

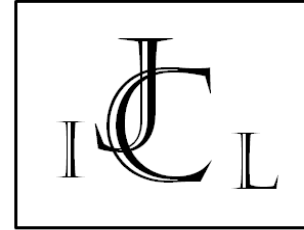


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The International Journal of Cooperative Law (IJCL) is a peer-reviewed, open access online journal, founded by Ius Cooperativum in 2018. It is the first international journal in the field of cooperative law. It aspires to become a venue for lawyers, legal scholars and other persons interested in the topics and challenges that the discipline of cooperative law faces.



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Foreword/Editorial

Dear Readers

Michel Serres, in his 2009 book ‘Temps des crises’ [Times/time of crises] considers the roots of the word ‘crisis’ and unravels how the then widely used term ‘financial crisis’ was a misleading label for the real crisis - created by a pensée unique, a one-track thinking, in economics and in law. He explains, “Si vraiment nous vivons une crise, en ce sens fort et médical du terme, alors nul retour en arrière ne vaut [If we are in a crisis, in the full sense of the word, no turning back is possible].

Serres’ insight was very much present during the preparatory works which led to the decision of the General Assembly of the United Nations in 2009 to declare 2012 the International Year of Cooperatives. Can it guide us out of the health crisis caused by the COVID 19 pandemic? Talk of a ‘new normal’ is on the lips, pencils and computer keyboards of politicians, academics, journalists, influencers and others. But what will *the* ‘new normal’ be? Once herd-immunity is achieved through natural selection and/or vaccination, will it mean a return to the old normal, labeled ‘new’ because the pandemic has deprived us of the ‘old’ for some time? Or will we strive for a ‘radically different’ normal, an other normal, perhaps without some of its homogenizing aspects/effects, allowing perhaps for many and diverse ‘normals’?

The difference between the current crisis and the global financial turmoil, understandably and necessarily, multiplies our appeal to solidarity - to assume responsibilities toward other persons or countries that go beyond philanthropy. Back to the roots: legal ‘obligationes in solidum’ are related to ‘the whole’, or ‘the entirety’. Not only financial interests - but also social and cultural ones; not only individual interests - but also those of the wider community, not only human interests - but all interests that make up the biosphere are to be considered. The pandemic has once again made it obvious that we live in a global world. The legal challenge that we still need to address is ‘how to institutionalize solidarity through law in cooperatives and other organizational types’ in this global world.

We hope that the pandemic will not be a reason to understand cooperatives once more as part of the recipe in a ‘temps de crise’, but rather that they will become part of the ‘new normal’. Your continued interest in our endeavor to publish an international journal of cooperative law, the IJCL, is reason to be optimistic and we hope that you will find the contributions to this issue useful, thoughtful and critique-provoking.

Articles- ANETA SUCHOŃ opens this section with her article on “Cooperatives in the process of developing the multifunctionality of rural areas in Poland – selected legal issues”. She examines the development of various cooperative types in the rural areas of Poland and assesses whether the current legislation is an enabling factor for such development or if certain improvements are needed. Under the title “Standardization of cooperative law in Africa: a comparative analysis between the OHADA Uniform Act Related to Cooperative Societies and the East Africa Community’s Co-operative Societies Bill”, WILLY TADJUDJE introduces the reader to the particularities of the African cooperative legislation by comparing two supranational acts on cooperatives, in particular the respective processes of their elaboration. In his article on “The Greek anti-paradigm: how legislation on agricultural co-operatives

caused their failure”, MICHAEL FEFES discusses negative impacts of cooperative law on agricultural cooperatives in Greece and he comments on the most recent agricultural cooperative law, Law no. 4673/2020. YIMER A. GEBREYESUS, in his article on “Saving and credit cooperative societies in Ethiopia: a quest for comprehensive laws”, elaborates on the shortcomings of the current Ethiopian cooperative legislation and argues in favor of an appropriate legislation on saving and credit cooperative societies to address the issue of financial exclusion.

Cooperatives and Other Fields of Law – In this special section you will find an article on “Cooperative relationships and French and European competition law” by SOPHIE GRANDVUILLEMIN where she explores the relationships between cooperative societies and their members under the aspect of competition law.

Legislation – THIERRY TILQUIN, JULIE-ANNE DELCORDE & MAÏKA BERNAERTS in their article “A new paradigm for cooperative societies under the new Belgian code of companies and associations” examine and comment on recent developments in legislation on cooperatives in Belgium. It is followed by an article on “Basque legislation on cooperatives in light of the new Basque cooperative law” written by AITOR BENGOETXEA ALKORTA and ITZIAR VILLAFÁÑEZ PÉREZ.

Court Cases This section is empty. Disputes and contested issues related to cooperative law are rare, which we might take as a positive sign. But they do exist. Their discovery and inclusion in the IJCL is a challenge that remains to be addressed.

Book Reviews - HAGEN HENRY shares his thoughts and comments on Christian Picker’s “Genossenschaftsidee und governance [The cooperative idea and governance] in which the specific cooperative governance model found in German cooperative law is analysed and he also reviews Georg Miribung’s “The agricultural cooperative in the framework of the European Cooperative Society” which discusses and compares issues of cooperative governance and finance in Italy and Austria and the applicable law for the establishment, governance and the financing of agricultural European Cooperative Societies in these two countries. *Book Announcements* has been added to the section “Book Reviews” to provide authors a space to present recent publications of their work. LEONARDO RAFAEL DE SOUZA and JOSÉ EDUARDO DE MIRANDA provide us with a brief presentation of their book on “Cooperative law and cooperative identity”, which examines the relevance of the cooperative identity for the law from a practical perspective.

Events – In this section DANTE CRACOGNA summarizes the main conclusions drawn from a webinar on “Cooperative law and the pandemic”. In addition, DANTE CRACOGNA and HAGEN HENRY share their thoughts on the session on “Cooperative law” on the occasion of the International Cooperative Alliance European Research Conference held at Berlin on August 21-23, 2019 and on the Continental Congress on “Cooperative law” held at San José/Costa Rica on November 20-22, 2019.

Practitioner’s corner - CLIFF MILLS, in an article titled “A study of indivisible reserves in cooperatives in EU Member States”, examines how indivisible reserves are dealt with by the co-operative legislation in these countries. JOHN EMERSON and JEFFREY MOXOM provide some preliminary remarks on the development of the “Legal Framework Analysis” by the ICA under the title of “Legal Framework Analysis and the ICA-EU Partnership: an update on ensuring a level playing field for people-centred organisations”. With his thoughts on “The contribution of cooperative banks and banking to social

market economy for Europe – moderation of capital ‘market and competition’” HOLGER BLISSE builds a case in favor of the inclusion of cooperative specific provisions for the reserves of former members in order to enable cooperatives to act as moderators in a market- and competition-driven economy. Finally, in this section, ANN APPS in her piece titled “Why Australia’s co-operative national law is not really a ‘national’ law” explains that while most of the Australian states and territories have adopted a model template law known as the ‘Co-operatives National Law’, it has taken almost eight years to achieve a consistent law, but the differences between the administrative regimes for co-operative law in each of the states and territories means that it is not a uniform national law on co-operatives.

Last, but not least, we have again interviewed an eminent cooperative lawyer. In this issue, PROFESSOR DR. ISABEL GEMMA FAJARDO GARCÍA shares with us her thoughts on key points of the development on cooperative law.

Again, we owe thanks to all those who have supported us – in solidarity: the authors, the peer reviewers, the proof-readers, and the members of the Advisory Board!

November 2020

Ifigeneia Douvitsa, Cynthia Giagnocavo, Hagen Henry, David Hiez and Ian Snaith

Articles

COOPERATIVES IN THE PROCESS OF DEVELOPING THE MULTIFUNCTIONALITY OF RURAL AREAS IN POLAND – SELECTED LEGAL ISSUES

Aneta Suchon¹

Abstract

The purpose of this paper is to indicate the different kinds of cooperatives in rural areas and the factors that have influenced the progress of such entities in Poland, as well as how cooperatives affect the development of agriculture and rural areas. The paper also considers whether legal regulations facilitate or hinder the setting up and functioning of cooperatives, from the perspective of multifunctional agriculture and rural development in Poland. Problems concerning both cooperatives and multifunctional rural development are broad. Therefore, only selected issues are addressed. The paper begins with general information about the multifunctionality of villages and the sustainable development of rural areas, followed by a short history of the development of cooperatives in Poland. The paper then turns to the contribution of cooperatives to the development of agricultural activity most popular in rural areas. The types of cooperatives considered include agricultural production cooperatives, cooperative groups, organizations of agricultural producers, and farmers' cooperatives. There is also a focus on social cooperatives and energy cooperatives and their contributions to multifunctionality of rural areas. What is observed is that legal regulations concerning the organisation and functioning of agricultural cooperatives are being extended. The political transformation, the principles of the market economy and the acquisition of EU membership have resulted in the legislator becoming more focused on the association of agricultural producers selling agricultural produce and supporting other stages of agricultural activity. This is an important activity of cooperatives in the process of developing the multifunctionality of rural areas in Poland. The discussion presented in the article has confirmed that social cooperatives have been functioning in the Polish legal system for a relatively short time, but they are becoming increasingly popular as effective tools of social economy in rural areas. The author underlines that such entities are especially needed in villages, where the unemployment rate is very high, and the ways of supporting

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excluded and disabled people are limited, when compared with cities. The author concludes that further changes in legislation are necessary for the continued process of developing cooperatives and the multifunctionality of rural areas.

1. Introductory remarks

Rural areas are an important part of the European Union. More than 56 percent of the population of the 27 Member States live in rural areas.² But only some of these people are involved in agriculture; through running a farm as an owner or a possessor, or through being a household member or a contractual employee.³ Cooperatives associated with agriculture or related sectors have been operating for many years in rural areas, sometimes from as far back as the 19th century. They provide essential services to the rural population including improved infrastructure, renewable energy, and cultural development. The income of village inhabitants is often lower than the income of the city dwellers.⁴ Cooperatives help by providing assistance to excluded or disabled people, for whom opportunities are limited compared with the city.

There are more than 3,500 cooperatives operating in rural areas in Poland. They include milk cooperatives, cooperatives associating agricultural producers, supply and sales cooperatives such as “Samopomoc Chłopska” (Peasants’ Self-Help), and social cooperatives. In recent years, social cooperatives have become increasingly popular. The social cooperative is a new type of economic entity, which operates under the Act of 27 April 2006 on social cooperatives,⁵ and entities of this kind are increasingly popular not only in cities but also in rural areas. These entities often deal with services, or manufacturing or building activity. Some are also engaged in agricultural activity connected with breeding or plant growing, often specializing in ecological agriculture. Currently, there are more than 1000 registered cooperatives of this type in Poland. Some of them operate in rural areas.⁶

This paper explores the different kinds of cooperatives in rural areas and the factors that influenced their progress in Poland. It also considers how cooperatives have affected the development of agriculture and

² Eurostat regional yearbook 2017 edition, <https://ec.europa.eu/eurostat/documents/3217494/8222062/KS-HA-17-001-EN-N.pdf> [access date: June 2019].

³ For example, employed under a civil law contract (contract of mandate, contract of specific task) or an employment contract.

⁴ See e.g. R. Gallardo-Cobos, *Rural development in the European Union: the concept and the policy* “Agronomía Colombiana” 2010, no 28(3), pp. 475-481; S. Mhembwe E. Dube, *The role of cooperatives in sustaining the livelihoods of rural communities: The case of rural cooperatives in Shurugwi District, Zimbabwe*, “Journal of Disaster Risk Studies” 2017, no 9(1), p. 341.

⁵ The first regulations on these cooperatives were adopted under the Act of 13 June 2003 on social employment (Journal of Laws, No. 122, Item 1143, as amended). The next stage was to adopt the Act of 27 April 2006 on social cooperatives (Journal of Laws, No. 94, Item 651). In the matters not regulated under this Act, the provisions of the Act of 16 September 1982 on Cooperative Law apply.

⁶ A. Suchoń, *Legal aspects of the organization and operation of agricultural cooperatives in Poland*, Poznań 2019, p. 8 et seq.

rural areas. The aim of this paper is to determine whether legal regulations facilitate or hinder the setting up and functioning of cooperatives, from the perspective of multifunctional agriculture and rural development in Poland.

Problems concerning both cooperatives and multifunctional rural development are broad, so only a few selected issues are addressed. The paper begins with general information about the multifunctionality of villages and the sustainable development of rural areas. This is followed by a short history of the development of cooperatives in Poland. The paper then turns to the contribution of cooperatives to the development of agricultural activity in rural areas, including agricultural production cooperatives, cooperative groups, organizations of agricultural producers, and farmers' cooperatives. This is followed by a focus on social cooperatives that provide jobs for people living in the countryside, where unemployment is highest. Energy cooperatives contribute to the development of renewable energy in rural areas and a definition is also provided. The basic research method used involves the analysis of normative texts, which is a characteristic feature of a lawyer's work.

2. General information about the multifunctionality of villages and the sustainable development of rural areas

The importance of the concepts of multifunctionality of villages and the sustainable development of rural areas are not doubted. These concepts aim to support diverse business activity in these areas, creating new workplaces, improving living conditions, and providing residents and businesses with access to a wide range of services or modern infrastructure. They also help to ensure the development of the social and cultural functions of the village, which helps the perception that rural areas are attractive places to live and work.⁷ The concepts also help the excluded and the disabled, since rural areas offer them fewer opportunities to develop than the urban areas.⁸

Cooperatives are entities which in principle act not for their own benefit, but for the benefit of their members. They are perfectly suited to implementing the principles of social economy. As Charles Gide, the French economist, observed "*A cooperative is business, but if it is only business it is a bad deal*".⁹ Cooperatives follow cooperative principles, including the principle of voluntary and open membership, democratic membership control, joint responsibility of the members, autonomy and independence,

⁷ M. Adamowicz, M. Zwolińska-Ligaj, *Koncepcja wielofunkcyjności jako element zrównoważonego rozwoju obszarów wiejskich*, „Zeszyty Naukowe SGGW from Warsaw, Polityki Europejskie, Finanse i Marketing” 2009, no 2 (51), pp.11-38; *Multifunctional development of rural areas*, ed. P. Bórawski, Ostrołęka 2012, pp. 5; M. Szczurowska, K. Podawca, B. Gworek, *Wielofunkcyjny rozwój terenów wiejskich szansą dla wsi*, „Ochrona Środowiska i Zasobów Naturalnych” 2005, no 28, pp. 49-59; M. Kołodziński, *Wielofunkcyjny rozwój terenów wiejskich w Polsce i w krajach Unii Europejskiej*, Warsaw 1996; idem, *Bariery wielofunkcyjnego rozwoju obszarów wiejskich*, „Wieś i Rolnictwo” 2012, no 2, pp. 40-50; J. Wilkin, *Wielofunkcyjność wsi i rolnictwa a rozwój zrównoważony*, „Wieś i Rolnictwo” 2011, no 4, pp. 27-39.

⁸ A. Suchoń, *Prawna koncepcja spółdzielni rolniczych*, Poznań 2016, p. 10 et seq.

⁹ Available on-line at: <<http://krs.org.pl> [Access date: December 2019].

training, education and information, and concern for the local community.¹⁰ Cooperatives use the values of self-help, self-responsibility, democracy, equality, justice and solidarity as the basis for their activity. According to the traditions of the founders of a cooperative movement, the cooperative members promote the following ethical values: honesty, openness, social responsibility, and concern for others.¹¹

The Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth, stresses that the Europe 2020 Strategy should be based on three priorities:¹²

- 1) smart development – development of the economy based on knowledge and innovation;
- 2) sustainable development – supporting the economy in order that it will be more environmentally friendly and more competitive, and use resources more effectively;
- 3) development promoting social inclusion – support for economies characterized by a high employment rate and ensuring economic and social consistency.

The document indicates that development promoting social inclusion means strengthening the situation of citizens by means of ensuring high employment rates, investing in qualifications, fighting poverty, and improving labour markets, training systems and social care. All these assumptions aim at helping people to predict and deal with changes and at building a coherent society. It is also important to make sure that the benefits of economic growth are equal in all regions of the European Union, including the most remote ones, which will result in increased territorial cohesion.¹³

Agricultural cooperatives run their activity in the field of agriculture, which serves various functions. Social and economic changes, environmental degradation, and civilization development present new challenges for agriculture. The sustainable development of agriculture is needed, combining economic, social and environmental goals (agritourism, renewable energy, commerce, high quality food production). It is also important to enhance the competitiveness of agricultural producers and increase their income, as well as to create workplaces in the rural areas. The United Nations in its document “Transforming our world: the 2030 Agenda for Sustainable Development”,¹⁴ states that by 2030 the goal is to double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, to implement resilient agricultural practices designed to

¹⁰ Ibidem.

¹¹ Krajowa Rada Spółdzielcza, *Karta etyki spółdzielczej*, Warsaw 2003, pp. 2-10

¹² http://ec.europa.eu/eu2020/pdf/1_PL_ACT_part1_v1.pdf [Access date: December 2019].

¹³ http://ec.europa.eu/eu2020/pdf/1_PL_ACT_part1_v1.pdf [Access date: November 2019]. D. Jarre, Europejski model społeczny i usługi socjalne użyteczności publicznej. Możliwości dla sektora gospodarki społecznej, in: *Przedsiębiorstwo społeczne w rozwoju lokalnym*, ed. E. Leś, M. Ołdak, Warsaw 2007, pp. 61-71.

¹⁴ ONZ, *Transforming our world: the 2030 Agenda for Sustainable Development*, http://www.unic.un.org.pl/files/164/Agenda%202030_pl_2016_ostateczna.pdf [Access date: December 2019].

increase productivity and production, to help maintain ecosystems and to strengthen capacity for adaptation to climate changes.¹⁵

New possibilities have been created by the so-called second pillar of the Common Agricultural Policy, which relates to the development of rural areas.¹⁶ It is aimed at improving the competitiveness of the agriculture and forestry sector, at strengthening the connection between agricultural activity and the natural environment, at promoting the diversity of the economy in rural communes and the quality of life, and at diversifying activities in these areas. There are, however, different situations which need to be carefully considered, beginning with distant rural areas that are becoming deserted, and suburban rural areas being subject to the increasing pressure of urban centres.¹⁷ The multi-functionality of agriculture means that in addition to providing food (food security), agriculture is also a producer of services.¹⁸

The recognition of the need for multifunctional agriculture found its practical reflection in the priorities and regulations of the Common Agricultural Policy and is mainly concerned environmental aspects.¹⁹

3. The history of cooperativeness on Polish soil

Cooperation on Polish soil has a rich history, and since the beginning it has been related to agriculture. Stanisław Staszic is considered to have been the forefather of Polish cooperation. It was he who established the Hrubieszów Agricultural Society (Towarzystwo Rolnicze Hrubieszowskie) in 1816, in order to ‘improve agriculture and industry and to provide mutual assistance in misfortunes’.²⁰ Its aim was to take care of the development of common property and individual farms, as well as to look after its members’ education and culture. A relatively high number of cooperatives operated in Poland as early as the times of the Partitions,²¹ and then during the interbellum. From the time of its establishment, the

¹⁵ A. Suchoń, *Cooperatives in the face of challenges of contemporary agriculture in the example of Poland*, in: *Contemporary challenges of Agriculture Law: among Globalization, Regionalization and Locality*, ed. R. Budzinowski, Poznań 2018, pp. 303–310.

¹⁶ M. Granvik, G. Lindberg, K.-A. Stigzelius, E. Fahlbeck & Yves Surry, *Prospects of multifunctional agriculture as a facilitator of sustainable rural development: Swedish experience of Pillar 2 of the Common Agricultural Policy (CAP)*, “Norwegian Journal of Geography” 2012, no 3, pp. 155-166.

¹⁷ Council Regulation (EC) No. 1698/2005 of 20 September 2005 on supporting the development of rural areas by the European Agricultural Fund for Rural Development. 2005. Official Journal of the European Union L 05/277, pp. 1ff, with amendments; Regulation (EU) No. 1305/2013 of the European Parliament and the Council of 17 December on aid for rural development via the European Agricultural Fund for Rural Development (EAFRD) repealing Regulation (EC) No. 1698/2005 of the Council, establishes the general regulations governing European Union aid for rural development during the period 2014-2020, Official Journal of the European Union L 347/487 with amendments.

¹⁸ J. Wilkin, *Wielofunkcyjność rolnictwa – nowe ujęcie roli rolnictwa w gospodarce i społeczeństwie*, in: J. Wilkin (ed.), *Wielofunkcyjność rolnictwa, Kierunki badań, podstawy metodologiczne i implikacje praktyczne*, Warsaw, pp. 17–51.

