profit-making » under European Union law

## a. The concept is rarely used

Even European work on draft statutes for social economy enterprises makes little reference to the non-profit aim, which is inherently intrinsic to them.

# 1) The concept of « non-profit-making » under European Union law

b. The reference to non-profit-making in **Article 54 TFEU** establishes a restrictive reading of non-profit-making

Art. 54 TFEU defines two categories of organizations :

- on the one hand companies under civil or commercial law, which includes cooperative societies,
- and on the other hand, those companies that do not seek profit (*« save for those which are non-profit making »*)

# 1) The concept of « non-profit-making » under European Union law

## Opposition between

1/ **economically disinterested** (non-profit) entities : entities that do not make any profit because they transact no monetary exchanges (free provision of services)

2/ **companies engaged in remunerated economic activities** : undertakings that make a profit, whether or not they distribute it.

# 1) The concept of « non-profit-making » under European Union law

- ⇒ There is a binary classification in force in EU law
- ⇒ Confirmed by others texts and decisions of the Court of Justice (lastly in Court decision FALCK of march 2019, C- 465/17) : “non-profit making” notion concerns only disinterested organizations.
- ⇒ Thus, in European Union law, associations, mutual, cooperatives and foundations that supply goods or services in return for remuneration **are characterized as "for-profit" enterprises**

## 2) The effects of European law attached to the non-profit character under the law of a Member State

**A statement : not-for-profit basis is not a feature integrated into EU law ...**

- The fact that an entity is designated as a non-profit or not-for-profit entity under its national law is never decisive for the application of Union law.
- European competition law, in particular antitrust and state aids rules, applies equally to all companies whether they pay dividends or not, whether they are « not-for-profit » or lucrative, in the national definition.
- The only valuable and operational criterion is the economic activity that supposes to provide good or services on a market.

## 2) The effects of European law attached to the non-profit character under the law of a Member State

**For-profit basis is not a feature integrated into EU law ... And there are very few exceptions, particularly for ethical and economic reasons**

- **"Gambling in Sweden" (2010): Ethical or moral reasons** have been admitted by the Court of Justice to justify an economic activity being reserved for non-profit-making bodies.

## 2) The effects of European law attached to the non-profit character under the law of a Member State

=> The "for-profit" company is the reference, the standard in EU law

There is some contradiction with article 345 TFEU : the Treaty is neutral on the property regime in the Member States.

What can be done then ?

### 3) The interest in creating a new legal concept : limited lucrativity

For a legal recognition of the difference between the enterprises of social economy and the enterprises whose objective is to share the benefits with the owners of the company is possible.

## 3) The interest in creating a new legal concept : limited lucrativity

**Three levels** of "lucrativity" would be legally recognized, reflecting the economic reality of entities operating in the EU:

- The "non-profit" or "disinterested" organization that makes no profit because it produces non-market goods or services (no money exchange)
- **The "limited lucrativity " enterprise (the new legal reality)** whose primary purpose is not to make profits but, if it produces them, has no right to distribute them to the owners (the profits are used for equity or to invest).
- The "for-profit" enterprise, which aims to maximize profits for distribution to the company's owners (in the form of dividends or share buybacks).

### 3) The interest in creating a new legal concept : limited lucrativity

The way has been opened by several European institutions.

- 1) by the **European Court of Justice** : in the *Paint Graphos* judgement in 2011 (cases C-78/08 to C-80/08)
- 2) by the European Commission and the Parliament through the notion of “Social enterprise”

### 3) The interest in creating a new legal concept : limited lucrativity

Definition of social enterprise in Regulation n. 1296/2013 on employment and social innovation:

*'social enterprise' means an undertaking, regardless of its legal form, which:*

*uses its profits first and foremost to achieve its primary objective and has predefined procedures and rules covering any distribution of profits to shareholders and owners that ensure that such distribution does not undermine the primary objective*

### 3) The interest in creating a new legal concept : limited lucrativity

There is a need to go beyond the limited approach of « social enterprise »



**Introducing the concept of limited lucrativity into European Union law**

This concept would **define companies likely to make profits or surpluses from their activity but which do not have as their main purpose to distribute them to their owners.**

### 3) The interest in creating a new legal concept : limited lucrativity

Description	Proposed qualifier
<b>A: The undertaking cannot make a profit</b>	Known as “non-profit” organization.
<b>B: The undertaking can make a profit, but it does not distribute it as a benefit that would increase the wealth of its members</b>	Known as “limited lucrativity” (new) undertaking.
<b>C: The undertaking can make a profit and distribute it to its owners</b>	Known as “for-profit” undertaking.

### 3) The interest in creating a new legal concept : limited lucrativity

*A new notion that would create rights :*

- **Operational**, this new notion in European Union law would allow the application of specific rules in the field of competition law and / or taxation, public procurements...
- **Fair**, it would restore the balance of competition with for-profit enterprises which do not have the same constraints on access to capital as companies with limited profitability.
- **Political**, it would allow the recognition of the social economy enterprises which, despite their economic weight and their societal utility, are the forgotten ones of European law.

## 3) The interest in creating a new legal concept : limited lucrativity

### **Some concrete proposals :**

1. Draft a political communication from the European Commission on the diversity of forms of entrepreneurship in Europe and the promotion of social economy;
2. Adopt a protocol on the diversity of forms of entrepreneurship in the European Union, annexed to the TFEU;
3. Extend point 5.4.1 of the Commission communication on the notion of State aid referred to in Article 107 (1) TFEU to other entities of the social economy than cooperatives
- 4 Draw up guidelines on the room for manoeuvre available to Member States to adapt taxation to social economy enterprises, while respecting State aid law;
5. Draw up guidelines on the proper use of Directive 2014/24 on public procurement adressed to social economy enterprises and contracting authorities.
6. Amend Article 54 TFEU to introduce the notion of limited lucrativity;

*THANK YOU FOR YOUR ATTENTION !*