

Proposed framework for a Luxembourg “Société d’Impact”

I. Context

The last years witnessed the emergence of “social enterprises” filling the gap between traditional for-profit companies and the world of charity.

Two categories of “social enterprises” were identified by the European Commission:

- Enterprises that provide goods and/or services of a social nature to a vulnerable public and/or;
- Enterprises that pursue the objective of integrating marginalized or excluded people in their production activity, whether or not this is of a social nature.

While the Commission restricts its scope to companies pursuing a social objective, we believe that companies active in the area of sustainable development, and particularly those in the ecological sector, should also be considered.

It is also believed that social entrepreneurship should go beyond borders of the European Union to allow developing economies to benefit from these investments.

II. Lack of specific legal regime in Luxembourg

In the current context, neither not-for profit structures nor commercial structures can fully satisfy the specific needs of “social enterprises”.

The proposal for a regulation on European Social Entrepreneurship Funds (EU SEFs) voted by the European Parliament in June 2012 confirms both the opportunity and the urgency to set up a legal regime adapted to “social enterprises”, in particular, but not only, as investment targets for the EU SEFs funds mentioned above.

Luxembourg benefits from major assets such as: (i) a social policy that gives priority to social economic players; (ii) a very active policy of cooperation for development; (iii) a leading position in the field of microfinance, and (iv) a philanthropic sector undergoing significant expansion.

Furthermore, the government’s 2009 programme had already initiated reflections on the creation of a new status for companies in the social economy.

The observations above justify taking action to: (i) recognize the specific characteristics of an economic model, the prime objective of which is to have a significant and measurable social and environmental impact, and (ii) improving access to financing, thus allowing a better integration of social economy in our economy.

III. Filling in the gap: the “Société d’Impact”

We propose to fill in this gap by creating a legal framework for a so-called “Société d’Impact”. This framework aims to address identified legal barriers and create a highly unique instrument that could bring together, within the same entity, various types of financial resources, such as:

- (i) Capital from private investors whose main objective is to achieve a social impact and who do not particularly seek a financial return on investment (though they may want to be able to recover the nominal amount of the invested capital);
- (ii) Capital from private investors who are, in principle, seeking a financial return on their investments but who accept that this return be conditioned by the achievement of social impact in the first place;
- (iii) Capital from public sources as well as possibly philanthropic funding aiming to achieve a social impact.

Fundamentally this structure requires that investors share a common interest: achieving an agreed upon social impact. Investors seeking a return on investment will have to accept the inherent risks linked to these types of investments, notably the possibility of not being remunerated if the social impact is not achieved (or until it is achieved).

A “Société d’Impact” will have the legal status of one of the commercial companies provided for in the Luxembourg law of 10 August, 1915 and will be granted a specific “label” if it meets pre-defined eligibility criteria. Ideally the relevant authority granting the Label will be independent. The “Société d’Impact” will have to provide substantial information to the relevant authority on a) its impact objectives, b) key performance indicators applied, and c) social/environmental measurement tools. Furthermore it will be required to produce an extra-financial annual report. Regular controls and monitoring will be carried out by the relevant authority to ensure that the “Société d’Impact” continues to comply with the eligibility criteria over time. As well as a financial audit, a social impact audit will also be required.

The distinguishing feature of a “Société d’Impact” is that it will be able to issue both impact shares and traditional for-profit shares. Articles of association and other constitutive documents can only be modified if a majority of impact and for-profit shareholders agree to do so. From a tax point of view, income attributable to traditional for profit shares will be subject to standard taxation, while income attributable to “impact shares” will remain in the company and will be reinvested in impact activities.

It is worth noting that the risk of commercial companies purposely misusing the “Société d’Impact” has been addressed as this structure is considered as a regular commercial company that does not offer any additional advantages for investors purely seeking a financial return on investments.

The “Société d’Impact” status will not only be of interest for social enterprises willing to gain access to private investors but also to philanthropic or public fund providers, as it overcomes restrictions and difficulties, e.g. administrative or tax-related concerns, which traditional companies encounter.

The proposed framework goes beyond the scope of the European Commission’s proposal and its outcome should not be considered as solely linked to it.

We believe that a legal framework tailored to the actors of the “social economy” will pave the way for further international actions, positioning Luxembourg as an attractive place for “social economy” and impact investing in Europe.