¹⁹ A. Kołodziejczak, *Wielofunkcyjność rolnictwa jako czynnik rozwoju zrównoważonego obszarów wiejskich w Polsce*, *STUDIA OBSZARÓW WIEJSKICH* 2015, vol. 37, pp. 131–142; see also C. Richards, H. Bjørkhaug *Multifunctional agriculture in policy and practice? A comparative analysis of Norway and Australia*, “Journal of Rural Studies” 2008, no 24.

²⁰ I. Drozd-Jaśniewicz, A.P. Wiatrak, *Spółdzielczość wiejska w gospodarce rynkowej*, Warsaw 2003, p. 65 and n.

²¹ In the second half of the 19th century, the cooperative “Banki Ludowe” (“People’s Banks”) and “Rolniki” (“Farmers”) (rural supply and sale cooperatives) were popular in Wielkopolska (Greater Poland) and “Kasy Stefczyka” (“Stefczyk’s

cooperative movement in Poland was associated with agriculture and contributed to the development of rural areas. In Poznań Province and in Pomerania, the first cooperatives appeared in the years 1861-65. They were organised within agricultural circles, which played an important role in spreading agricultural education in rural areas, teaching peasants rational land cultivation and farming. At the same time, they initiated the creation of agricultural and commercial cooperatives.²² Their basic function was to supply farmers with essential household products, as well as the means of agricultural production, even though their main objective was to collect agricultural products particularly cereals.²³ Credit and dairy cooperatives also started to operate at this time. But the real development of the cooperative movement, especially credit cooperatives, occurred later.²⁴ Apart from people's banks and agricultural and commercial cooperatives, "Rolnik" parcel cooperatives operated in some rural areas of Poznań Province and Pomerania and also played an important role.

Immediately after the establishment of the Polish state at the end of the First World War, work began on the preparation of the Act on Cooperatives. Cooperatives throughout the whole of the Polish territory were functioning well, but having been formerly organised in areas under three different partitions, they had operated within three different legal frameworks.²⁵ On 29 October 1920, the Act on Cooperatives was passed,²⁶ at the time it was a very modern and progressive law. It constituted a kind of cooperative constitution in Poland, as is rightly emphasised in the literature, based on a wealth of historical experience drawn from various legal systems, especially the Austrian and German systems, where the conditions for the development of this form of activity were favourable.²⁷ It is no coincidence that between 1919 and 1920, the Minister of Internal Affairs of the reborn Poland was Stanisław Wojciechowski, one of the founders of "Społem", and later the president of the Republic of Poland.²⁸ The Act adopted contained only general provisions and did not regulate individual types of cooperatives, thus leaving greater freedom when it came to creating different types of cooperatives.²⁹ According to the Act of 1920, a cooperative was an association with an unlimited number of people, with variable capital and personal composition, aimed at increasing the earnings per household of its members by running a joint enterprise.

Banks) in Galicia. The first dairy cooperatives appeared. The cooperatives operating in partitioned Poland were not only flourishing businesses, but they also played a crucial role in defence of the Polish identity. For more information, see e.g. A. Piechowski, *Rodowód przedsiębiorczości społecznej* in: *Przedsiębiorstwo społeczne w rozwoju lokalnym*, ed. E. Leś, M. Ołdak, Warsaw 2007, p. 30 ff. S. Inglot, 1971, *Zarys historii polskiego ruchu spółdzielczego*, Warsaw, p. 127 et seq.

²² See: J. Mroczek, *Początki rozwoju spółdzielczości w Polsce*, „Przegląd Prawniczy, Ekonomiczny i Społeczny” 2012, no 1.

²³ K. Boczar, *Spółdzielczość. Problematyka społeczna i ekonomiczna*, Warsaw 1986, p. 78.

²⁴ J. Gójski, L. Marszałek, *Spółdzielczość. Zarys rozwoju historycznego*, Warsaw 1968, p. 38. See J. Szczepański, *Spółdzielczość*, Poznań 1987, pp. 40-41.

²⁵ A. Jedliński, *Ustawa z 1920 r. na tle ówczesnych regulacji europejskich*, in: *90 lat prawa spółdzielczego, materiały pokonferencyjne Krajowej Rady Spółdzielczej*, Warsaw 2010, p. 21 et seq.

²⁶ Journal of Laws, No 111, item. 733 as amended.

²⁷ See A. Piechowski, *Historyczny kontekst uchwalenia ustawy z 29 października 1920 r.*, in: *90 lat prawa spółdzielczego*, post-conference materials National Cooperative Council, Warsaw 2010, p. 17 et seq.

²⁸ Ibidem.

²⁹ Ibidem.

In carrying out these economic tasks, a cooperative was also to seek to improve the cultural level of its members.

The 1920 Act on Cooperatives did not contain any separate legal regulation concerning agricultural cooperatives. However, agricultural cooperatives continued to develop (e.g. dairy cooperatives, agricultural services cooperatives, purchasing and marketing, egg cooperatives, poultry cooperatives, sales of agricultural tools, grazing cooperatives, grain purification cooperatives, and processing cooperatives such as distilleries, bakeries, sugar factories, etc.).³⁰ Their operations were subject in some measure to the influence of legal regulations governing agriculture, although there were not many of them.³¹

After the Second World War the country's agricultural policy changed and the collectivisation of agriculture began to play an increasingly important role. It was intended to create large agricultural enterprises, i.e. agricultural production cooperatives and public agricultural holdings.³² The period of socialism was particularly unfavourable to the development of the idea of the cooperative movement. Although cooperatives operated in rural areas during that period, they were used for the implementation of the command-and-control policy. Their independence was limited, and they became strongly controlled by the state.³³

Following the transformation of the economic system and the introduction of a market economy, the role of cooperatives as providers of services to rural areas and agriculture weakened considerably. At the beginning of the 1990s many cooperatives were closed down. This was related to people's negative attitude towards them, as they were perceived as "remnants of the bygone era". Poland's accession to the European Union led to changes both in the mental approach to cooperatives and legal regulations. Agricultural producers saw that due to cooperatives, which had a stable position and prosperous organisational structures in many European countries, farmers were more competitive on the European and global market. Following Poland's membership in the European Union, the position of some dairy cooperatives has grown stronger in the market. The rapid process of closing agricultural production cooperatives has been stopped and social cooperatives including in agriculture have been established. In recent years there has also been a dynamic development of groups of agricultural producers in Poland.

³⁰ *Spółdzielnia wiejska jako jedna z głównych form wspólnego gospodarczego działania ludzi*, ed. W. Boguta, Warsaw 2011, p. 28; M. Brodziński, *Oblicza polskiej spółdzielczości wiejskiej*, Warsaw 2014, p. 53 et seq.

³¹ A. Suchoń, *Legal aspects of the organization and operation of agricultural cooperatives...*, p. 30 et seq.

³² J. Bański, *Historia rozwoju gospodarki rolnej na ziemiach polskich*, in: *Człowiek i Rolnictwo*, ed. Z. Górka, A. Zborowski, Kraków, 2009, pp. 33-34.

³³ From 1944 to 1990, cooperatives were a tool of the communist authorities used for the implementation of the rural and agricultural policy. They were monopolists in many segments of the market. In practice, farmers were forced to sell their products and to purchase the means of production from the cooperative where they were members, see <http://krs.org.pl>, [Access date: March 2019].

These are associations of farmers working together to improve the market position of farms and increase their income. There were only 126 agriculture producer groups in 2006, but now there are more than 900. Despite the availability of a choice of entity type, most agricultural producer groups have opted to function according to the rules specific to cooperatives.

4. Current legislation concerning cooperatives operating in rural areas

According to the Act of 16 September 1982 on Cooperative Law,³⁴ a cooperative is a voluntary association of an unlimited number of persons, with a variable composition and a share fund, which conducts joint economic activities in the interests of its members. It should be stressed that Article 1 of the Act stipulates that a cooperative may also carry out social, educational and cultural activities for the benefit of its members and their environment. The scope of legal regulations affecting the organisation and functioning of agricultural cooperatives is very wide. It is not limited to the Act of 16 September 1982 on cooperative law itself, and the Act of 4 October 2018 on Farmers' Cooperatives,³⁵ Apart from the regulations applying directly to different types of agricultural cooperatives and the regulations indirectly governing the structure and operation of cooperatives, they are also subject to the regulation of their economic environment and agriculture as a part of the economy covered by the Common Agricultural Policy.

As an example, one may point to the Act of 15 September 2000 on Agricultural Producer Groups and their Associations,³⁶ the Act of 27 April 2006 on Social Cooperatives,³⁷ the Act of 20 April 2004 on the Organisation of the Milk and Dairy Products Market,³⁸ the Act of 23 April 1964 entitled the "Civil Code",³⁹ the Act of 19 October 1991 on the Management of Agricultural Property Stock of the State Treasury,⁴⁰ the Act of 11 April 2003 on the Shaping of the Agricultural System,⁴¹ legislative acts related to taxes,⁴² agricultural markets,⁴³ or acts issued by the European Union.⁴⁴

³⁴ Journal of Laws of 2018, item 1285, as amended.

³⁵ Journal of Laws of 2018, item 2073.

³⁶ Consolidated text: Journal of Laws of 2018, item 1026, as amended.

³⁷ Consolidated text: Journal of Laws of 2018, item 1205, as amended.

³⁸ Consolidated text: Journal of Laws of 2019, item 1430, as amended.

³⁹ Consolidated text: Journal of Laws of 2019 item 1145, 1495, as amended.

⁴⁰ Consolidated text: Journal of Laws of 2019 item 817, 1080, as amended.

⁴¹ Consolidated text: Journal of Laws of 2018 item 1405, 1496, 1637, as amended.

⁴² For example the Act of 12 January 1991 on Local Taxes and Fees, uniform text: Journal of Laws of 2019, item 1170 as amended; Act of 15 February 1992 on Company Income Tax (consolidated text: Journal of Laws of 2018 item 1509 as amended); Act of 15 September 1984 on Agricultural Tax (consolidated text: Journal of Laws of 2019 item 1256, 1309 as amended).

⁴³ Act of 19 December 2003 on the Organisation of the Fruit, Vegetable and Hops Market (consolidated text: Journal of Laws of 2019, item 935 of as amended).

⁴⁴ For example, *Regulation (EU) No 1308/2013 of the European Parliament and of the Council* of 17 December 2013 establishing a common organization of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72,

5. Cooperatives connected with agricultural activity

Cooperatives associated with agricultural activity engaged in by agricultural producers are important for the development of rural areas. As emphasized in the literature “Due to the close relationship between agricultural development and the development of rural areas, it is impossible to speak of the sustainable development of these areas without sustainable agriculture”.⁴⁵

The term ‘agricultural cooperative’ is itself not a legal term. It can be found in the literature,⁴⁶ draft bills,⁴⁷ and foreign legal systems.⁴⁸ The new Act of 4 October 2018 on Farmers’ Cooperatives, on the other hand, as the name suggests, introduces the normative basis for the operation of such entities (Farmers’ Cooperatives). Besides the farmers’ cooperatives, cooperatives of agricultural producers have existed for many years, such as dairy cooperatives, cooperative agricultural producers’ groups, ‘Samopomoc Chłopska’ (farmers’ self-help) cooperatives, and others. It is therefore assumed that the term ‘agricultural cooperatives’ extends to cooperative entities engaged in agricultural production (agricultural holdings) and other entities operating in the agricultural sector, which take on at least one stage of such activity, or operate more broadly in this sector. The members of such cooperatives are mainly agricultural producers.

A. Dairy Cooperatives

Dairy cooperatives are important for several reasons including the development of agriculture, ensuring the right quantity and quality of agricultural products, and providing jobs for rural dwellers. The milk cooperatives in Poland have been developing since the interwar period. Currently, there are over 100 of them. However, it is not their number but their market share and how they contribute to the development of agriculture that matters the most. Milk cooperatives in Poland have been expanding. Similarly to cooperative agricultural producer groups, milk cooperatives have taken over some activities connected with an agricultural activity run by a member (agricultural producer). Those activities include purchasing

(EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (Official Journal of the European Union abbreviated O.J.EU (L 347, p. 671).

⁴⁵ D. Żmija, *Zrównoważony rozwój rolnictwa i obszarów wiejskich w Polsce*, Studia Ekonomiczne 2014, no 166, pp. 149—158. See A. Kołodziejczak, *Wielofunkcyjność rolnictwa jako czynnik rozwoju zrównoważonego obszarów wiejskich w Polsce*, STUDIA OBSZARÓW WIEJSKICH 2015, vol. 37, pp. 131—142 https://rcin.org.pl/Content/55723/WA51_76029_r2015-t37_SOW-Kolodziejczak.pdf, [Access date: December 2019].

⁴⁶ S. Wojciechowski, *Spółdzielnie rolnicze: jakie być mogą i powinny w Polsce według wzorów zagranicznych*, Poznań 1936; A. Suchoń, *Prawna koncepcja spółdzielni rolniczych*, Poznań 2016; idem COGECA, *Development of Agricultural Cooperatives in the EU*, Brussels 2014, p. 6 et seq.; J. Bijman, R. Muradia, A. Cechin, *Agricultural cooperatives and value chain coordination*, in: *Value chains, inclusion and endogenous development: Contrasting theories and realities*, B. Helmsing, S. Vellem, eds., Milton Park 2011, p. 82.

⁴⁷ *MPs draft of the law on agricultural cooperatives 2003*, Print No 2759 of 2004. Available at: http://orka.sejm.gov.pl/proc4.nsf/drafts/2759_p.htm. [Access date: December 2019].

⁴⁸ Chapter III of the French Rural Code (*Code rural et de la pêche maritime*) applicable to societies cooperatives agricoles. See e.g. *Code rural et de la pêche maritime, code forestier, commenté*, La Rochelle 2014. The Italian legislature also uses the concept of agricultural cooperatives in the Civil Code, e.g. Article 2513 of the Italian Civil Code.

milk from the members and supporting cattle breeding. The regulations do not define milk cooperatives, so the scope of their activity is specified in a statute (by-law). They usually deal with the purchase and processing of milk. It needs to be pointed out that there are cooperatives which only deal with purchasing and do not engage in processing. However, there are not so many of these entities. It is important to stress that milk products qualify as agricultural products under the Treaty of Rome and are listed in Attachment 1.

Along with these main activities, some milk cooperatives engage in breeding milk cattle owned by the members, and in increasing milk production and enhancing its quality. They take actions against cattle diseases and promote hygiene and prevention principles. They also help to organize farms which specialize in milk production and delivery.⁴⁹ Such actions contribute to the development of the farms owned by milk producers and the innovative nature of the milk market. Milk cooperatives which deal with milk processing allow the producers to participate in another stage of the food chain, i.e. to make money not only from the sale of milk, but also from the balance of any surplus deriving from the processing activity. Poland's milk cooperatives mostly sell their products on the international market.

B. Agricultural production cooperatives

It goes without saying that in current economic circumstances agricultural producers in Poland are more interested in cooperating in terms of marketing or the sales of agricultural products, rather than in running a joint farm. However, there are still agricultural production cooperatives that were set up before the political transformation. Such cooperatives guarantee jobs to their members, household members and other countryside dwellers, who otherwise would have little chance of finding employment, since the unemployment rate in rural areas is high. Therefore, these cooperatives also contribute to the development of the multi-functionality of villages and the sustainable development of rural areas. Members who make contributions to agricultural production cooperatives are not always prepared or willing to independently run a farm, and that is why they want the agricultural production cooperatives to keep operating. For this reason, it is worth analyzing the issue of cooperatives running a joint agricultural farm.

Pursuant to the Act of 16 September 1982 on Cooperative Law,⁵⁰ the object of the activity of agricultural production cooperatives is to run a joint agricultural farm and activity for the benefit of members' individual farms.⁵¹ A cooperative may also run other business activity. The regulations cover neither the

⁴⁹ See. Available online: <<http://mleczarstwopolskie.pl/>>, [Access date: March 2020].

⁵⁰ Journal of Laws from 1982, No. 30, Item 210. Consolidated text: Journal of Laws from 2003, No. 188, Item 1848, as amended.

⁵¹ P. Zakrzewski, *Cel spółdzielni*, „Kwartalnik Prawa Prywatnego” 2005, issue 1, p. 61.

type of such activity nor the proportions between business activity and other activity⁵². It is worth mentioning that in its decision of 27 February 1986 the Higher Court (IV PRN 1/86, issued before the amendment) decided that the object of the agricultural activity of an agricultural production cooperative is to run a collective farm on the basis of the personal work of its members. Such a cooperative may also engage in other manufacturing activity or be in the service sector, but such activity cannot eclipse the main activity.

For many years agricultural production cooperatives have run, apart from joint farms, extra-agricultural business activities. This was usually the consequence of an unfavourable economic situation, but some periods it was also a consequence of beneficial tax regulations.⁵³ A characteristic feature of agricultural production cooperatives is the fact that the regulations stipulate the requirements which have to be met by their members. Membership in agricultural production cooperatives is only allowed to farmers who are: 1) owners or independent holders of farmland; 2) lessees, users, or other dependent holders of farmlands. Membership in the cooperative is also allowed to other people with useful qualifications for work in the cooperative. Another feature of agricultural production cooperatives that is essential in terms of the multifunctionality of villages and the sustainable development of rural areas, is the fact that their members, who are able to work, have the right and obligation to work in such a cooperative to the extent established by the management board every year and according to the needs resulting from the business activity plan. When assigning work to its members, a cooperative should consider their professional and private qualifications. The cooperative may employ not only its members, but also their household members, namely every family member and other people if they reside together with the member and run a common household. Apart from its members and household members, a cooperative may also employ other people under an employment agreement or any other agreement on work performance in accordance with its need. The members are compensated for work in the form of a share in profits, divided proportionately to their personal contribution.

Once Poland joined the European Union, Polish agriculture started to be covered by the Common Agricultural Policy, and the principles of funding and running agricultural activities have been changed. One of the main income sources of agricultural producers are payments within direct support schemes. According to some economists, they constitute more than 70% of the income of agricultural producers conducting agricultural activities in the countries of the “old” European Union. The payments are also

⁵² See A. Kokot, *Normatywne pojęcie działalności pozarolniczej w rolniczych spółdzielniach produkcyjnych*, „Prawo rolne” 1991, issue 1, p. 37-49.

⁵³ *Ibidem*, p. 37-49.

used by agricultural production cooperatives. These direct payments refer not only to the lands owned by agricultural production cooperatives.

C. Cooperative groups and organizations of agriculture producers, farmers cooperatives

A form of comprehensive joint action, referred to as cooperation,⁵⁴ is essential among individual entities in agriculture. It can take various forms including an agreement between agricultural producers, or it can be a more permanent structure (setting up a separate organisation). The latter possibility is of great importance within the framework of Poland's membership of the EU and in times of globalisation. In my opinion, a cooperative is the most appropriate form of cooperation for agricultural producers. The attribute that distinguishes a cooperative entity from other business entities is that it combines not only financial means (capital), but above all people.⁵⁵ Agricultural producers and their farms constitute small units. So consequently, joint action is extremely important. This is especially important in Poland, where there are over 1 million agricultural holdings in operation but the average area of agricultural land on a farm in 2019 was 10.95 ha.⁵⁶ In 2018, 1,428,800 farms used 1,469,000 ha of agricultural land and reared 9,842,500 large livestock units.⁵⁷

Agricultural producer groups contribute to the development of farms and rural areas. Pursuant to the Act of 15 September 2000 on Agricultural Producer Groups, natural persons, organisational units without legal personality, and legal persons that as part of agricultural activity run:

- a) a farm, in accordance with the agricultural tax regulations, or
- b) an agricultural business in special branches of agricultural production

may establish agriculture producer groups. Their purpose is to:

- adjust agricultural products and production processes to market conditions,
- jointly market products, and to prepare products for sale,
- centralize sales and deliveries to wholesale buyers,

⁵⁴ For more on cooperation, see: A. Perzyna, *Kooperacja w rolnictwie na tle ogólnego pojęcia kooperacji*, „Studia Iuridica Agraria” 2008, vol. VI, 2007, p. 215 et seq.;

⁵⁵ M. Zuba, *Spółdzielnie mleczarskie trwałą formą agrobiznesu*, „Zeszyty Naukowe WSEI w Lublinie, Seria Ekonomia” 2009, no 1, pp. 167-175.

⁵⁶ The announcement of the President of the ARMA of 17 September 2019 on the size of the average area of agricultural land on farms in individual provinces, and on the average area of agricultural land in an agricultural holding in the country in 2019. Available on-line at: <<https://www.arimr.gov.pl/pomoc-krajowa/srednia-powierzchnia-gospodarstwa.html>> [Access date: March 2020].

⁵⁷ Central Statistical Office, *Rolnictwo w 2018 r.*, Available on-line at: <<https://stat.gov.pl/obszary-tematyczne/rolnictwo-lesnictwo/rolnictwo/rolnictwo-w-2018-roku,3,15.html>> [Access date: March 2020].

- set out common rules on the production information especially in connection with crops and the availability of agricultural products,
- develop business and marketing skills,
- streamline the innovation processes, and to protect the environment.

The groups carrying out those goals help to develop agriculture and to increase the incomes of agricultural producers. An agricultural producer group is not itself a separate legal entity, but such groups can be organised using various types of business entity, i.e. a limited company, a cooperative, an association or a voluntary association. There are two stages in the formation of such groups. In the first stage, the legal personality is established, e.g. a limited liability company, a cooperative, an association or a voluntary association. In the second stage the group is registered. The Director of regional office of the Agency for Restructuring and Modernization of Agriculture (appropriate to the seat of the group) makes an administrative decision which states that the legal personality has met the conditions specified in the regulations and has been registered as an agricultural producer group. The legal status of the group needs to be taken into consideration. The agricultural producer group is an association of agricultural producers managing farms (i.e. independent business units) and working together in order to achieve the common aim of improving the financial situation and competitiveness of farms. The group does not work for its own profit but for the benefit of its members. It functions only owing to the entities from which it is composed. Thus, it is possible to assume that groups of agricultural producers work according to the rules characteristic of cooperatives. One of the definitions of a cooperative states that a cooperative is an entity running a business which belongs to and is controlled by its users and which distributes the financial surplus depending on the degree to which its services are used.⁵⁸

In the EU 2014–2020 funding period, agricultural producer groups may still apply for financial aid, but the rules for its granting have changed. The main regulations are: Regulation of the Minister of Agriculture and Rural Development of 2 August 2016, which sets out detailed conditions and method of granting, payment and repayment of financial aid within the activity “Creation of producer groups and organization”, covered by the Programme of Rural Areas Development for the years 2014-2020,⁵⁹ The

⁵⁸ See the definition of agricultural cooperatives formulated by the American Department of Agriculture together with a group of scientists in: D. Mierzwa, *Przedsiębiorstwo spółdzielcze. Tradycja i współczesność*, Wrocław 2011, p. 41 and n. Different definitions of the cooperative, see K. Hakelius, *Cooperative Values – Farmers’ Cooperatives in the Minds of the Farmers*, Uppsala 1996, p. 47 and n.

⁵⁹ Journal of Laws of 2016, item 1284, as amended.

Regulation of the Minister of Agriculture and Rural Development of 18 February 2016 also sets out the requirements to be fulfilled by a business plan of a group of agricultural producers.⁶⁰

In addition to cooperative groups of agriculture producers, there are also organizations of agriculture producers which are often created by cooperatives. Section 131 of the Preamble of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organization of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007,⁶¹ stipulates that: “Producer organizations and their associations can play useful roles in concentrating supply, in improving the marketing, planning and adjusting of production to demand, optimizing production costs and stabilizing producer prices, carrying out research, promoting best practices and providing technical assistance, managing by-products and risk management tools available to their members, and thereby contributing to strengthening the position of producers in the food chain”. So far, no agricultural producer organizations have been established in Poland in the milk market. The situation in other markets is the same. Fruit and vegetable producer organizations are an exception, but there are separate legal regulations in this area and they already have a certain tradition.⁶² The Polish legislator intends to encourage the creation of organizations, which is why legal regulations have been amended and issued in recent years. For example, on 20 May 2020 the Regulation of the Minister of Agriculture and Rural Development of 27 April 2020 took effect, amending the Ordinance concerning the detailed conditions and procedure of granting, disbursement and return of financial aid as part of the activity entitled “*Establishment of groups of producers and producer organizations*” covered by the Programme of Rural Areas Development for the years 2014-2020.⁶³

For the multifunctionality of villages and the sustainable development of rural areas, it was important to adopt the Act of 4 October 2018 on Farmers’ Cooperatives. Article 4 of the Act of 4 October 2018 on Farmers’ Cooperatives,⁶⁴ states that a farmers’ cooperative is a voluntary association of natural or legal persons who engage in the following activities:

1. Run an agricultural farm as specified in the agricultural tax regulations and who:
 - a) conduct agricultural activity falling under special branches of agricultural production,
 - b) are the producers of agricultural products or of groups of these products, or
 - c) breed fish, and who are hereinafter referred to as “farmers”

⁶⁰ Journal of Laws of 2016, item 237, as amended.

⁶¹ O J EU L of 2013, No 347/671 as amended, hereinafter referred to as Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013.

⁶² A. Suchoń, *Agricultural Cooperatives and Producer Organizations in Poland*, “CEDR Journal of Rural Law 2015”, no 2, pp. 25–37.

⁶³ Journal of Laws, item 799.

⁶⁴ Journal of Laws of 2018, item. 2073.

2. Are not farmers and conduct activity related to:
 - a) the storing, sorting, packing, or processing of agricultural products or groups of these products, or
 - b) the fish produced by the farmers referred to in point 1, or
 - c) service activities supporting agriculture, including those referred to in point 1, such as services using machines, tools or devices for the production of agricultural products by these farmers or groups of these products, or fish, and who are hereinafter referred to as the “entities which are not farmers”.⁶⁵

It should be noted that the members of such a cooperative are not only farmers, but also other entities that have the necessary premises, equipment or experience, for example, which may contribute to the development of farmers' cooperatives, and consequently agriculture and rural areas.

A cooperative of farmers can be established by at least 10 farmers. According to the Act of 4 October 2018 on Farmers' Cooperatives, these entities are predominantly made up of farmers, fluctuating bodies of persons and variable capital which conduct joint business activity for the benefit of their members. This Act stipulates that the activity of a farmers' cooperative is focused on conducting business activity for the benefit its members. A business activity may relate to

- the farmers planning their production of produce, or groups of products, and adjusting it to market conditions, especially considering their quantity and quality and the concentration of supply and
- handling the sales of products or groups of products produced by the farmers; and the concentration of demand; and
- handling the purchase of necessary means for the production of products or groups of products.

In addition to the above activity, the farmers' cooperative can also conduct activity relating to:

- storing, packaging and standardising the products or groups of products produced by the farmers;
- processing the products or groups of products produced by the farmers and the marketing of those processed products;
- providing services for the benefit of farmers in connection with the production of products or group of products by the farmers;

⁶⁵ For more on the Act on Farmers' Cooperatives, see e.g. J. Bieluk, *Spółdzielnie rolników – konstrukcja prawna*, „Studia Iuridica Agraria” 2018, vol. XVI, pp. 13ff.; A. Suchoń, *Legal aspects of the organization and operation of agricultural cooperatives in Poland*, Poznań 2019, pp. 7 et seq; idem, *Uwagi na tle projektu ustawy o spółdzielniach rolników*, „Przegląd Prawa Rolnego” 2017 no 2, pp. 191-208 et seq.

- promoting among its members environmentally friendly cropping techniques, production technology and waste management methods.

A farmers' cooperative may also run social, cultural and educational activities for the benefit of its members and their environment but the income coming from these activities must not account for more than 25% of the income of the farmers' cooperative earned in a given trading year.

Legal regulations encourage the establishment of farmers' cooperatives. A tax preference is also introduced by the Act of 4 October 2018 on Farmers' Cooperatives. For example, for buildings and structures or parts of buildings and land occupied by a farmers' cooperative or an association of farmers' cooperatives for the activities defined in Article 6 (1) and (2) of the Act of 4 October 2018 on Farmers' Cooperatives.

6. Social Cooperatives

Social cooperatives are particularly important for the development of rural areas. A social cooperative is a social economy entity offering support for the people at risk of social exclusion or who are already socially excluded. The operation of these entities and the concept of social economy fall under the scope of the EU actions. The European Lisbon Strategy, for instance, puts great emphasis on creating new workplaces and on economic development. These goals can be achieved by means of promoting employment, improving social care policies based on money transfers, supporting the adaptive abilities of the employees, and ensuring the flexibility of labour markets. A key factor in the process of achieving these goals is the development of civic society.⁶⁶

The regulations on social cooperatives were introduced into the Polish legal system in 2003 under the Act of 13 June 2003 on Social Employment,⁶⁷ changing the Act of 16 September 1982 on Cooperative Law. That was followed by the Act of 27 April 2006 on Social Cooperatives. In all the matters relating to the entities in question not regulated by that act, the provisions of the Act of 16 September 1982 on Cooperative Law apply. Under the law, the subject of activity of a social cooperative is to run a joint enterprise based on the individual work of its members and the workers of the social cooperative. A social cooperative takes actions for:

⁶⁶ A. Sienicka, A. Van den Bogaert., *Modele przedsiębiorstwa społecznego: Polska i Belgia*, 2009. [Access date: March 2019].

⁶⁷ Journal of Laws, No. 122, Item 1143, as amended.

- the social reintegration of the members and workers of a social cooperative, which includes actions designed to rebuild and maintain the skills connected with participating in the life of local community and performing social roles at work, place of residence or stay.
- the professional reintegration of its members and the workers of a social cooperatives, which refers to actions designed to rebuild and keep the ability to work independently on the job market – and those actions are not taken as being part of the business activity conducted by the social cooperative.

The social cooperative can conduct a social, as well as educational and cultural activity for the benefit of their members, employees, and local community, as well as socially useful activity in the field of public tasks. A social cooperative can be set up by, e.g., the unemployed, the disabled as provided for in the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, persons up to 30 years old and over 50 years old who have the status of a job seeker, the unemployed as prescribed in the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions, unemployed job seekers or persons not engaged in other gainful employment. Every member has the right to work in a social cooperative.

A novelty which has been introduced is that social cooperatives can set up a cooperative consortium in the form of an agreement to: 1) increase the economic and social potential of the associated social cooperatives; 2) jointly organize the network of production, trade or services; 3) jointly promote cooperative or economic actions; or 4) promote a common trademark, as mentioned in the Act of 30 June 2000 on Industrial Property Law.

Social cooperatives, being social economy entities, can use both Polish and European funds, as well as some other facilities. A social cooperative, for instance, does not pay a court fee while applying to be entered into the National Court Register and does not pay any fee for publishing an announcement in the Court and Commercial Gazette (*Monitor Sądowy i Gospodarczy*). Simultaneously, under Article 17(1)(43) of the Act of 15 February 1992 on Corporate Income Tax,⁶⁸ the income of a social cooperative spent in a tax year on the purposes provided for in Article 2(2) of the Act on Social Cooperatives, in compliance with this Act, in the part not qualified as deductible costs, are exempted from income tax.

Social cooperatives have been functioning in our legal system for a relatively short time but they are becoming increasingly popular. This is confirmed by the existence of more than 1000 social cooperatives and their more or less equal development in particular parts of Poland. Most people working in these

⁶⁸ Consolidated text: Journal of Laws 2012, item 361, as amended.

entities, among whom there are many people with disabilities, are employed under cooperative employment agreements.⁶⁹ Social cooperatives are becoming increasingly effective tools of the social economy. They are especially needed in rural areas, where the unemployment rate is very high and the ways of supporting the excluded and disabled people, compared with cities, are limited. Credit should be given to the programmes that provide people with relevant knowledge on how to set up and run social cooperatives, also in rural areas. Currently, however, it is important to allocate more financial resources to facilitate and extend the scope of activity of already existing cooperatives. It is obvious that the legislator is trying to introduce some improvements relating to the setting up and running of activity by social cooperatives.

The activities of cooperatives are part of the concepts of both the multifunctionality of villages and sustainable development of rural areas, supporting diverse business activity on these areas, creating new workplaces, and improving the living conditions for disabled people.

7. Energy cooperatives

For the multifunctionality of villages and the sustainable development of rural areas, the development of energy cooperatives is also important. Pursuant to the Act of 20 February 2015 on Renewable Energy Sources⁷⁰ (with amendments from 2019), an energy cooperative is a cooperative within the meaning of the Act of 16 September 1982 on Cooperatives or of the Act of 4 October 2018 on Farmers' Cooperatives, the object of which is the production of electricity, biogas or heat in renewable energy source installations, and balancing the demand for electricity or biogas or heat, exclusively for the own needs of the energy cooperative and its members, connected to an area-defined electricity distribution network with a nominal voltage lower than 110 kV, or a gas distribution network, or a district heating network.

The Energy Cooperative must meet all the following conditions:

1. operate in a rural or urban-rural commune within the meaning of the regulations on public statistics, or in an area of no more than 3 such communes directly neighbouring each other.
2. the number of its members has to be less than 1000;
3. if the object of its activity is the production of:

⁶⁹ Information about the operation of Social Integration Centres and Clubs for the Sejm and Senate of the Republic of Poland” (Issue No. 679), www.sejm.gov.pl [Access date: March 2018].

⁷⁰ Journal of Laws, Item 478, as amended.

- i. electricity, then the total installed electric power of all installations of a renewable energy source must cover at least 70% of the cooperative's own annual energy needs, and the needs of and its members, and cannot exceed 10 MW;
- ii. heat, then the total available thermal capacity cannot not exceed 30 MW; or
- iii. biogas, then the annual capacity of all installations cannot exceed 40 million m³ (Article 38e).

Article 38f states that an energy cooperative may produce electricity, heat or biogas in installations of a renewable energy source owned by the energy cooperative or its members. The energy cooperative may start its operations once it has been entered in the register of energy cooperatives. The register of energy cooperatives is maintained by the General Director of the National Support Centre for Agriculture.

8. Summary

As can be seen from our research, Polish cooperatives have a long history, and since the times of S. Staszic and the establishment of the Hrubieszów Agricultural Society to 'improve the agriculture and industry and to provide mutual assistance in misfortunes'. Cooperatives have contributed to the development of agriculture and the multifunctionality of rural areas. Poland's membership in the European Union has created new possibilities of development for the cooperative movement in rural areas.

The development of agricultural activity, which is most popular in rural areas, is closely related to the multifunctionality of villages and the sustainable development of rural areas. Cooperatives contribute to improved productive capacity and the competitiveness of the agricultural sector, and they increase the value of its share in the food chain of agricultural producers. Agricultural activity is the basic activity in rural areas and the cooperation of agricultural producers is important. This is important in terms of the multifunctionality of villages and the sustainable development of rural areas.

Agricultural producers engaged in agricultural activity in the field of milk production, pig farming and others, and belonging to various cooperatives may, on the one hand, better develop their agricultural activity, while on the other hand, such a cooperative contributes to the development of rural areas. In agriculture (the aims of which focus on the production of food and raw resources for various branches of industry,⁷¹ and, more broadly speaking, on the supply of public goods)⁷² there is a high level of financial

⁷¹ For more detailed discussion, see: A. Nowak, T. Kijek, A. Krukowski, *Polskie rolnictwo wobec wyzwań współczesności, Tom I Wymiar ekonomiczno-strukturalny*, Lublin 2019: 24ff; A. Daniłowska, *Rolnictwo produkuje nie tylko żywność*, Available on-line at: <<http://www.nowoczesnerolnictwo.info/technologie-rolnictwo/rolnictwo-produkuje-nie-tylko-zywnosc>> [Access date: March 2020].

⁷² Economic goods (food and energy security); environmental goods (biodiversity, agricultural landscape, soil protection, proper water relations); socio-cultural goods (economic and social vitality of villages, enrichment of national culture, shaping local, regional and cultural identity). Cf. A. Biernat-Jarka, *Dobra publiczne w rolnictwie w nowej perspektywie finansowej Unii*

uncertainty for agricultural producers, due to, for example, the relatively high costs associated with agricultural activity, the price changes of agricultural products and the impact of weather conditions. Cooperatives help reduce costs by sharing between agricultural producers and enabling them to meet more and more requirements related to public health and animal health. For farmers who cooperate in a cooperative, it is easier to engage in farming business by means of the methods oriented at environmental protection, to achieve the sustainable development of agriculture, and to introduce innovations which require a high outlay. Working together also helps to take actions about limiting the effects of climatic changes, and to use alternative sources of energy. In some European countries, like Germany or France, where the system of biogas plants is well-developed, a cooperative usually acts usually as the investor in the construction of biogas plants.

Cooperatives are important legal entities which have a very positive effect on developing the multifunctionality of rural areas. The Act on Agricultural Producer Groups was passed as early as 2000, but only amendments to it and the possibility of obtaining EU funds led to the development of entities that bring agricultural producers together. Cooperative groups of agricultural producers sell the agricultural produce produced on the members' agricultural holdings, market it, and store and deliver the means of production.

The discussion presented above has confirmed that social cooperatives have been functioning in our legal system for a relatively short time, but they are becoming increasingly popular. This is confirmed by the existence of more than 1000 social cooperatives and their more or less equal development in particular parts of Poland. Most people working in these entities, among whom there are many people with disabilities, are employed under cooperative employment agreements.⁷³ It can be said, therefore, that social cooperatives are increasingly effective tools of social economy in rural areas. They are especially needed in villages, where the unemployment rate is very high, and the ways of supporting excluded and disabled people are limited, when compared with cities. Credit should be given to the programmes providing people with relevant knowledge on how to set up and run social cooperatives, also in rural areas.⁷⁴ These trends in the development of cooperatives in the context of the multifunctionality of villages and the sustainable development of rural areas have an impact on the development of legislation. What is observed is that legal regulations concerning the organisation and functioning of agricultural

Europejskiej, Zagadnienia Ekonomiki Rolnej 2016, 1(346): 42–151; J. Wilkin, *Wielofunkcyjność rolnictwa. Kierunki badań, podstawy metodologiczne i implikacje praktyczne*, Warsaw 2010: 12ff; D. Baldock, K. Hart, M. Scheele, *Dobra publiczne i interwencja publiczna w rolnictwie*, Available on-line at: <<https://enrd.ec.europa.eu/enrd-static/fms/pdf/45227AED-EB65-0E88-C0FF-9D706AF6572C.pdf>> [Access date: December 2019].

⁷³ Information about the operation of Social Integration Centres and Clubs for the Sejm and Senate of the Republic of Poland” (Issue No. 679), www.sejm.gov.pl [Access date: March 2019].

⁷⁴ P. Zakrzewski, *Cel spółdzielni*, *Kwartalnik Prawa Prywatnego* 2005, issue 1, p. 61.

cooperatives are being extended. At the same time, the normative basis for cooperatives of agricultural production was widely regulated in the period after the Second World War. The political transformation, the principles of the market economy and the acquisition of EU membership have resulted in the legislator becoming more focused on the association of agricultural producers selling agricultural produce and supporting other stages of agricultural activity.

The current trend in the development of agricultural cooperatives is in line with the development of EU policies. This is related, for example, to the need to increase the competitiveness of agricultural producers, the protection of regional products, the social economy, energy, environmental protection, and processing. A cooperative is a complex legal entity and at the same time a dynamic unit in the context of taking into account changes in CAP and EU policies. The growing impact of regulations related to the development of agricultural law and food law on the activities of agricultural cooperatives should be noted.⁷⁵ The scope of legal regulations concerning cooperatives has been extended and encourages the association of agricultural producers e.g. Act of 4 October 2018 on Farmers' Cooperatives. It is also worth mentioning tax reliefs and exemptions, the possibility of cooperatives using EU funds (e.g. “*Establishment of groups of producers and producer organizations*”), exemptions of social cooperatives from fees during the registration at the court.

Nevertheless, further changes in legislation are necessary for the continued process of developing the multifunctionality of rural areas. The essence of multifunctional development is raising the standard of economic and cultural life of the rural population (especially by increasing income). Cooperatives in rural areas contribute to achieving this goal.

⁷⁵More on the expansion of agricultural law see R. Budzinowski, *Współczesne tendencje rozwoju prawa rolnego*, *Studia Iuridica Agraria* 2009, vol. VII, p. 17 et seq.

STANDARDIZATION OF COOPERATIVE LAW IN AFRICA: A COMPARATIVE ANALYSIS BETWEEN THE OHADA UNIFORM ACT RELATED TO COOPERATIVE SOCIETIES AND THE EAST AFRICA COMMUNITY'S CO-OPERATIVE SOCIETIES BILL

Willy Tadjudje¹

Abstract

In Africa, two organizations have developed supranational legal frameworks applying to cooperative societies. The first is the Organization for the Harmonization of Business Law in Africa, in French *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA) with the Uniform Act on Cooperative Societies (UA). The second is the East African Community (EAC) with the East African Community Cooperative Societies Bill 2014 (EAC Bill). The EAC Bill has not received the assent of the Heads of State in the EAC, so it is not yet an Act of the EAC Community. However, the purpose of this article is to compare these two legal frameworks. For the purpose of this analysis and comparison, the EAC Bill will be treated as if it was an Act of the Community.

Introduction

The African continent has 55 countries all represented in the African Union². In a bid to ensure their economic development, most African States have joined various regional economic integration organizations³. These organizations may use several means to achieve their integration objectives, including legislation. However, in certain regions of Africa, particularly in West and Central Africa, there are regional organizations whose only aim is legal integration⁴. These organizations coexist with economic integration organizations, which also produce regional legislation. One such organisation is the

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² The African Union (AU) is a continental body consisting of the 55 member States that make up the countries of the African Continent. It was officially launched in 2002 as a successor to the Organization of African Unity. More details on its website: <https://au.int>

³ Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Economic and Monetary Community of Central Africa (CEMAC), East African Community (EAC), Southern African Development Community (SADC), etc. For more details on regional integration in Africa, see De Melo, J. & Tsikata Y. (2014): "Regional integration in Africa Challenges and prospects" WIDER Working Paper 2014/037.

⁴ For example, the CIMA (*Conférence Inter-Africaine des Marchés de l'Assurance*) - Inter-African Conference of Insurance Markets. More details on its website: <https://cima-afrique.org/>

Organization for the Harmonization of Business Law in Africa, in French *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA). It was established in 1993⁵, and currently comprises 17 States in Central and Western Africa⁶. OHADA includes the following institutions: the Permanent Secretary⁷, the Common Court of Justice and Arbitration⁸, the Higher Regional School of Magistracy⁹, the Council of Ministers of Justice and Finances¹⁰, the Conference of Heads of State and Government¹¹. It is a legal integration organization aimed at the standardization of business law through the introduction of uniform acts whose provisions are directly applicable in national laws¹².

Ten uniform acts have already been adopted and deal with various business law matters¹³. The ninth act is about cooperative societies and it was introduced after almost ten years of negotiation within the OHADA zone. The Uniform Act relating to cooperative societies (UA) was adopted on 15 December 2010 and published on 15 February 2011 in the OHADA official Gazette¹⁴.

The UA did not introduce a new law for cooperative societies which supplemented existing national laws. Rather, the new law replaces existing national laws which will disappear or will subsist only as a complement to the UA. Specifically, the UA applies directly in domestic law. Its provisions take precedence over the rules of domestic law, which may be applied only if they are not contrary to the provisions of the UA. With the UA, OHADA has produced the first supranational cooperative legislation in Africa.

Four years after the adoption of this Uniform Act, the East African Community (EAC) also prepared a legal framework applicable to cooperatives. The EAC is a regional intergovernmental organization of 6

⁵ This organization was born after a Treaty signed in Port-Louis (Mauritius) on October 17, 1993 (modified in Quebec City in 2008) with the aim of building a community of legal integration through Standardization of business law.

⁶ Benin, Burkina Faso, Cameroun, Chad, the Comoros, Congo, Democratic Republic of Congo, Ivory Coast, Central Africa Republic, Gabon, Guinea, Equatorial Guinea, Guinea Bissau, Mali, Niger, Senegal, Togo.

⁷ The Permanent Secretariat is attached to the Council of Ministers and is responsible for the preparation of all acts and the annual program for the harmonization of business law. The headquarters are in Yaoundé - Cameroon).

⁸ The Court is based in Abidjan, Ivory Coast. Its main functions are to hear appeals against the decisions of the national courts, and to give opinions on the common interpretation and application of the Treaty, the regulations made for its application and the Uniform Acts. The Court also intervenes in arbitration proceedings.

⁹ The School is responsible for the training of magistrates and judicial officers of the Member States in harmonized law and business law. The headquarters are in Porto Novo, Benin.

¹⁰ Composed of Ministers responsible for Justice and Finance Ministers, it meets at least once a year, convened by its President.

¹¹ It is the Supreme organ of OHADA. It was created through the revision of the original Treaty at the Quebec City Summit of October 17, 2008, which remedied an absence that was felt. The Conference "shall be composed of the Heads of State and Government of the States Parties. It shall be chaired by the Head of State or Government whose country holds the presidency of the Council of Ministers".

¹² Martor, B., Pilkington, N., Sellers, D. & Thouvenot, S. (2009) : "Le droit uniforme africain des affaires issu de l'OHADA", *LexisNexis*.

¹³ Pougoue, P.G. (2011), "Encyclopédie de droit OHADA", *Lamy*.

¹⁴ The Uniform Act entered into force 90 days after its publication on 15 May 2011. It is therefore expressly provided that existing cooperatives must adapt their by-laws within two years of this entry into force, in order to comply with its new provisions (before 15 May 2013).

Partner States: the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda. Its headquarter is in Arusha, Tanzania. The EAC was established by the EAC Treaty which guides the work and the activities of the Community. The EAC Treaty was signed on 30th November 1999 and entered into force on 7th July 2000. The main Organs of the EAC are the Summit¹⁵, the Council of Ministers¹⁶, the Co-ordinating Committee¹⁷, the Sectoral Committees¹⁸, the East African Court of Justice,¹⁹ the East African Legislative Assembly²⁰ and the Secretariat²¹.

The objectives of the EAC are to develop policies and programs aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit (Article 5 of the Treaty). One way of achieving these objectives is the production of appropriate and applicable legal standards (Acts). One of these proposed legal standards is the EAC Co-operative Societies Bill, 2014. (EAC Bill). According to Article 62-1 of the EAC Treaty²², “the enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community”. The East Africa Legislative Assembly²³ stated in a media released on January 2015 on its website that the Bill was passed, but there is no information available regarding assent by the Heads of States. Article 63-1 and 4 of the EAC Treaty provides that “1. the Heads of State may assent to or withhold assent to a Bill of the Assembly” and “4. if a Head of State withholds assent to a re-submitted Bill, the Bill shall lapse”. Article 54 of EAC Bill provides that it shall prevail over the laws of the partner States in respect of

¹⁵ The Summit includes Heads of Government of Partner States. The Summit gives strategic direction towards the realization of the goal and objectives of the Community.

¹⁶ The Council of Ministers is the central decision-making and governing Organ of the EAC. Its membership constitutes Ministers or Cabinet Secretaries from the Partner States whose dockets are responsible for regional co-operation.

¹⁷ Under the Council, the Coordinating Committee has the primary responsibility for regional co-operation and coordinates the activities of the Sectoral Committees. It also recommends to the Council about the establishment, composition and functions of such Sectoral Committees. It draws its membership from Secretaries responsible for regional co-operation from the Partner States.

¹⁸ Sectoral Committees conceptualize programs and monitor their implementation. The Council establishes such Sectoral Committees on recommendation of the Coordinating Committee.

¹⁹ The East African Court of Justice is the principal judicial organ of the EAC and ensures adherence to the law in the interpretation and application of compliance with the EAC Treaty. It was established under Article 9 of the Treaty.

²⁰ The East African Legislative Assembly (EALA) is the legislative organ of the EAC and has a cardinal function to further EAC objectives, through its legislative, representative and oversight mandate. It was established under Article 9 of the Treaty. The Assembly has a membership comprising of 45 elected Members (nine from each Partner State), and 7 ex-officio Members consisting of the Minister or Cabinet Secretary responsible for EAC Affairs from each Partner State, the Secretary-General and the Counsel to the Community totaling 52 Members. More details on the website of EALA: <http://www.eala.org/>

²¹ The Secretariat is the executive organ of the EAC. As the guardian of the EAC Treaty, it ensures that regulations and directives adopted by the Council are properly implemented.

²² The treaty is available on the EAC's website: <https://www.eac.int/documents/category/key-documents>

²³ See <http://www.eala.org/media/view/assembly-passes-eac-cooperative-societies-bill-2014>. Also, a press release from the Farmers' Federation is accessible via this link: https://www.ica.coop/en/media/library/press-releases/press-release-east-african-community-co-operative-societies-act-passes?_ga=2.228284440.447941260.1588746275-197673619.1580869006

any matter to which its provision relates. This assumes that the national provisions which are not contrary to or complementary to the Act remain valid.

The objective of this article is to compare two examples of supranational cooperative law, namely the EAC Bill and the OHADA UA . Particular emphasis will be placed on the development process and the contents (constitution and functioning). This article presents only a few essential points of comparison.

Adoption procedure: Work of experts (OHADA) versus concerted approach (EAC)

We can identify four steps in the history of the EAC Cooperative Societies Bill, 2014²⁴.

Period	Activities	Comments
<u>First phase: mobilizing broad-based expertise to define a model legislation</u>		
In 2009	A comparative study on cooperatives	EAFF ²⁵ commissions a comparative study of cooperative laws in Ethiopia, Uganda and Kenya. Best practices are identified and a model legislation drafted serving as a very first draft of the Bill ²⁶ .
March 2010	Validation of the study	The study report is validated during a workshop among EAFF members.
June 2010	Sharing the draft with EALA members	EAFF convenes a workshop in Nairobi to look at policy issues and process at the EAC.
June 2011	1st think tank on cooperatives	EAFF convenes a think tank at the Cooperative College of Karen (Kenya) to further work on the draft.
<u>Second phase: from a farmer proposal to a regional law</u>		
March 2012	Meeting at EAC	EAFF sends a delegation to meet the Speaker of EALA and the EAC

²⁴ IFAD (2018), Farmers' Organizations in Africa Support to Farmers' Organizations in Africa Programme (SFOAP) – Main phase 2013-2018, IFAD, 31-32 : https://www.ifad.org/documents/38714170/40324794/SFOAP_Results.pdf/c863b76b-7939-4899-91a8-2971c30fb185

²⁵ Eastern Africa Farmers' Federation.

²⁶ Nkandu, J. (2010) "Analytical Study of the Co-operative Acts of Eastern Africa (Ethiopia, Kenya and Uganda)" Commissioned by the Eastern Africa Farmers' Federation (EAFF), Draft Report : The next link doesn't work: http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF%20Cooperatives%20Study%20Report.pdf

	and EALA	Secretary General
May 2012	1st presentation to the Parliament	EAFF appears before the EALA Committee to present the Bill for the first time (Arusha, Tanzania).
April 2013	2nd presentation to the Parliament	EAFF appears before the Committee for a second time during their session in Kigali, Rwanda
August 2013	Side meeting during EAFF Congress	EAFF convenes a side meeting to discuss the Bill with their members during the 3rd EAFF Farmers' Congress in Burundi
October 2013	2nd Co-operatives Think Tank	A 2nd think-tank with EAFF members and legal experts from the Kenyan Ministry in charge of Cooperatives and the Cooperative University College is organized to further critique the Bill.
October 2013	Submission to EALA and parliamentary sponsorship	EAFF submits the revised Bill to EALA.
January 2014	The Bill is published	The Bill is published by the order of the EAC and is placed as a notice in the EAC Gazette No. 1 of 3rd January, 2014.
22 January 2014	1st Reading of the Bill	The Bill is read for the first time during the EALA session in Kampala, Uganda. EAFF sends 22 representatives to witness the Reading. The motion is seconded and the Bill is forwarded to the Committee for further consultations, before the Bill is brought back to the Assembly for the 2nd Reading.
<u>Third phase: back to the countries</u>		
January– July 2014	National and district consultations	EAFF organizes national and district consultations with members and stakeholders to ensure that the Bill is comprehensively critiqued, while preparing for EALA to convene Public Hearings in the Partner States.

		A report is further prepared and validated
August – September 2014	Public hearings.	
September – October 2014	Preparation of the amended document	All stakeholders comments and submissions are compiled by the Principle Legal Draftsman of the EAC, the Clerk and Secretary of the EALA Committee and the EAFF Policy Officer. A report is consequently drafted together with a proposed schedule of more than 60 amendments.
<u>Fourth phase: the Bill becomes an Act of EALA</u>		
October 2014	Back to EALA	The mover of the Bill and the Chair of the Committee table the report of the public hearings and the schedule of amendments before EALA for further reading.
22 January 2015	The 2nd reading	The Chairman of the Committee presents the Report to the Assembly gathered in Arusha (Tanzania). The Bill successfully goes through the 2nd reading.
27 January 2015	The 3rd reading	The Bill is scrutinized clause by clause during a 3rd reading in Arusha, Tanzania.
28 January 2015	The Bill is passed.	Once ratified, the Bill will become law and take precedence over existing national laws.

Source: Galletti, V. : “Successful engagement of Farmers’ Organizations in the policy arena: EAFF experience with the EAC Co-operative Societies Bill, 2014”,

http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF_EAC%20Coop%20Bill_Case%20study.pdf

The object of the EAC Bill is to provide a legal framework for cooperative societies. The EAC Bill intends to standardize national cooperative laws in the EAC Partner States. The process outlined above was participatory, involving all stakeholders. As stakeholders were aware of the process, outreach and awareness may not become a major problem. This stands in contrast to the process used with the OHADA UA. In East Africa, the Bill was introduced by a farmer organization (EAFF), while in the OHADA zone,

it was an intergovernmental entity (the Panafrican Cooperative Conference). In East Africa, the cooperative movement took part in the elaboration process, while in the OHADA zone, they were absent (only the OHADA national commissions were part of the process, as detailed below).

The UA was the result of a decade-long process of elaboration. The project was launched in March 2001 following a decision of the OHADA Council of Ministers meeting in Bangui (Central African Republic). During this session, the Council decided to extend the program for the harmonization of business law to cooperative and mutual societies. The project originated in the adoption in July 1999 in Yaoundé (Cameroon) of the 10-year Action Plan to Combat Poverty through Cooperative Entrepreneurship in Africa, at the initiative of the Pan-African Cooperative Conference (CPC), BCEAO (Central Bank of West African States) and ILO (International Labor Office). A few months before the adoption of the 10-year Action Plan in 2000, an expert workshop on the development of a uniform act related to cooperative and mutual societies in Africa was held in Yaoundé. At the end of the workshop, a recommendation was adopted describing the importance of developing a law for cooperative and mutual societies by OHADA²⁷.

In light of the arguments put forward in this recommendation, the experts suggested to the Governing Board of CPC to refer the matter to the Permanent Secretariat of OHADA. The recommendations adopted during this workshop of experts attracted the attention of the Council of Ministers, which agreed to include the law of cooperative and mutual societies in OHADA's legislative agenda as early as 2001. As a result of this validation, work continued with the aim of achieving a uniform act related to cooperative and mutual societies.

In accordance with Articles 6 to 8 of the OHADA Treaty, the process begins with the appointment of an expert to prepare a draft Uniform Act. Once the project is completed and submitted to the Permanent Secretariat of OHADA, it is then sent to the States Parties for comments (most often through the OHADA National Commissions). Subsequently, a plenary meeting of the OHADA National Commissions is held in one of the States Parties to discuss and finalize the draft, with a view to reaching agreement on any amendments. Once this version is adopted, it is then submitted to the OHADA Court for an opinion to be delivered within thirty days. Following the advice of the OHADA Court, the Permanent Secretariat finalizes the draft and presents it to the Council of Ministers for adoption.

²⁷ The main reason was to modernize cooperative law. At that time (2000), OHADA had just adopted a Uniform Act on commercial company law (1998), and the CPC questioned why cooperatives should be left out. According to the CPC, recognizing that most States Parties had outdated cooperative laws, the idea of adopting a Unified Cooperative Act was a strategy to modernize the legal framework and thus a means of boosting cooperative entrepreneurship.

After the integration of the law of cooperative and mutual societies into OHADA's legislative agenda, a working schedule was drawn up under the aegis of the Permanent Secretariat of OHADA. An expert was appointed and a first draft was proposed. A workshop was organized and the exchanges revealed serious inadequacies with the draft. The text was not in harmony with universally recognized cooperative principles and values. At the beginning of the process, OHADA had insisted on such harmony in order to identify the specificity of cooperatives and mutual societies and to achieve a uniform act consistent with the cooperative philosophy. In 2007, a new version was produced taking into account the comments and observations of the reviewers of the first version.

During the numerous debates organized on the basis of the latter draft, difficulties, both legal and practical, arising from the wide scope of the proposed law were highlighted. In Bamako on 30 January 2009 the delimitation of the law became final. During this meeting, the main point of the debate was on the title of the preliminary draft. This led to the deletion of all references to mutual societies in order to adopt the title "Uniform Act related to cooperative societies' law". The Uniform Act was published in the official Gazette on February 15, 2011.

Arguably, the process of elaboration of the UA was not sufficiently participatory, particularly in its final phase. The cooperators and other actors in the cooperative movement in the different States, were not involved enough or were not involved at all in the process, and this may have repercussions on the reception of the UA²⁸. OHADA did not take any steps to disseminate knowledge of the UA through workshops and extension seminars. Consequently the text is still largely unknown to the cooperators who may not agree with OHADA's approach or the content of a large number of the UA's provisions. In contrast, EAC made an effort to include the various stakeholders in order to provide a text that was as consensual as possible. OHADA focused its process on expert work, which may be far from the real needs of recipients of the cooperative legislation. OHADA does not have a legislative assembly, unlike EAC which has a legislative assembly of parliamentarians from all Partner States. Moreover, the CPC, which initiated the UA project represents only States, and not cooperative organizations.

It has been suggested that OHADA should diversify and allow harmonization alongside standardization.

“ The OHADA model is specific and original, but it is far from meeting the promises of flowers. Perhaps it carries a bit of a dream. In order to make it shine brightly, some asperities have to be corrected: to contain the understanding of business law within strict and reasonable limits; to strengthen the dialogue between the CCJA [Court of Justice and Arbitration of OHADA] and the national supreme courts; to enrich the civil law fund of the OHADA law with measured

²⁸ Tadjudje, W. (2015) : “Le droit des coopératives et des mutuelles dans l’espace OHADA”, Larcier, 74-79.

contributions of comparative law; *to accept, besides standardization, other more flexible processes of legal integration, such as directives and model laws , etc.*”. [English translation by the author]²⁹.

Harmonisation would allow national adaptations, which would provide an opportunity for the cooperative movement to have a say. Standardisation, in contrast, requires the application of the same law in all 17 States Parties³⁰.

Constitution of cooperatives

The definition of a cooperative in the UA and the EAC Bill is consistent and inspired by the International Cooperative Alliance (ICA) Statement on Cooperative Identity. The same is true of the cooperative principles, although in the EAC Bill they are elaborated in greater detail.

The UA recognises two types of cooperative: the simplified cooperative society (SCOPS) and the cooperative society with a board of directors (SCOPCA). In most countries of the OHADA zone, there are similar entities, called groups. According to Mr Idrissa Kéré, former Director of Legal Services³¹, the question of the integration of groups in the UA had been considered during the preparatory period. The UA provides more flexible rules for SCOPS, analogous to the rules governing groups under national laws, and more rigid rules for SCOPCA. The aim was to transform the groups into SCOPS and to transform classical cooperatives into SCOPCA. However, the OHADA legislator does not state this intention in the UA. Cooperatives have the choice between setting up as SCOPS (at least five members) or SCOPCA (at least fifteen members) while groups are not recognised in the UA³².

The EAC Bill provides for only one legal model, the cooperative society, whose constitution requires at least ten members. If the formalities of incorporation are met, the founders must apply for registration. Article 7 of the EAC Bill provides that a cooperative society shall be registered by the appropriate authority in the Partner State. It is left to national authorities to determine the registering authority. Article 52 of the EAC Bill states that “an agency responsible for organizing, registering, promoting or supporting cooperative societies and for rendering training, conducting research and other technical support to cooperative societies shall be established by law”. The establishment of the agency shall be determined by

²⁹ Pougoué P.-G. (2009) : “Présentation générale du système Ohada”, in Akam Akam A. (editor), Les mutations juridiques dans le système Ohada, L’Harmattan, 11-19.

³⁰ This argument concerning the admission of harmonization alongside standardization may also be valid for the EAC insofar as it adopts Acts applicable in the same way in the Partner States. Since each country has its own history, culture and specificities, the fact that they cannot be taken into account in a legislative process may create barriers in the implementation of the adopted Acts.

³¹ Director of Legal Services at the OHADA Permanent Secretariat until 2012.

³² Hiez, D. & Tadjudje W. (2012) : “Analysis of the differences between SCOPS and SCOPCA”, RECMA : http://www.recma.org/sites/default/files/scops_scoopca_differences_en.pdf

the societies and documented by way of a resolution passed through the national apex cooperative organization. Also, the EAC Bill requires that at least half of the members constituting the board of the agency shall be selected from cooperative societies.

In the UA it was provided that the cooperatives registry shall be kept by the national authority in charge of territorial administration, or the competent authority. From one country to another, this authority is different. Given that OHADA law is intended to be uniform, this approach is likely to cause many contradictions in the application of cooperative law. Presently, the registry of cooperative societies in Ivory Coast is maintained at the office of the court, in Cameroon and Gabon it is at the Ministry in charge of agriculture, in Mali at the Ministry in charge of the elderly³³. Not only is the authority in charge of the cooperatives registry difficult to identify under the terms of the UA, in addition, all prerogatives are retained by the State. The EAC Bill requires cooperation between the members of the cooperative promotion agency (in charge of registration and others), and is designed to respect the experience, specificities and potential of cooperatives.

The two laws deal with the question of time limits for registration differently. In the EAC Bill, the appropriate authority shall register a society and issue a certificate of registration within 15 days, when it is satisfied that the submitted application for registration has fulfilled the requirements for registration. If the appropriate authority rejects the application, it shall give a written explanation to the representatives of the cooperative society within 15 days. The certificate of registration issued to a cooperative society is evidence that such society is registered in accordance with the EAC Bill, and a society so registered shall have juridical personality from the date of its registration and their members shall have limited liability (Article 8 of the EAC Bill).

According to Article 77 of the UA, as soon as the applicant's request is ready, the administrative authority responsible for keeping the registry shall assign a registration number and shall mention it on the form provided to the declarant. There is no defined time within which the registration must be processed. Such a situation may cause harm to those seeking to register their cooperative, if the delays are too long and there is no mechanism for redress.

³³ Tadjudje W. (2017) : "L'insuffisance du cadre juridique général du registre des sociétés coopératives en droit OHADA des sociétés coopératives", in Hiez D. & Kenmogne Simo A. (Editors), *Droit des coopératives OHADA*, Presses Universitaires d'Aix-Marseille, 181-191.

Functioning of cooperatives

1. Director's mandates

In terms of governance, the cooperative bodies are almost the same under each law., with the classic distinction between management bodies and supervisory bodies³⁴. One point of distinction is the denial of the accumulation of mandates for directors under the UA. In SCOPS, the chairman of the management committee may be a member of a board of directors of SCOPCA but is not eligible to serve as chairman of the board of directors. He/she may be a member of other management committees, but may not be a chairman. However, in the SCOPCA, the directors can only belong to another SCOPCA board of directors having their seat in the territory of the same State Party. In addition, the chairman of the board of directors may not hold office as chairman of a board of directors or as chairman of a management committee in other cooperative societies in the same State. Similarly, as a director, he or she may not be a member of another SCOPCA board of directors having their seat in the territory of the same State Party³⁵. Given that unions and federations (cooperatives apex organizations) have the legal nature of SCOPCA, this provision on the denial of the accumulation of mandates may prove to be disruptive.

2. Member's Common bond

The UA places great emphasis on the notion of the common bond between members as a criterion for the acquisition of cooperative status. In the UA the common bond between members is explicitly defined. According to Article 8 of the UA³⁶, the cooperative is composed of cooperators who are united by the common bond on the basis of which the society was founded. This common bond designates the objective element or criterion shared by the cooperators and is the basis on which they come together. It can be the profession, or it can be proximity or any other objective link that can bind members such as a community of interests, objectives, etc.

In contrast, the EAC Bill does not focus on the concept of common bond. Under the EAC Bill, the founders (at least ten members) must be people living in the same area. There is one exception: a cooperative society may sell some of its shares to persons outside its area when the society faces shortage

³⁴ However, it should be recalled that in OHADA law, given the existence of two forms of cooperatives, the names of the organs are particular to facilitate distinctions: in SCOPS we have a management committee and in SCOPCA, a board of directors.

³⁵ Hiez, D. & Tadjudje W. (2013): "The OHADA Cooperative regulation", in Cracogna D., Fici A & Henry H. (Editors), *International Handbook of cooperative law*, Springer, 89-113.

³⁶ "A cooperative shall be composed of members who, united by common bond on the basis of which the cooperative was created, shall take part in the activities of the cooperative and hold shares proportional to their contributions and pursuant to cooperative principles.

Within the meaning of this Uniform Act, the common bond shall refer to the element or objective criteria that members have in common and on the basis of which they gather.

It may, in particular, be related to a profession, an identity of a purpose, business or legal form".

of capital. This is the only basis upon which a cooperative society may allow people outside its area to get membership.

The weaker interest of the EAC Bill on the issue of the common bond might be related to the fact that it is already mentioned in national laws. Kenya's national law provides that a person (other than a cooperative society) shall not be qualified for membership of a cooperative society unless, among other requirements, his or her employment, occupation or profession falls within the category or description of those for which the cooperative society is formed, and he or she is resident within, or occupies land within, the society's area of operation as described in the relevant bye-laws. This means that cooperative members must share either a community of occupation or activity, or a geographical proximity³⁷. Once membership has been acquired, the cooperator has rights and obligations. The EAC Bill sets these out clearly. In the UA they must be deduced from the combination of various provisions.

3. Apex organizations

The UA, the law provides for unions, federations and confederations (at national level), to which it adds the cooperative networks (at a regional level) to gather cooperative organizations from different State Parties. The law sets out the frameworks, the methods of formation, and the rights and obligations of these apex organizations without setting out the mechanisms for this vertical structuring. The EAC Bill is less prescriptive and refers to possible collaboration between apex bodies. Article 5 of the EAC Bill provides that cooperative societies serve their members most effectively and strengthen the societies' movement by working together through local, national, regional and international structures. Also, a cooperative society may, according to its nature, be established at different levels as determined by its members.

The EAC Bill recommends the establishment of a single national apex cooperative organization in each Partner State. In the OHADA zone, there are usually several apex organizations in each country, which is unlikely to assist in the unification of the cooperative movement. The EAC Bill's recommendation that there is only a single apex organization at the national level will oblige the national actors to work together, especially since the Bill also ensures that the cooperative movement is represented in the agency responsible for the promotion and registration of cooperatives. The key role of the national apex cooperative organization includes promoting cooperative societies, formulation and review of policy and legislation, and serving as a platform for cooperative societies at the national level.

³⁷ Article 14 of the Kenyan Cooperative societies Act, Revised Edition 2012 [2005].

4. Audit

In the EAC Bill there are two distinct types of audit: a financial audit and a cooperative or organizational audit. The financial audit is conducted to check the accounts of the cooperative in order to assess whether the financial resources have been properly managed. The cooperative or organizational audit is carried out to evaluate the application of the cooperative principles in the cooperative's life. By comparison, no cooperative audit system has been prescribed for by the UA, omitting an important mechanism for protecting the cooperative identity.

5. Policies applying to cooperatives

The EAC Bill has provided for tax exemptions for cooperatives, subject to certain conditions. Similarly, it has provided that cooperatives may access public land under certain conditions. It should be noted that the EAC Bill is the result of a negotiations carried out by agricultural organizations grouped together within a sub-regional entity, and this may explain the inclusion of a public policy relating to access to land. The UA does not deal with public policies for cooperatives, and these matters are left to the prerogative of the States.

6. Dispute resolution

Both laws support the use of alternative means of conflict management. The EAC Bill cites them directly and details the procedures. The UA is not as direct. However, there is the OHADA Uniform Act on Arbitration and a uniform law on mediation is also in progress in OHADA.

Conclusion

Without discounting its merit, the UA has contradictions and inadequacies that complicate the construction of a common philosophy for cooperatives in the OHADA zone. The UA was an opportunity to enshrine in a regional law the culmination of a long tradition and culture in cooperatives in the region since the pre-colonial period. But, it seems to have missed the mark.

In contrast, the EAC Bill has developed an appropriate legal framework for cooperatives. The framework is appropriate insofar as it has taken into account, the opinions of all stakeholders. National parliamentarians are represented in the Community Parliament. The EAC Bill's intended entry into force appears to have been foreshadowed by awareness programs, which may eventually lead to a favorable reception and enforceability. The OHADA legislator can draw on the experience of its counterpart in East Africa in the event of a possible revision of the UA. Drawing inspiration from what is best and

reproducible is always beneficial and it should be remembered that the EAC cooperative legal framework was largely inspired by the Ethiopian experience. The approach in East Africa could enable the OHADA legislator to improve the legal framework for cooperatives. This does not mean that the experience in East Africa is perfect, but it involved a more effective process for stakeholder engagement than that of OHADA.

However, it should be pointed out that the assumed effectiveness of cooperative law in East Africa is only theoretical since the Bill has not yet moved to become an Act of the Community. In spite of this situation, the EAC Bill has at least the merit of being a model law that can inspire various regions interested in the standardization or harmonization of cooperative law, either in the process of its elaboration or in its content.

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THE GREEK ANTI-PARADIGM: HOW LEGISLATION ON AGRICULTURAL CO-OPERATIVES CAUSED THEIR FAILURE

Michael Fefes¹

Abstract

The first piece of Greek co-operative legislation was promulgated in 1914. This legal regime remained till 1979, having been amended several times. Since 1979, there were seven laws concerning exclusively rural co-operatives. One may presume that such interest shown by Greek legislators would mean the development and expansion of co-operative model in rural sector. Nevertheless, the co-operative enterprise model has been a failure in Greece, at least as regards rural co-operatives. The present paper attempts to point out that Greek legislation has played a negative role for rural co-operatives and had a serious contribution to their decline instead of serving as an encouraging and enforcing factor to their routing and betterment. In addition, one may stipulate that Greek legislation follows a specific pattern with the purpose to supervise and control rural co-operatives, treating them not as enterprises but as political tools. The above comments will be based on the analysis of three relevant laws in Greece, that is Law 1541/1985, Law 4015/2011 and Law 4384/2016, while a very brief commendation is to be done as to the very recent development on 11th March 2020 (Law 4673/2020).

Keywords: rural co-operatives; Greek legislation; legal deficiencies.

1) INTRODUCTION

The aim of the present paper is to illustrate the shortcomings of the Greek rural co-operative legislation. We shall start with Law 1541/1985, then we shall proceed with Law 4015/2011 and the paper will complete its description with an analysis of Law 4384/2016 to a larger extent, as it was the legislation in force until 13/03/2020.

Law 4384/2016 reformed the legal status for rural co-operatives, abolishing the previous legal provisions. Nevertheless, Law 4384/2016 itself fell prey to the constant legislative practice as regards Greek rural co-operatives, i.e. the repealing of a legislation and its replacement with a new one, every time there is a change in the government or in the leadership in the concerned ministry (Rural Policy and

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Food). Thus, Law 4673/2020² is the current legislation on rural co-operatives, and one could assume that it may remain in force only until there is a change in the government. Though it may be premature, a very brief comment on Law 4673/2020 is included in the present paper for the purpose of completeness of presentation.

The co-operative movement is far from being a marginal phenomenon. At least 12% of humanity is a direct or indirect member of any of the 3 million co-operatives in the world.³ Nevertheless, the co-operative enterprise model is argued to be a failure in Greece, at least as regards rural co-operatives. There are specific reasons for this, mainly the clientelistic element of Greek political life envisaging co-operatives as the best means of manipulating and harnessing rural voting. In most cases, the co-operatives' members were more concerned with their political activities and aspirations than with the progress of their enterprises. This fact, combined with the generally low educational level of farmers, created a climate of doubt and disparagement for co-operative institution, with the consequence that co-operatives became marginal market players functioning rather as intermediaries, between farmers and the then Agricultural Bank of Greece or the State.⁴

As mentioned above, the Greek legislation, to an extent, has been evidenced to facilitate the shortcomings in the application of cooperative law in the country. The main shortcoming for co-operatives is that they were never allowed to operate freely as businesses. Paragraph 4 of Article 12 of the Greek Constitution provides that "Rural and civil co-operatives of all kinds are self-governed institutions according to the law and their statutes, and are protected and supervised by the State, which is obliged to concern for their development". Such concern and supervision definitely does not entail components such as guardianship, or manipulation, or strict, unnecessary and unjustified control systems.

After a brief discussion on the Greek rural co-operatives from a historical perspective, the present paper will turn to the explanation of several legal provisions found in the legal measures described above. Following that, it is indicated that co-operative legislation contributed to the decline of rural co-operatives in Greece instead of serving as an encouraging lever for their development. In addition, one may stipulate that Greek legislation follows a specific pattern with the purpose to oversee and control rural co-operatives.

2) GREEK CO-OPERATIVE MOVEMENT

Co-operatives are *sui generis* private enterprises. They differ from the other common commercial legal entities, because they combine an economic and a social facet in their activities. They are bodies

². Greek OJ 52, 1st Issue, 11/03/2020.

³. https://www.ica.coop/en/cooperatives/what-is-a-cooperative?_ga=2.247599684.2135337862.1550498409-1121495596.1550498409.

⁴. Agricultural Bank of Greece lost its banking permit on 2012 and is currently under liquidation.

composed of natural persons or/and legal persons and pursue both economic and social aims. The private economic initiative is an element residing in their inherent character during the process of their business. On the other hand, the social element gives them their *sui generis* character. Their economic activity, entrepreneurial activity, organisation and management are purely internal matters of the co-operative. The State may encourage the co-operative movement at its very beginning and then foster it by securing a friendly environment for its growth and stability. The importance of the attitude of the State for the stable and rational development of co-operatives is great. The provision of a legal framework, adapted to the nature of the enterprise on an equal basis to that of commercial companies and giving useful guidelines to co-operatives, is of equal importance.

As a principle the above remarks are generally accepted and reflected in the literature concerning co-operatives worldwide, taking as a necessary prerequisite that co-operatives always work within the framework of an open and fair market competition. It is also generally accepted that the essential nature of co-operatives is that they are created to serve the needs of their members and this is the reason we meet co-operative enterprises all over the world. Nevertheless, each country has developed its own co-operative entrepreneurial model according to the peculiarities of each particular State. A brief analysis of the historical evolution of rural co-operative movement in Greece will serve as an explanatory tool for the present situation in the co-operative sector.

There were several traditional models of co-operation among professionals in Greece.⁵ Thus, one may wonder why farmers did not follow these patterns of co-operation, when the Modern Greek State was founded. Greece may be considered as a country that presents the perfect model for the application of rural co-operative activities. Since the main structural problems in Greece were the small size of holdings, their territorial fragmentation and the multicultivation of crops, co-operation among farmers seemed necessary. Co-operatives could have played a vital and reviving role in the agricultural economy of the infant State. Nevertheless, for nearly eighty years (1827-1914) there were no formal co-operatives at all.

There are particular factors that influenced co-operatives and led to the structural deficiencies they suffer even nowadays. At first, during the Ottoman rule, Greek population, being in substantial cultural and economic isolation from the western world, was not able to come into contact with the other European countries and follow their evolution. On the other hand, the War of Independence, which lasted nine years, left the country in ruins. The whole rural structure had been destroyed. The rural economy was at a primitive level. It is characteristic that the only tools at the disposal of the farmers were antiquated.

Secondly, the basic prerequisite for the development of co-operatives, that is land ownership, did not exist, because the large volume of land belonged to the State and the Church. Experience shows that farmers who are independent owners of family farms come together easily to form various kinds of co-

⁵. See Antoniou, p. 239-250.

operatives, but peasants whose tenure is insecure are not likely to do so, or do so only with difficulty. It is futile to organise a massive co-operative movement, until thoroughgoing schemes of land reform are implemented. The need for comprehensive and enabling land reforms existed from the beginning in Greece. One may note that a final shape of a land reform scheme took shape and was implemented in 1928.

Thirdly, Greek governments, during the first fifty years of the new state, had no agricultural policy at all. Thus, no central planning existed for the development of the agricultural economy. There were no means of transport and no transport network, no agricultural insurance, credit and education, no land reform. The Ministry of Agriculture was established only in 1917. Naturally, its establishment did not mean an automatic correction. It took several years before an elementary national agricultural policy could be planned. In conclusion, during the first century there was a haphazard agricultural evolution and the necessary infrastructure that could make co-operatives flourish was non-existent.

Fourthly, the absence of an agricultural credit institution left the farmers to fall victims of usury. Though co-operative credit was very essential, the financing of the agricultural sector was very limited due to its particularities. The rarity of loans and their severe conditions turned farmers to seek recourse to usurers. No possibility of economic solidarity of co-operatives could exist under those circumstances.

Finally, since the co-operative is a complicated form of organisation, its establishment and administration demand specific knowledge of co-operative affairs as well as knowledge of agricultural matters generally. However, most of the Greek farming population was completely illiterate. On the other hand, the State showed no interest in their training, save a few sporadic attempts. The shortage of educated people was shocking in the agricultural sector. In 1898 there were 38 agronomists and till 1865 not even one veterinarian.

Consequently, the essential requirements for the success of the co-operative movement in Greece were missing during the first 80 years of its modern history. Having to face utmost poverty, Greeks could not think of a superior way of economic activity, but were too absorbed in the day-to-day struggle for survival.

The first co-operative created in Greece was the co-operative of Almyros, a village near Volos, Thessaly, in 1900. This event is presumed to be the beginning of Greek co-operative history. Additionally, a very significant event was the adoption of Law 602/1914, which provided for a general legal framework for the organisation of all kinds of co-operatives. It followed the internationally accepted co-operative principles and was quite progressive and radical for its day. It is important to underline that Law 602/1914 remained valid as the basic co-operative law till 1979. The law seems to have given

farmers the necessary impetus. While before its adoption there were only 150 co-operatives, their number increased to 5,186 till 1939. The predominant co-operative form was the credit society.⁶

Law 602/1914, if applied properly, could be a valuable tool for the advance of co-operatives in Greece. Unfortunately, co-operatives failed for many reasons.⁷ It suffices to note that the main reasons were the weakening and falsification of the legal and institutional framework of co-operatives, the interference of the State in co-operative affairs, the legal prohibition of a real credit policy by co-operatives after the creation of the Agricultural Bank of Greece and the total indifference of the State toward the establishment of a sound agricultural co-operative education and training for farmers. On the other hand, it is known that the rural community tends to be conservative. Combining all these factors, one may understand why Greek farmers adopted a hesitant at first and negative afterwards attitude towards co-operative organisation. The obvious advantages that co-operatives presented were curtailed by the destructive intervention of the State.

In a few words, Greek rural co-operatives are supposed to be private enterprises, but they were transformed into quasi-public entities serving the interest of the political parties and not the real interests of their members. Greek legislation, naturally, considers co-operatives as private enterprises responsible for their own activities and liable for their success or failure. However, the actual situation is completely different. Greek rural co-operatives were used as governmental tools to implement “social” policies in the agricultural sector. The strict political tutelage and severe party involvement in co-operatives resulted in serious damages of the institution and the general distrust of Greek public opinion, farmers included. The legislation contributed to that end including several legal deficiencies and other subtle provisions that worked at the expense of co-operatives.⁸

Let us now turn to an analysis of Law 1541/1985, and Law 4015/2011 and a more thorough description of Law 4384/2016, which will corroborate the above arguments. One might also suggest that the promulgation of Law 4673/2020 leads, more or less, to the same conclusions, since it is one more telling example of the practice followed in Greek rural co-operative legislation.

3) LAW 1541/1985

The reference to an old legal instrument may only serve as an emphasis to the basic argument of the present paper. Therefore, there will be a brief comment as to four of its provisions. More specifically:

⁶. See Fefes, *Greek and Italian Co-operative Movement*, p. 102-105.

⁷. See Papageorgiou, p. 27-48.

⁸. An exception was Law 2810/2000, a modern piece of legislation combining co-operative principles and innovative entrepreneurial organisation. However, such legislation has not helped co-operatives to develop, which proves that it is very difficult to undo the damage already done.

1) Article 4⁹ violated the 1st co-operative principle, since it prohibited the establishment of more than one co-operative within the same district. Therefore, if a farmer wished to become member of a co-operative, he had no choice but to become member of the only co-operative of the district or not become a member at all.

2) Article 8¹⁰ violated the 2nd principle distinguishing the members of a co-operative in regular and special members. Such distinction was related to the profession of the prospective members, that is whether they were farmers or had another occupation as well. The members did not have the same rights, therefore people that were involved in producing agricultural goods were not keen to membership in co-operatives.

3) The law allowed for close relatives of the members of the administrative board to be elected as members of the supervisory board, creating thus phenomena of nepotism and mismanagement.

4) Article 28§5¹¹ provided for the election of the members of the administrative board according to the party-slate system and not under the system of a single ballot. The said system created fractures within co-operatives, division among members and rekindling of political passions. Combined with the “only one co-operative in one district” provision, such election system made co-operatives an ideal battlefield for political parties in order to manipulate farmers’ votes.

4) LAW 4015/2011

Law 4015/2011 was till 2016 the instrument on rural co-operatives. It abolished in essence the previous measure, that is Law 2810/2000 (maybe the best legislative specimen in the field of rural co-operatives). The law’s purpose (as reflected in its Explanatory Report¹²) was to serve as a new beginning for co-operatives in Greece. Its provisions aimed to avoid any phenomena of fraudulent behavior within co-operatives serving as a landmark. The following comments show clearly that the said law was one more example of failed legislative action:

1) Article 5§1 provided that only natural persons may be members of a co-operative. Consequently, legal persons, such as other co-operatives, were not able to become members of a co-operative, not to

⁹. Article 4 read as follows: “1. The seat of the rural co-operative organization is the municipality or community, where is its administration. 2. The district of the rural co-operative is defined by the administrative borders of one or more neighboring municipalities or communities of the seat of the co-operative, wherein the farms of its members are located. 3. A second rural co-operative may not be established within the same district”.

¹⁰. Article 8 read as follows: “1. Regular members of a rural co-operative may be adults, male or female, who are engaged personally, professionally and exclusively in any branch of the rural economy ... Full members may also become adults, who are engaged personally, professionally, but not exclusively, with the above-mentioned work. Special members of a rural co-operative may become adults, who are owners of agricultural property located within the district of the rural co-operative, but are not personally and professionally involved in the production of agricultural products”.

¹¹. Article 28§5 read as follows: “Elections are held by secret ballot with the system of party-slate. Each party-slate includes candidates for the administrative board, which are listed on the ballot paper in alphabetical order”.

¹². Greek laws are always going together with an Explanatory Report describing the reasons for legislative action on the specific issue the law regulates.

speak of forming a co-operative themselves. The prohibition to acquire membership of a rural co-operative by legal persons was a clear violation of Article 12 of the Greek Constitution, which enshrines and protects the individual right of association. The only (limited and insufficient) right for a co-operative was to have only one share in another co-operative.

Article 19§8 of L. 4015/2011 was an attempt to fill the vacuum created by the “prohibition” of co-operation among co-operatives. It provided that the then existing Joint Ventures of Rural Co-operatives and Central Co-operative Unions (legal persons provided for in Law 2810/2000) were forced to be transformed to Branch Rural Co-operatives, or else they would not be registered as co-operatives in the Co-operative Registry of the Ministry of Rural Development. Such Branch Co-operatives should function at a national level and there could be only one Branch Co-operative, that is all olive oil producers were either to be members of such co-operative or not be members at all. Such provision in essence imposed a kind of compulsory co-operative violating the 1st Co-operative Principle.

Thus, in Greece the legislator not only precluded a legal person from joining a co-operative, but also effectively prohibited co-operatives from joining other co-operatives. It goes without saying that there is absolutely no reason, legal, economic, functional or other, justifying such prohibition. It did not only violate the 6th Co-operative Principle, but also run counter to the provisions of the SCE Regulation, which explicitly provides for the establishment of a European Co-operative from other co-operatives.¹³

2) Law 2810/2000 provided for the ability of first-level co-operatives to form second-level co-operative (Unions).¹⁴ Articles 18 and 19 of Law 4015/2011 provided for a specific compulsory procedure of amalgamation of such Unions. More specifically, Unions were abolished and transformed to first-level co-operatives through the amalgamation of their members. Moreover, such compulsory transformation existed for Joint Ventures and Central Co-operatives as well. It is evident that such procedure violated article 12 (right of association) and article 5§1 (right of economic freedom) of the Greek Constitution.

3) Article 16§11, modifying article 17 of Law 2810/2000, provided that, among other duties, the auditors of a rural co-operative control, in particular, “the managerial order, both as to the legality and the essential purpose of expenditure and is intended primarily to detect irregularities, misconduct or other infringements and to identify those responsible”. Such provision is far beyond the duties of auditors, especially in comparison to the auditing of a *société anonyme* (SA) in Greece. The strict control of the materiality and necessity of expenses in an enterprise obviously is an impediment to the actions of the manager or directors, since it concerns any kind of business decision. The wording of the article was so general that it covered all types of expenditure from the largest to the everyday expense. This type of

¹³. See Fefes, *European Institutions of Social Economy*, p. 137.

¹⁴. Law 2810/2000 provided for a three-level organisation of co-operatives, distinguishing them to first-level co-operatives (established, e.g., as small legal persons at a village or town), second-level (established at a prefecture) and third-level, which had a panhellenic dimension). Such structure was abolished by Law 4015/2011 and the abolishment is still valid after the promulgation of Law 4384/2016.

control usually leads to idleness and decline of an enterprise. Therefore, the said provision violated article 5§1 (right of economic freedom) of the Greek Constitution.

A final comment has to do with the creation by Law 4015/2011 of a new Registry, wherein all rural co-operative collective entities should be registered and remain there as long as they were functioning.¹⁵ The Registry was an instrument of supervision for co-operatives. The objective of the newly introduced supervisory process was the liquidation of inactive co-operatives, whose only reason of existence was to vote in the election of the bodies of the second- and third-level co-operatives. However, all these inconsistencies were totally unnecessary. The then existing Law 2810/2000 offered solutions to the supervisory authority, which could initiate the procedure of winding-up and liquidation of those co-operatives not complying with the provisions of the law. Hence, the liquidation of inactive co-operatives was purely a matter of political will and application of the law, and not a matter for a new legislative initiative. The only reason for inertia was the “political cost”, that is the fear for loss of control of the rural vote.

5) LAW 4384/2016

As said, the till very recently the legal regime for rural co-operatives in Greece was found in Law 4384/2016. The following analysis indicates once more the pattern of Greek legislation towards a strict control of co-operatives. The law repeated the same mistakes that put co-operatives at a disadvantageous position. More specifically:

1) Article 4§1 provided that the minimum number of founding members of a co-operative was at least twenty persons. There is a tendency for experiments with the minimum number of founding members in the Greek legislation. In most countries the number of founding members varies from 3 to 10. The SCE Regulation provides for 5 persons, natural or legal, coming from at least two different Member-States.¹⁶ Greek co-operative legislation started from number seven (Law 602/1914) and Law 2810/2000 provided for the same number. It is evident that twenty was too large and restrictive. The number of members has initially to be small, as the co-operative is an enterprise based on the free will of the members to co-operate with sincerity and solidarity after having fully understood the advantages of the institution and such co-operation. Larger and financially-viable co-operatives are always our best intention and objective, however this is not achieved by legislative pressure and the mandatory

¹⁵. It is worth mentioning the events following the creation of the Registry. The deadline for submitting applications expired within three months of the publication of Law 4015/11, ie 21/12/2011. The short deadline was the reason for “funny” events such as an unofficial extension to be registered. The Registry remained open after 21/12/11 and those co-operatives enrolled afterwards received a registration number and a certificate of registration without, however, being officially registered, since the deadline could be extended only by amending the law. It is clear that such a legal provision resulted to a plethora of judicial adventures and multiple legislative corrections.

¹⁶. See Fefes, *European Institutions of Social Economy*, p. 137.

requirement of a large number of members. If the members come themselves to the conclusion that large business size is for their own benefit, only then will they seek to expand their co-operative.

2) The law prohibited the registration of members in co-operatives three months prior to the date of election of the members of the administrative and supervisory boards (article 7§1, d). This provision was unreasonable and violated the 1st co-operative principle. It clearly depicts the legislator's attitude over co-operatives and sheds light to the reasons of many inefficiencies of co-operatives in Greece. The pretense for such provision is to avoid the falsification of boards' election through the enrollment of many members, whose only purpose is to vote for specific persons to be elected as board officers. Such attitude assimilates a co-operative to a political party, as if specific fractions in a co-operative are trying not to lose control of power. Even if there are such potential phenomena, it is for the co-operative itself to react. For instance, the statutes may simply provide for a least period of membership, avoiding thus all "free rider" cases.

3) Article 8§3 provided for an obligation of the members to deliver to co-operatives at least 80% of their annual produce and purchase from their co-operatives at least 80% of their annual supplies. Regardless of its content or whether such agreement is right or wrong, such a provision was a rather unnecessary legislative intervention. Transactions between members and co-operatives are a purely internal matter and are not to be compulsorily regulated.

4) The mandatory presence of a lawyer at the procedure of boards' elections - moreover as the chairman of the electoral committee - was another unacceptable interference of the legislator with purely internal co-operative issues. The provision was supposed to promote transparency and credibility of the voting procedure and results, but was inspired by intense suspicion and doubt for co-operatives, burdening them at the same time with unnecessary expenses and bureaucracy. Such rule was unique and is not found in other entities' board elections. Only the statutes should regulate the details of the electoral procedure and all other relevant issues.

5) Articles 17§8c and 16§1 stipulated that the chairman of the administrative board could be elected for only two consecutive terms. Furthermore, a person who had served as chairman for two consecutive terms could not be a candidate as a simple member of the administrative board. Such provisions are meaningless and irrelevant, since they concern purely internal co-operative matters and their only outcome is that co-operatives may lack the services of experienced officers.

6) Article 17§1 provided that in the ballot paper there will be mandatorily female candidates. The percentage of women candidates for the administrative board would be at least equal to the percentage of female members of the co-operative. The provision was another example of an unfortunate legislative intervention, introducing discrimination on grounds of sex. Members, regardless of gender, must be treated in full equality.

7) Article 16§10 provided that co-operatives with a turnover exceeding 10,000,000 euros may, by decision of the general meeting, offer remuneration to the chairman of the administrative board. This provision was another futile intervention by the legislator on exclusively internal co-operative issues.

8) Article 16§12 provided that the chairman of the administrative board (and the CEO or the manager/s if any) were compelled to submit annually a statement of their private assets in case that the co-operative's annual turnover exceeded 2,000,000 euros. Such obligation is valid for all those persons having a direct or indirect relationship with the Greek State. Nevertheless, co-operatives are private enterprises, not connected or related to the State, thus one may not comprehend the obligation reserved for chairmen of administrative boards, CEOs and managers. Such persons are neither officers of the State, or public servants, nor are they involved in public affairs or deal with public money and public expenditure. Such obligation would be acceptable, for instance, in the case of a public contract undertaken by the co-operative with a fee of 300,000 euros. All other provisions are unnecessary.

9) It is true that to hire a competent and co-operatively experienced manager benefits a co-operative and creates a favourable environment of co-operation and trust among the members of the administrative board and co-operative workers. On the other hand, the recruitment of a manager is a purely internal matter of function and administrative structure of a co-operative and should be an issue which lies in its exclusive discretion. However, article 16§11 provided that the appointment of a manager was mandatory, if a co-operative had a turnover exceeding one million euros. Such provision for compulsory recruitment was unique for a private enterprise.

10) The wording of Article 9 indicated that there was only one compulsory share. Unfortunately, the law abolished additional mandatory shares. Such abolition was incorrect, because additional mandatory shares (depending on the member's transactions with the co-operative) means additional funding for the co-operative in order to avoid bank loans. The provision was also contrary to the provisions of the SCE Regulation, which states in Article 4§7 that "the statutes lay down the minimum number of shares required to be subscribed for".

11) Article 26§2 provided that the General Assembly decided the winding-up of the co-operative, if the own funds, as reflected in the balance sheet, had become less than 1/5 of the co-operative capital. This provision was, in essence, a copy-paste of the then Article 47 of Codified Law 2190/1920 on SA, therefore it was totally misplaced and erroneous and violated the first co-operative principle. As said, a co-operative has a variable capital, because, due to the open door principle, the number of members is variable. The provision would make sense, only if the law provided for a minimum co-operative capital, as provided for, i.e., in the SCE Regulation.¹⁷

¹⁷. See Fefes, *European Institutions of Social Economy*, p. 181.

12) The initial version of article 27§12 of Law 4384/2016 provided that after the full repayment of the co-operative's debts, the remainder of the liquidation, if any, is not distributed to the members. The statutes were to regulate the manner of allocation of the remainder, for instance, either to another co-operative, or to a social cause. Unfortunately, the said provision was replaced by article 13 of Law 4492/2017, stating that the liquidator deposits any remainder with the Organisation of Management of Real Estate, a legal person controlled by the State. The Organisation delivers the remainder either to another co-operative, or to support activities that contribute to the development of rural economy. Such provision was an unacceptable intervention of the legislator with the co-operative's property, it violated the right to free disposal of one's property and was, in essence, a confiscation of the co-operative property.

13) As clearly mentioned in the Explanatory Report of the law, there was a clear legal distinction for the first time between "mixed" co-operatives and women co-operatives in Greece. Even if such distinction was based on good intentions, it is rather unfortunate and problematic. The statutory prohibition of free entrance in a co-operative based only on sex (article 2§1), regardless of the fact that the candidate member fulfilled all the other criteria, created a clear discrimination. Such provision violated article 4 of Greek Constitution and the 1st co-operative principle. It is recalled that equality of men and women has been established for co-operatives since 1844, being an article in the statute of the Rochdale Co-operative.¹⁸

14) Article 39 provided for the creation of a non-for-profit legal person of private law under the name "Rural Co-operative Education and Training Fund". Members of the Fund were to become all rural co-operatives and another legal person ("Greek Agricultural Organisation DIMITRA"). The Fund's resources were to come from the distribution of co-operatives' surpluses (2% of the annual surplus of a co-operative goes to the Fund - article 23§4d), from European Union programmes regarding education and training and any other potential funding from the rural co-operatives (after a decision of their administrative board). As a rule, whenever the State thinks necessary to set up a legal person as the said Fund, it has on the same time to take care of both its resources and its administration. Legal provisions envisaging compulsory funding from enterprises of the private sector, as are co-operatives, as well as compulsory membership are a direct violation of Greek Constitution (economic freedom and freedom of association).

¹⁸. "Where restricting membership is a direct response to wider gender discrimination and disadvantage women face in society, restricting membership to women only does not breach this 1st Principle". The legislator's attitude clearly comprehends Greece as falling in the category of countries, which place women at a disadvantageous position. <https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>, pp. 10-11.

6) LAW 4673/2020

The said law was published on 11/its shareholders'03/2020. In its article 37 it provides for the abolishment of Law 4384/2016 with the exception of articles 37 and 38, which include provisions for producers' groups and organisations and PDO-PGI-TSG products.

The Explanatory Report of Law 4673/2020 explains that the then current Law 4384/2016 failed to alleviate the prolonged deep institutional and financial crisis affecting negatively the Greek co-operatives. On the contrary "the new law provides increased opportunities for co-operative members to formulate the appropriate framework for them in order to operate as a private and autonomous enterprise, which will have access to all business activities that do not alter its rural character".

It is not possible to get in an into depth analysis of the new law in such a short period of time, however a few initial comments on the new law are as follows:

1) Article 1§5 provides for the supplementary application of the provisions of Law 4548/2018 on SA and the Civil Code as regards matters not regulated by the law itself. The supplementary application of the SA legal regime is a mistake. One should remind the classical distinction in Greek legislation between capital and personal enterprises. Co-operative is a personal enterprise basing its activities on its members and not on invested capital. SA is a capitalist enterprise basing its activities on its shareholders' capital. It is a wrong practice to use legislation irrelevant to the nature and scope of the original enterprise. One might say that the same is provided for in the SCE Regulation, however such provisions are only applying within the specific context of an article of the Regulation and not in general terms, and furthermore such application is controlled by the residual competence of each Member-State legislation.¹⁹ An acceptable practice would be the application of an SA rule in a co-operative case specifically mentioned in the law text. General supplementary application alongside the Civil Code is not a good practice and may cause questions and contradictory issues.

2) Article 33§5 provides that the remainder of the liquidation, if any, is distributed to the members. Such provision is detrimental for co-operatives violating the 3rd co-operative principle.²⁰

3) The Explanatory Report indicates as one of the advantages of Law 4673/2020 "the opportunity to solve the constant problem of financing the functioning of the co-operatives, which makes them non-competitive. Thus, the statutes may provide for the registration of voting investor-members, making their participation attractive" (article 6§2 of Law 4384/2016 did not allow voting rights to investor-members). Hence, if the statutes allow, investor-members may participate with more than one compulsory shares in the co-operative capital and each compulsory share corresponds to one vote under the condition that such

¹⁹. See, i.e., Fefes, *European Institutions of Social Economy*, p. 153.

²⁰. "The ethical principle driving these restrictions is that the residual net assets of a co-operative, its indivisible reserves created by generations of co-operative members, ought not to be seen to be owned by and available for the personal benefit of current members", <https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>, pp. 37-38.

shares and votes will not exceed 35% of the whole of compulsory shares and corresponding votes (article 9§2).

Investor-members' contributions are a capital source for co-operatives, however their presence should follow specific criteria. Co-operatives that accept non-user members or investor-members create a potential risk to a co-operative's autonomy and independence in addition to risking breaching the 3rd co-operative principle of "limited compensation on capital subscribed as a condition of membership". This risk arises, because such members inevitably will not have the same commitment to the long-term sustainable autonomy and independence of the co-operative as user-members have. This is particularly the case where non-user or investor-members are granted voting rights in a co-operative's general assembly or rights to appoint nominees to the board.²¹ Investor-members come only at the third place of potential capital sources for a co-operative.²² As a counterargument, one might point out that the SCE Regulation provides for investor-members. This is true, nevertheless they do not participate and vote in the General Meeting of the SCE (as provided for in article 12 of Law 4673/2020).²³ They form their own special meeting, formulating and expressing their opinion as regards their own interests and communicate this opinion at the General Meeting of user-members.

4) It is true that the new law amended some deficiencies of Law 4384/2016, for instance it reduced the minimum number of founding members of a co-operative from at least twenty persons to ten. However, many of the abovementioned shortcomings of Law 4384/2016 remained intact. Somewhat more specifically:

a) The law prohibits the registration of members in co-operatives three months prior to the date of election of the members of the administrative and supervisory boards (article 7§3).

b) Article 8§1f preserves the obligation of the members to deliver to co-operatives their annual produce and purchase from their co-operatives their annual supplies at a specific percentage. The only difference from the previous regime is the reduction of the percentage from 80% to at least 75%.

c) The law provides for the mandatory presence of a lawyer at the procedure of boards' elections as the chairman of the electoral committee (article 20§1).

d) Article 16§11 provides that the chairman of the administrative board undertakes the obligation to submit annually a statement of private assets in case that the co-operative's annual turnover exceeds 1,000,000 euros instead of 2,000,000 euros provided in Law 4384/2016, that is the new law makes stricter the said requirement.

²¹. <https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>, p. 55.

²². "Co-operatives should always consider the relative priority for raising capital from the following sources: 1st – a co-operative's own members, 2nd – other co-operatives and co-operative financial institutions, 3rd – social bonds and social investors, 4th – commercial lenders – the financial markets". <https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>, p. 40.

²³. See Fefes, *European Institutions of Social Economy*, p. 96.

e) The wording of article 9§2 indicates that there is only one compulsory share for user-members prohibiting the acquirement of additional mandatory shares for these members in contrast with investor-members that may acquire more than one compulsory shares.

f) The legal distinction between “mixed” co-operatives and women co-operatives in Greece remains, hence the statutory prohibition of free entrance in a co-operative based only on sex (article 2§1).

7) CONCLUSION

Co-operatives need for their existence and development a specific legal framework that adequately reflects their particular nature and function, thereby ensuring them a level playing field relative to other business organisations, and that preserves their distinct identity, which more generally is the precondition for both a variety of legal entities and market pluralism to exist. The regulation of co-operatives cannot be identical to that of other business organisations, especially companies, but must be modeled on the specificities of its subject matter, which in turn this regulation contributes to shaping. This does not imply that co-operatives are to be the recipients of a preferential treatment as compared to other business organisations, but of a specific treatment as far as their particular features so require.²⁴

The different approaches to legislation governing co-operatives can be categorized into three types:

1. Countries where there is one general co-operative law;
2. Countries where co-operative legislation is divided according to the sector and social purpose of the co-operative;
3. Countries where there is no co-operative law and where the co-operative nature of a company is solely derived from its internal articles of association or rules.

Anyway, initial ownership structures of co-operatives (consumer-, producer or worker-oriented) exert a predominant influence on the type of laws and norms applied to this type of company, i.e. the path dependency is mainly structure driven. For instance, in some jurisdictions of the EU, the co-operative is viewed as an association, in others as a society or as part of contract law, while in some other EU member states co-operatives have no special legal statute, like in Denmark and the United Kingdom. This does not mean that co-operatives with an economic objective cannot include societal effects of solidarity, network building, trust and education of members, capacity building and a sustainable development of local communities or regions.²⁵

Both the above passages illustrate, on the one hand, the coordinated research done on co-operatives and on the other, the existence of valuable resources and aids on co-operative legislation and its proper drafting. The only safe conclusion is that in order to draft a law on co-operatives, one must have a deep

²⁴. See Fici, p. 7.

²⁵. See Groeneveld, p. 20-21.

knowledge of co-operative definition, values and principles, as enshrined in the ICA Statement on the Cooperative Identity, and follow the international evolution of co-operative practice and experience, the jurisprudence of national courts and the Court of the EU. If the legislature is not aware of the above principles, then what it creates may be anything but a co-operative.

The above brief description of several specimens of Greek rural co-operative legislation clearly reflects the attitude of the Greek legislator. It is evident that the main approach is depicted by lack of knowledge of the co-operative institution, persistent distrust for co-operatives, and endeavour to control their function. There is definitely no connection to the desirable and correct legislative process quoted. A true service to Greek cooperatives would be if the legislature adopts a single law on co-operatives, following the above patterns.

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SAVING AND CREDIT COOPERATIVE SOCIETIES IN ETHIOPIA: A QUEST FOR COMPREHENSIVE LAWS

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Abstract

Formal cooperatives were introduced in Ethiopia by employees of the Ethiopian Road Authority and Ethiopian Airlines in early 1950. Since then, saving and credit cooperatives are one of the most common kinds of cooperatives in Ethiopia. However, saving and credit cooperatives cannot be considered champions in facilitating access to finance for people, mainly due to lack of innovation, networking among themselves, limited product varieties offered to their members, and lack of a comprehensive legal framework that supports their development. Well thought-out laws that provide the required confidence for members and other stakeholders are vital for the development of cooperatives in the country. However, in Ethiopia, there are no laws that have been specifically developed to regulate saving and credit cooperatives, other than a general mention in the cooperative laws that focus on other forms of cooperatives. Ethiopian cooperative laws do not provide detailed provisions in relation to saving and credit cooperatives. This article argues that Ethiopia should introduce a legal framework that provides clear guidelines on important issues that are currently left unaddressed by the Cooperative Societies Proclamation No. 985/2016 to maximize the financial, social and economic benefits from saving and credit cooperatives. Ethiopia is one of the poorest countries in the world with alarming rate of financial exclusion. Access to finance is critically limited in the country and only a few privileged get access to credits from formal sources. The majority of the people get loans from the informal credit markets at exorbitant interest rates. Saving and credit cooperatives therefore, with appropriate legal and policy frameworks, can be part of the solution to curb the problem of financial exclusion of the majority of the people.

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1. A Brief Historical Background of Cooperatives and Credit

According to Holyoake, the history of cooperatives goes back to Minnos of Greece. Holyoake stated that the idea of cooperatives had been forgotten for centuries until it was recognized later as a new concept in Thomas More's *Utopia*. He mentioned that:²

“the cooperative idea is no new-fangled conception which needs to apologize for its novelty. It has an ancient pedigree, and though long intervals have occurred when the principle appeared to be dead yet, like the grains of wheat found in the coffins of Egyptian mummies, it has possessed vitality and power of germination after thousands of years.”

We can see from the quote provided above that the values and principles of cooperatives have been part of human social history for centuries though these values and principles were dented for long time in some part of the world for different reasons. In Africa, cooperation has been the founding social and economic philosophy in most societies and continues to play a vital role. African traditions have had cooperation as their main ingredient for centuries. The *Iddir* and *Eqqub* in Ethiopia, *Stokvel* in South Africa, *Osusu* in Nigeria are traditional cooperative institutions that are providing critical institutional framework for interdependence and mutual co-existence. These traditional cooperative institutions play a vital role to mitigate the damage from natural and human-made calamities. However, these institutions are not recognized and supported by proper policies and laws. The traditional social and economic structure was neglected by policy makers for so long and therefore they are not able to develop and evolve in a natural and orderly manner without losing their intrinsic values and principles to catch the dynamic social and economic problems of the people.³ In many African countries, borrowed laws and policies that thwart the function of these traditional intuitions have been imposed.

Modern cooperative enterprises with new structure and model were reinvigorated in the 19th century. Cooperatives emerged mainly as a response to the capitalist companies (investor-controlled) that focus rather on financial interests of their members than the well-being of community, users and workers. The companies that had started to work for the development of the local communities with supervision and control of trade chambers and manufacturing unions moved from their original philosophy and became monopolistic and profit maximizers that undermined the general interest of the society⁴. The cooperative

² Holyoake, George Jacob (1903) *The Co-Operatives Movement to-day*. Methuen & Co, London. (Re)Published in 2012 by Forgotten Books. Page 95.

³ Wanyama, F., Develtere, P., and Pollet, I. (2009) Reinventing the wheel? African Cooperatives in A liberalized economic environment. *Annals of public and cooperative economics*. Volume 80/ 3. P. 361-392.

⁴ *Supra* note 1, Holyoake, George Jacob (1903). Page 95.

movement therefore was intended to challenge this selfish interest of investor-owned companies and to offer an alternative ownership and enterprise model to the community. It was supported by intellectuals and thinkers like John Stuart Mill, Alfred Marshal, Leon Walras, George Holyaoke and Robert Owen⁵.

It should be, however, noted that cooperatives are not just a reaction to change in the society, rather they are part of the transformation process in the society. Brett Fairbairn provided that “they are neither the causes of basic transformations in the society nor an oppositional reaction to such changes: rather, they are attempts by people to steer and guide, to influence development, and shape their own futures within a changing world.”⁶ Economic and social changes have forced disadvantaged groups to find a system that mitigates burdens of new economic developments. Cooperatives are a practical response to help the working class and farmers benefit from their own labor and creativities by sharing their labor, generating capital and sharing benefits. The idea of cooperative movement has allowed farmers to challenge the urban centered price determination process that denied farmers their right to fairly benefit from their own production. Workers also get the opportunity to challenge the policy that allow manufacturers and monopolists to determine both the wage of labor and the price for goods that the workers consume that makes life a mounting challenge⁷.

The birth-place of modern credit co-operatives is in Germany. The father of the idea of modern urban credit co-operatives is Hermann Schulze-Delitzsch who founded the first urban credit cooperative in Germany.⁸ The main motive was to provide alternative sources of credit for the marginalized and small operators who were by then dependent on usurers. Schulze-Delitzsch then established the Volksbanken (peoples bank) based on the principle of self-help with the objective of helping the community to establish their own bank as cooperatives.⁹

In 1949, the first rural cooperative bank was started by Friedrich Wilhelm Raiffeisen. Credit unions were mainly motivated by religious reasons to avoid usury in the community. Rural cooperative banks were limited to specific territories and provided credit only to their members. Rural credit cooperatives were rapidly accepted by peasantry and they became common in many parts of Germany. In 1876 the credit

⁵ Zamagni, V. (2017). A worldwide historical perspective on co-operatives and their evolution. In Michie, J., Blasi, R. and Borzaga, C. (2017) *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*. Oxford University Press. Page 99.

⁶ Fairbairn, B. (2004) *History of Cooperatives*; in Merrett, C and Walzer, N. (Ed), (2004). *Cooperatives and Local Developments: Theory and Application for the 21 Century*. ME Sharpe. Page 23.

⁷ Ibid.

⁸ Goglio, S. and Kalmi, P. (2017). Credit unions and cooperative banks across the world. In Michie, J., Blasi, R. and Borzaga, C. (2017). *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*. Oxford University Press. Page 147

⁹ Ibid

unions networked and formed the Raiffeisen bank of Germany.¹⁰ It is also important here to mention the building societies that first appear in Britain. The first building society was founded by Richard Ketley in 1775. The building societies collected contributions from members, and built houses for their members. Building societies became common in many western countries in different forms and structures. Saving and credit unions were also involved in the housing sector and some of the building societies also transformed into standard banks following the liberalization of the financial industry around 1980s.¹¹

2. Cooperatives in Ethiopia

2.1. The development of cooperatives

Ethiopia is home to different cultures and languages. The different languages and cultures however share some common features. Institutions and cultures that coordinate labour and resources for mutual benefits of the people are among the most common traditional institutions one finds across the different cultures and ethnic groups in Ethiopia. The different associations and social groupings coordinate social and economic activities that enable the community to use the available resources in a more efficient and effective manner. In a society that uses domestic animals for farming, it is important to organize how the community can use the available animals in the community in effective way without causing harm to the wellbeing of animals. The coordination is also important with regard to human labor as the labor market is undeveloped and limited only in urban areas. Therefore, cooperatives in different forms have existed in Ethiopia from time immemorial. However, cooperatives that are similar to those widely known in the west emerged in Ethiopia in 1950.¹² Ethiopian Road Authority and Ethiopian Airlines employees are considered as pioneers of saving and credit cooperatives with western-style structure and management. The saving and credit cooperatives were established even before Ethiopia enacted a law to regulate cooperatives. Ethiopia enacted the first law that regulated cooperatives in 1960. The 1960 decree 44/1960 dealt with agricultural cooperatives and intended to encourage cash crop producing farmers. In 1966 a new cooperative society law was announced with more broad and comprehensive provisions that are intended to promote cooperatives as a main engine of the economy. The proclamation also established an office to organize registration and establishment of cooperatives and to provide trainings and technical support for cooperatives. The new law encouraged the establishment of different cooperatives including credit unions, consumer associations and small-scale producers organized as cooperatives. In 1974 around 149 cooperatives were registered by the agency. Most of the cooperatives at that time were organized as

¹⁰ Ibid.

¹¹ Supra note 5, Fairbairn, page 23

¹² Mojo, D., Degefa, T., & Fischer, C. (2017). The Development of Agricultural Cooperatives in Ethiopia: History and a Framework for Future Trajectory. *Ethiopian Journal of the Social Sciences and Humanities*. Volume 13(1). P.44-77. Available at <https://www.ajol.info/index.php/ejossah>.

multipurpose cooperatives.¹³ With regard to agricultural cooperatives, however, only large-scale producers and rich farmers organized as cooperatives. Most small-scale peasants remained neglected and they were dependent on subsistence farming.¹⁴

After the military backed socialist government came into power, it banned all cooperatives that were established during the previous government except the credit unions.¹⁵ The new government then introduced its own version of the cooperative movement based on the Marxist ideology. Proclamation No. 71/1975 was enacted to establish peasant associations throughout the country. The peasant associations were formed with government support and control. In most cases, cooperatives were established without the free will of the farmers. Those cooperative associations were established mainly as a means to achieve the Marxist policy.¹⁶ The government enacted Proclamation No 138/1978. The main objectives were to organize small scale industries, service providers and farmers in government-controlled cooperatives and to provide critical support to them to increase production and productivity in the country. Credit unions were also included in the proclamation as one form of cooperatives but detailed provisions that are required for credit unions to operate efficiently with the required scale and structure were missing. The cooperative Proclamation also provided legal protection and support for housing cooperatives that were intended to solve the problem of housing for urban dwellers¹⁷.

The cooperative structure and governance approach were highly politicized and greatly limited the freedom of members to control the cooperative and had no control of their production and marketing strategy. They were required to supply their products only to government agencies on fixed price below the market price.¹⁸ Principles of cooperatives, such as voluntary membership, democratic control, autonomy and independence, were undermined. The disregard for basic principles of cooperative organizations cultivated an antipathy to the cooperative movement. Therefore, when in 1990 the government introduced a new law that gave members freedom to decide on the fate of the cooperative as associations, most cooperatives decided to dissolve the cooperative enterprises.¹⁹

¹³ Ibid.

¹⁴ Bernard, T., G.T. Abate and S. Lemma. (2013). Agricultural Cooperatives in Ethiopia: Results of the 2012 ATA Baseline Survey. Washington (DC): International Food Policy Res. Available at <http://ebrary.ifpri.org/cdm/ref/collection/p15738coll2/id/127690>.

¹⁵ Tefera, D., Bijman, J., & Slingerland, M. (2017). Agricultural Co-operatives in Ethiopia: Evolution, Functions and Impact. *Journal of International Development*, Volume 29. Available at <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jid.3240>. Page, 44-77.

¹⁶ Ibid.

¹⁷ Supra note 14, Tefera, Bijman, & Slingerland, Page, 44-77.

¹⁸ Holmberg, S.R. (2011). Solving the Coffee Paradox: Understanding Ethiopia's Coffee Cooperatives through Elinor Ostrom's Theory of the Commons (Dissertation). Amherst: University of Massachusetts. Citing Dessalegn, Rahmato (1984). Agrarian Reform in Ethiopia. Uppsala: Scandinavian Institute of African Studies.

¹⁹ Ibid, page, 103.

Generally, during 17 years of the socialist reign, the potential of cooperative associations to transform the economic and social conditions of their members and the community at large was limited due to the political instability that dragged the country into civil war and the stagnant agrarian economy that remained unchanged.

Following the fall of the socialist government and the coming into power of EPRDF (Ethiopian People's Revolutionary Democratic Front), most cooperatives, especially the peasant associations were dismantled and destroyed.²⁰ Sadly, cooperatives were considered as manifestations of the failed socialist government and they were destroyed and their property was embezzled and robbed. Some of the managers of these cooperative were also jailed. Here, it is important to note two things: (1) The EPRDF is generally a result of the Marxist orientated student movement and it is very difficult to repudiate its leftist Marxist inclination; therefore it is somewhat incoherent that it dismantled the cooperatives that in principle should have been considered to be tools to enhance the social and economic wellbeing of the farmers; (2) It underlined the fact that cooperatives cannot become successful without full consent of their members. The members and the leaders of the cooperatives not only failed to protect the property of these cooperatives but also they were active in taking the property of the cooperatives as they failed to consider the property of the cooperatives to be of their own.²¹ It is good to take note here that the traditional associations like Iddir survived all the three governments and they are still functioning without any serious problem. It clearly implies that the traditional institutions are true people's cooperatives that can effectively prevail social and political shocks. Therefore, connecting the new cooperative movement with these traditional institutions may provide the required glue to members to cooperate in the real sense of cooperation.

The new government lately came to understand the advantages of cooperatives to facilitate development in the country. The government then introduced a new proclamation that focused only on agricultural cooperatives, disregarding all other forms of cooperatives. The agricultural cooperative society Proclamation No. 85/1994 was introduced to organize agricultural cooperatives. However, after four years a new cooperative Proclamation No. 147/1998 was introduced to embrace other forms of cooperatives. The 1998 proclamation allowed different forms of cooperatives by different interest groups. At this time, a special team was also established under the Prime Minister's Office to organize and provide policy and technical support for cooperatives in the country.²² The government became aware of the importance of cooperatives for economic growth, job creation, equitable distribution of income, and to improve the saving culture in the society. The government then established a cooperative commission

²⁰ Supra note 18, Holmberg. Page 93.

²¹ Ibid.

²² Ibid.

(now agency) under Proclamation No. 274/2002 at federal level and all regions have also established regional cooperative agencies by law.

The Federal Cooperative Agency is mandated under the laws to organize, support, regulate and to develop a policy and legal framework for cooperative societies at federal level.²³ Interestingly, one of the duties of the commission was to conduct research on traditional financial institutions and to produce a policy document on how these institutions would be transferred into modern cooperatives. The Proclamation under article 5(4) articulates that one of the responsibilities of the commission is to “Undertake research and study to promote traditional and local self-help associations to modern cooperative societies, it shall make known and disseminate the results of the study and follows up the implementation thereof.”

2.2. Proclamation No. 985/2016/ and Cooperatives

In 2016 a new cooperative societies law was proclaimed to further enhance the legal framework for cooperatives.²⁴ In the next section, this article discusses the main features of the proclamation that is currently the applicable law.

The Proclamation provides a working definition for cooperatives as follows:²⁵

“cooperative society” means an autonomous association having legal personality and democratically controlled by persons united voluntarily to meet their common economic, social and cultural needs and other aspirations, which could not be addressed individually, through an enterprise jointly owned and operated on the basis cooperative principles”

The definition is broad enough to bring under its wings all associations that operate based on cooperative principles. The definition indicates that cooperatives can be formed to promote common social, economic and cultural interests. The definition understandably avoids political interest as ground of cooperation for the purpose of the proclamation. The definition also indicates that the cooperatives shall be formed based on free will of its members. The definition provides a vague requirement of “having a legal personality” in the definition. The definition is meant to identify or to qualify the associations that can be given a legal personality as cooperative enterprises. Therefore, requiring legal personality as a condition to be

²³ Cooperatives' Commission Establishment Proclamation, No. 274/2002, *Federal Negarit Gaeta*, No 21. Regional states have their own laws that regulate cooperative societies and there are also cooperative agencies in each region that coordinate the development of cooperatives in regional states.

²⁴ Cooperative Society's Proclamation No 985/2016. *Federal NegaritGazeta*, No 7, P. 9436, Ethiopia, Addis Ababa. For legislative history of cooperatives in Ethiopia and for history of cooperatives see; Mojo, D., Degefa, T., & Fischer, C. (2017). The Development of Agricultural Cooperatives in Ethiopia: History and a Framework for Future Trajectory. *Ethiopian Journal of the Social Sciences and Humanities*. Volume 13(1). P.44-77. Available at <https://www.ajol.info/index.php/ejossah>; Supra note 14, Tefera, Bijman, & Slingerland. .

²⁵ Article 2(1).

recognized as cooperative societies is confusing. Article 11 of the proclamation clearly shows that legal personality is to be bestowed by the regional or federal cooperative agency once the enterprise has been registered. It provides that “any cooperative society registered in pursuance of Article 10 of this Proclamation shall have juridical personality from the date of its registration.” Therefore, the phrase “having legal personality” in the definition seems somehow used to exclude traditional institutions like *Eqqub* and *Iddir* from its scope.

Another important point that should be noted in the definition is the use of ‘person’. Under article 1(24) it is provided that the definition of person includes both natural person and juridical person. Therefore, when we read the definition of cooperative societies as provided in the proclamation together with the definition of persons provided under article 2(24) it appears as if juridical entities were also allowed to form cooperatives under the proclamation. The bare reading of article 2(1) and article 2(24) seems to suggest that investor-owned business entities such as shareholding companies, private limited companies and partnerships can be organized as cooperative societies or cooperative unions. It is however obvious that this is not the intention of the legislature. We can also infer from the change of terminology from persons to individuals when the Proclamation refers to members of primary cooperatives. The law provides that primary cooperatives can be established “by individuals who live or work or are engaged in specific profession within a given area; and by number of members not less than fifty.”²⁶ Article 24 makes it unequivocally clear that only natural persons can be members of a cooperative society. Therefore, only natural persons are allowed to form primary cooperatives and juridical persons cannot become members of cooperatives. The definition provided under the proclamation that includes both juridical and natural persons seems to be enunciated having in mind secondary cooperatives that can be established by cooperatives. Cooperative unions, cooperative societies federations and cooperative societies league can be established by primary cooperatives, but not by natural persons directly. Therefore, the intention of the proclamation is that natural persons can form primary cooperatives and only legally recognized cooperatives (juridical persons) can form cooperative unions, federations and leagues.

The Proclamation interestingly under Article 5 provides general principles of cooperatives, including democratic control, one member one vote, contribution for community, providing education and training and autonomy and independence. The Proclamation also recognizes that profits shall be divided according to share value.²⁷ Article 6 provides that self-help, self-responsibility, promoting culture of democracy, equality, equity and solidarity are the values that cooperatives should adhere to achieve. The Proclamation lists honesty, openness, accountability, participatory, social responsibility and caring for others as ethical

²⁶ Article 1(2) of the same Proclamation.

²⁷ Article 5(3).

values under Article 7. The legal effect of these values is not so clear. However, these values shall be considered by members in drafting the bylaws and other internal guidelines and manuals. The values shall be also relied by arbitrators and courts in adjudicating disputes between members or between members and the management or the board of the cooperative society.

The proclamation should be applauded for including a dispute resolution mechanism that can help cooperatives to avoid the slow and inefficient litigation in courts.²⁸ The Proclamation provides that parties shall try to solve their dispute by reconciliation as primary method of dispute resolution. The Proclamation however provides neither detailed rules on how the reconciliation shall be organized nor an institutional framework to facilitate reconciliation. Cooperatives therefore shall include more elaborated rules in their bylaws in the use of reconciliation to solve disputes. The reconciliation may become more effective if it is designed based on the norms and the practice that are used in the traditional institutions like *Eqqub* and *Iddir*.

The Proclamation provides that disputes that cannot be solved by reconciliation should be adjudicated by arbitration. Arbitration can be established by disputant parties. Each party in the dispute elects an arbitrator and the two arbitrators elect the chair of the arbitration tribunal. The law also provides that the arbitration tribunal shall make its decision as per the civil procedure code and they have the same power and mandate as a civil court. Article 65 provides that “[T]he Arbitrators shall have the same power, with regard to the cases provided ... as a Civil Court for the summoning of witnesses, production of evidence, the issuing of orders or for the taking of any other legal measures.” It is surprising here to note that the law does not require the arbitrators to be lawyers. It is very common to set as a requirement by the law that at least one of the arbitrators should be a trained lawyer in order to apply procedural laws and other laws of the nation that are relevant to the case at hand. The role of lawyers in the development of cooperatives has been crucial, as we learn from history.²⁹

It is commendable that the Proclamation tried to introduce amicable dispute resolution mechanism to solve disputes that arise in the government and management of cooperatives. However, there are serious substantive and procedural limitations in the Proclamation that need to be amended so that cooperatives may benefit from amicable dispute resolution mechanisms as it is intended by the legislator.

²⁸ See Part nine, Articles 61-67.

²⁹ Lawyers assisted cooperatives in Europe, in the USA and in Canada to get legal recognition and to find legal coverage and recognition. The Rochdale Society of Equitable Pioneers was for example, getting critical legal advice and supervision from Edward Vansittart Neale. See Holyoake, George Jacob(1903) *The Co- Operatives Movement To-day*. Methuen & Co, London. (Re)Published in 2012 by Forgotten Books. Page 95.

The first limitation that needs to be rectified is in relation to appeal from arbitration decisions. The Proclamation allows parties to appeal to formal courts whenever they disagree with the outcome of the arbitration decision. Article 67 provides that

“any person who has grievance on the decisions given by the Arbitrators pursuant to article 65 of this proclamation may lodge appeal to the Regular Courts if the issue is at regional level to Regional Court which have jurisdiction, if it is at federal level to the Federal High Court” and sub 2 of the same article further provides that “Without prejudice to the provisions of article 61 and 62 of this proclamation, if parties do not agree on conciliation or arbitration they can bring the issue to regular court which has jurisdiction.”

This contradicts with the provisions of the Civil Procedure Code that limits appeal from arbitration tribunals to only specific grounds of appeal. The general intention of arbitration is also to avoid lengthy and costly legal litigation. Therefore, to allow parties to appeal to formal courts without any limitation negates the very reason that arbitration is required for. The Proclamation generally failed to provide the required clarity for the dispute resolution mechanisms to achieve their objectives. It has failed to make clear the distinction between *shimglina* and arbitration.³⁰

What could have been better in this regard is to introduce institutional arbitration by establishing an independent and neutral arbitration institution or special tribunal that adjudicates disputes using multilevel dispute resolution mechanism. Establishing special tribunals may provide the following advantages. It can include experts who understand the cooperative principles and values in the arbitration tribunal, it can be accessible and uncomplicated, and it can make its verdicts within a reasonable period. Generally, institutional arbitration would help to solve disputes efficiently and effectively. Furthermore, the tribunals may creatively integrate the traditional dispute resolution methods and techniques with modern business practices to come up with fair, equitable and rational procedures that in the long term help to create a smooth and predictable dispute resolution mechanism that avoids or reduces disputes among members, the management and the workers. Well defined dispute settlement mechanisms help the cooperative enterprise to become more stable and reliable institution so that creditors and other business partners will be confident in their dealing with the enterprise.

³⁰ For further reading on the issue see Petros, F. (2009) Underlying distinctions between ADR, *Shimglina* and arbitration: a critical analysis, *Mizan Law Review* vol. 3, no. 1, pp. 105-133. Addis Ababa: St. Mary's University.

3. Saving and Credit Cooperatives and the Law in Ethiopia

Saving and credit cooperatives are considered one of the most sustainable and effective cooperatives in the history of cooperatives in Ethiopia.³¹ The number of saving and credit cooperatives have been rapidly growing in the last 10 years in Ethiopia. According to the Federal Cooperative Agency report 2018, 20,591 cooperative societies and 128 cooperative unions are registered in the country. They have collected 12 billion Birr in savings. They have 4 billion Birr as capital and have provided more than 8 billion Birr as credit to their members.³²

There is no specific law that regulates saving and credit cooperatives in Ethiopia other than Proclamation No. 985/2016 that gives very little attention for saving and credit cooperatives. Hereunder the article discusses some of the provisions that are relevant to the topic.

3.1. Formation of Saving and Credit Cooperatives

The proclamation defines a saving and credit cooperative society as a “society established to provide saving, credit and loan – life insurance services to its members.”³³ The objectives of cooperative societies are, according to the Proclamation, to enhance saving culture of the society, to provide loan to its members, to encourage investment and development and to minimize and share risks in the society.³⁴ The Proclamation provides that the minimum number of members to establish a cooperative society is fifty.³⁵ The Proclamation provides that cooperatives can be established by individuals who live or work in the same area and by professionals who are engaged in the same profession.³⁶

The requirement to live or work in the same area is very vague as the expressions ‘living in the same area’ and ‘working in the same area’ are not defined by the Proclamation and the terms are not also used in the Civil Code that regulate the personal laws. Furthermore, the requirement of working in the same area or living in the same area would make it more difficult for individuals who would like to come together and establish saving and credit cooperatives. The Proclamation seems to follow the Raiffeisen approach that was developed and applied in Germany for rural credit unions. However, for urban residents the Schulze-Delitzsch Volksbanken (people’s bank) approach seemed more appropriate at the time.³⁷ To require

³¹ Supra note 14, Tefera, Bijman, & Slingerland, Pages 431-453.

³² Report of the Federal Cooperative Commission, available at <http://www.fca.gov.et/>. The report on the website is not updated. The author contacted in person the official who is in charge of organizing and supporting credit and saving unions in the Agency and the official provided the latest report of 2018.

³³ Cooperative Society’s Proclamation No 985/2016. *Federal Negarit Gazeta*, No 7, P. 9436, Ethiopia, Addis Ababa. Article 1(70)

³⁴ See Article 4, Cooperative Society’s Proclamation No 985/2016.

³⁵ Article 7(2) of the Cooperative Society’s Proclamation. The Proclamation has given the authority discretion to decide on the number of members considering the nature of the work.

³⁶ Ibid.

³⁷ Goglio, S. and Kalmi, P. (2017). Credit unions and cooperative banks across the world: in Michie, C, Blasi, R. and Borzaga, C.(2017) *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*. Oxford University Press. Pages 145-156.

working in the same office or living in certain location as a necessary condition for the formation of saving and credit cooperatives may hinder the effectiveness of saving and credit cooperatives in urban areas. It is also useful to note here that the requirement of living in the same area or working in the same place makes it difficult for individuals who work in the informal economy and for small and medium enterprises to organize credit and saving cooperatives. The requirement to work in one sector or to live in similar place also makes it difficult for traditional financial institutions like *Eqqub* to reorganize themselves as saving and credit cooperatives, if they need so. *Eqqub* members commonly come from different professions and places. It is very common to find civil servants, traders, and teachers in one *Eqqub*. The diversification of members is vital in *Eqqubs*, as diversified members have diversified financial interests that complement each other. Some members in *Eqqub* are interested in using *Eqqubs* for saving while others are interested in quick access to credits that makes *Eqqubs* relevant for both of them.³⁸

Nowadays some saving and credit cooperatives that are not based in a certain organization follow an open membership policy that violates the law that requires cooperatives to recruit their members from specific area or specific profession. So far, they are openly operating with members who are from different areas and from different professions and the regulators turn a blind eye on these cooperatives. Therefore, it seems that there is a consensus among stakeholders that the law which demands members of cooperatives to share living area or profession is not meant to be implemented in practice.

3.2. The Governance of Saving and Credit Cooperatives in Ethiopia

Corporate governance can be defined as “the mechanism for internal control system that makes up the structure through which the objectives are defined, the means to reach the goals are determined and the results are controlled. It involves a set of relationships among the shareholders, the board of directors, the managers, and other stakeholders”³⁹ In relation to saving and credit cooperatives, the main challenges in relation to governance relate with the following points:⁴⁰

- a. Loss of interest by members in the governance of the union as the process becomes complex and technical;
- b. Possible conflict between cooperative philosophy and the interest of members;

³⁸ The South African Cooperative Bank Act No 40/2007 provides that “a co-operative registered as a co-operative bank in terms of this Act whose members— (a) are of similar occupation or profession or who are employed by a common employer or who are employed within the same business district; or (b) have common membership in an association or organisation, including a business, religious, social, co-operative, labour or educational group; or (c) reside within the same defined community or geographical area.” It seems that a similar approach may help to integrate the traditional institutions with modern cooperatives.

³⁹ Amha, W and Alemu, T (2014). Household Saving Behavior and Saving Mobilization in Ethiopia, EIFTRI, Addis Ababa, Pages 152-153.

⁴⁰ Ibid.

- c. The risk that the board becomes independent from members' control;
- d. Growing agency problem;
- e. Weakening of democratic control;
- f. Mission drift by excluding the poorest; and
- g. Entry barrier for new cooperative banks due to regulation.

The Proclamation has tried to address some of the concerns in the governance of cooperatives.

It requires that the founders should deposit money in a bank that is enough to cover one year's administrative costs of the cooperative and one fifth of the subscribed amount shall be paid up and the remaining paid in the coming four years.⁴¹ This strategy is to avoid cooperatives that come and vanish without carrying out any meaningful activity for their members and society. However, the Proclamation provides nothing in relation to how much credit can be allowed to a member, how they deal with unpaid loan, how many loans they can get from other sources and how they cooperate with other institutions like banks and microfinance institutions. It can be said that these issues shall be regulated by the by-laws. However, considering the delicate nature of the transaction in the saving and credit cooperatives, it would have been better to introduce a separate proclamation or regulation with the required details. Saving and credit cooperatives require a more elaborated and detailed regulation than what is generally provided in Proclamation No 985/2016.

The cooperative law allows cooperatives to issue special shares for non-members with special privileges. Therefore, credit unions can allow non-members to own special shares. The law also allows cooperatives to decide freely the lending interest rate and the borrowing interest rate.⁴² The law allows a member to control 10% of the shares. Therefore, this clearly shows that credit unions deserve special regulation that provides the required prudent supervision as well as provide them with the opportunity to grow further to become important players in the financial sector of the country. The cooperative Proclamation under Article 10 indicates that special regulation with specific and detailed provisions will be enacted by the Council of Ministers. However, so far, the Council has not taken any action.

3.3. Financial Services that Saving and Credit Cooperative Provide

The main function of saving and credit cooperatives is provided under Article 21(9). They are mandated to collect savings, to provide credits and loan- life insurance to their members. Saving and credit cooperatives are not allowed to make credits to nonmembers and to collect saving from non-members. However, cooperatives can provide loans to other cooperatives.⁴³ It is important to note here that

⁴¹ Articles 21 and 27(2) of the Proclamation.

⁴² Article 48(2).

⁴³ Article 48.

cooperatives that are not specifically established as saving and credit cooperative societies can also provide credit to their members and they can also provide loan to other cooperatives.

Cooperative societies are allowed to receive revolving funds from development partners to serve their members and also nonmembers.⁴⁴ The mandate to receive funds from development partners is open to all cooperatives and it is not limited only to saving and credit cooperatives. What is interesting with regard to revolving funds is the fact that the law puts no limitation on the source of the fund. Therefore, funds from foreign sources or from international development actors can also be eligible to finance the society via cooperatives. The cooperative societies may collect payment as service charges and interests from the revolving funds they provide for beneficiaries according to the contract they agreed with the fund providing partner.

Saving and credit cooperatives are allowed to use collaterals for credits and they are empowered to decide the applicable interest rate by their by-laws.⁴⁵ Cooperatives have also a right to be paid in priority to other creditors except for debts owed to the government.⁴⁶ The privilege to be paid in priority is an important addition to the advantages that are given to cooperatives by the law. A right to be paid in priority may be the most appealing incentive for traditional financial institutions to restructure themselves as cooperatives as they are currently facing a problem of not getting adequate share from insolvent debtors who also owe debts to banks and microfinance institutes. Article 40 of the Proclamation provides that the share in cooperatives is exempted from possible court attachment to satisfy a member's personal creditors. However, the shares can be set off for debts a member owes to the cooperative society. Cooperatives are exempted from income tax, and are entitled to get access to land free from auction and they are exempted from court fees in all litigation in which they are involved.

3.4. Arguments for Specific and Comprehensive Laws

Saving and credit cooperatives can play an irreplaceable role for the development of the financial sector and to improve financial inclusion in Ethiopia.⁴⁷ Saving and credit cooperatives help to enhance equitable and accessible financial service for the segment of the society that is excluded from the financial sector. Saving and credit cooperatives however need to be supported with the required prudent supervision and legal framework to avoid a disaster for their members and for the society at large. In Ethiopia it seems that so far, they are not given the required attention by the relevant authorities and they are cornered by policy makers. The central bank that regulates banks, microfinance institutions and insurance has not

⁴⁴ Article 23 (C).

⁴⁵ Article 49.

⁴⁶ Article 40.

⁴⁷ Supra note 40, Amha and Alemu. Page, 69.

enacted any directive or any law in relation to saving and credit cooperatives and they are left to be dealt by the cooperative agency which lacks the required experience, expertise and understanding of the financial system and the banking system of the country.

Saving and credit cooperatives, like other cooperatives, can form credit unions and federation of cooperatives to benefit from scale. That means they can become big enterprises that can attract a lot of savings from their members and attract additional finance from non-members using special shares and loans from other sources. Therefore, the way they are established, controlled, administered and structured are important issues that we need to make sure that they play a positive role in enhancing financial inclusion in the country. The Proclamation that is intended to regulate all kinds of cooperatives has a very limited capacity to provide the required framework for saving and credit cooperatives to develop further and to provide the required service to their members and to the community at large. Therefore, credit unions deserve special laws and attention. To leave them full control and regulation by the cooperative agency is imprudent for two reasons: (1) It creates a risk for depositors and for members as it may be easily abused by the management of federation; and (2) it denies cooperatives the opportunity to scale up and become cooperative banks that provide a multitude of services to their members and to the society at large. In Ethiopia there is currently no legal framework that allows cooperatives to scale up to operate as cooperative banks which allows them to serve non-members. To force them to become just another commercial bank and change their identity is not the right thing.⁴⁸ The lack of diversified banking ownership system can be considered as a limitation in the sustainable and healthy growth of the financial sector for the following reasons:

1. Access to credit is one of the most restricted services in developing countries and the situation is not different in Ethiopia. Credit from banks is inaccessible for most people in Ethiopia not least for those who are unfamiliar with the complex bureaucracy and stringent security requirements of banks. Only 21% of the population has access to banking business in Ethiopia and it is assumed that most of those who have access to banking business may not be qualified to get an advance or loans from the banks.⁴⁹ It is also important to note that even when some applicants are lucky enough to get credit from banks the amount of credit is commonly less than what they need to avoid dependency on the informal market. Therefore, as the credit from banks will not be accessible or insufficient to start business, entrepreneurs in many cases partially or totally depend on the informal credit market.

⁴⁸ The Oromia Cooperative Bank is established by cooperative enterprises in Oromia as main shareholders. However, as they were not allowed to maintain their identity as cooperative banks, they changed their structure to become investor-owned commercial banks by drifting from their cooperative identity. Had it not been for the poor legal framework, they could have emerged as the first true cooperative banks in the country. Now they only maintain the name cooperative, but they are just investor-owned banks.

⁴⁹ The Ethiopian National Bank, Financial Inclusion Strategy, 2018.

Supporting and promoting credit unions is among the best strategies to improve access to finance in developing countries. “Legislative intervention to support the operation of the mutual model in deprived areas may be necessary to help combat this growing problem of financial exclusion.”⁵⁰ Therefore, allowing credit unions to form a small scale bank that is owned and controlled by its members provides a good alternative to credit consumers.⁵¹

2. The agricultural cooperatives that are playing a significant role in importing and distributing fertilizers and improved seeds for farmers are also facing a growing challenge to get financing from commercial banks. Cooperatives have a limited financial power to distribute fertilizers both to members and non-members. Cooperatives then depend on government owned commercial banks or microfinance institutions to get the fund they need to distribute fertilizers for farmers. Commonly, the government owned commercial banks of Ethiopia provide credit to cooperatives directly or sometimes they provide funds to microfinance institutions that are affiliated with regional governments. Regional governments provide guarantees to the commercial banks. Therefore they can provide credit to cooperatives. This long and complicated process makes credit expensive for households. Cooperatives also take the difficult and risky job of collecting the loan from farmers but without any proportional reward for their contribution. Therefore, establishing cooperative banks may solve this problem. Cooperative banks, based on the principle of “cooperation among cooperatives”, can work effectively with agricultural cooperatives to solve the problem. The cooperative banks will benefit from the special privileges that are given to cooperative enterprises and they can use this advantage to provide affordable credit and insurance services to other cooperatives. They can be supervised jointly by the Cooperative Agency and by the National Bank to assure they play a positive role in the development of the banking system and also for the development of cooperatives in the country.
3. The third argument to provide a framework for cooperative banks in Ethiopia is based on the need to diversify the banking ownership structure in Ethiopia. Investor-owned share company is the only model of ownership that is allowed to operate as bank or as a microfinance institution in Ethiopia.⁵² However, especially after the recent financial crisis many finance experts and lawyers are asking if the investor owned model is the best model for the financial sector.⁵³ At least currently there is a

⁵⁰ Adams, Z. and Deakin, S. (2017). Enterprise Form, Participation and Performance in Mutuals and Co-operatives. In Michie, J., Blasi, R. and Borzaga, C. (2017). *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*. Oxford University Press. Page 242.

⁵¹ Abdula, Kelifa (2009). Can the Rich Finance the Poor in Ethiopia? A Fresh Look to Address the Challenge in the Microfinance Sector: in Tekie Alemu (ED) (2009). *Proceedings of the 10th Anniversary of AEMFI Ethiopia*, Addis Ababa. Pages 87-108.

⁵² See Microfinance Business Proclamation No 626/ 2009. The Banking Business Proclamation No 592/2008 and the Proclamation to Amend the National Bank of Ethiopia Establishment Proclamation No. 591/2008.

⁵³ Supra note 49, page 238.

consensus that complicated systems like the financial system will be better off if they are required to follow a diversified ownership structure. Adams and Deakin argued that:⁵⁴

“different legal models serve different social and economic needs. It may be desirable for the law to intervene in order to maintain plurality so that the specific needs served by the different models are not left unmet”. They further explained that “the experience of the 2008 financial crisis has lent support to the view that preserving a diversity of ownership structures in a sector of the economy may be necessary pre-requisite to the avoidance of systemic risk.”

To exclude all other ownership modalities and to rely only on the share company model seems to be founded on shaky assumptions that are challenged both theoretically and empirically, especially following the 2008 financial crisis.⁵⁵ Generally, both theoretical arguments and empirical findings decidedly imply that member controlled financial services are more stable and less risk averse than commercial banks.⁵⁶ Bülbül, Schmidt and Schüwer suggested that:⁵⁷

“Most savings and cooperative banks also fared relatively well in the crisis and better than most of their competitors from the ranks of large private banks. This is due to the fact that, by virtue of their institutional design, they have limited incentives to take on greater risks, while their strong local roots and their embeddedness in close networks puts limits on their possibilities to do so.”

Therefore, policy makers in Ethiopia need to give the required attention to introduce cooperative banks or strong credit unions. Cooperative banks will help to reduce the level of financial exclusion in Ethiopia and to increase saving in the country.⁵⁸ Furthermore, cooperative banks or credit unions, as owned and controlled by consumers, will contribute to protect consumer rights in the credit market. Cooperative banks will also help to diversify the ownership structure of banks and thereby may help to avoid a systemic risk in the financial sector.

Conclusion

Cooperative enterprises that are owned by members for members' benefit are considered to be one of the most prominent social innovations that provide alternatives to investor owned enterprises in many countries. Cooperative enterprises are considered as one of the best suitable ownership models to promote

⁵⁴ Supra note 49, page 238.

⁵⁵ Supra note 49, page, 238.

⁵⁶ Supra note 49, page 237.

⁵⁷ Bülbül, D., Schmidt, R., and Schüwer, U (2013). Savings Banks and Cooperative Banks in Europe. White Paper Series No. 5. Center of excellent SAFE Sustainable Architecture for Finance in Europe. Goethe, Available at https://safefrankfurt.de/uploads/media/Schmidt_Buelbuel_Schuewer_Savings_Banks_and_Cooperative_Banks_in_Europe.pdf. Page 17.

⁵⁸ Supra note 38. Amha and Alemu. Page 69.

social welfare and a sustainable development. Credit and saving cooperatives play a dual role in the cooperative based development. They provide affordable saving and credit services for their members and most importantly they provide financing services for other cooperatives based on the principle “cooperation among cooperatives”⁵⁹.

Ethiopia has attempted to use cooperatives to alleviate some of its intricate social and economic problems. However, generally speaking modern cooperative enterprises in Ethiopia have always been the project of the government and have never been the result of a social movement that was initiated and developed by the community and as a result they are sadly kept separate from indigenous institutions.⁶⁰ They regrettably have lost the opportunity to capitalize on what is already known and acceptable by the society. However, one prominent exception can be saving and credit cooperatives. Credit and saving cooperatives are very popular and commonly free from unwarranted government intervention.

Credit and saving cooperatives are regulated by the cooperative Proclamation that gives limited attention to credit and saving cooperatives while it focuses on agricultural cooperatives as its main subject. The lack of a separate legal framework that is developed considering the special nature of credit and saving cooperatives has posed at least two self-evident challenges to the sector. Firstly, the lack of proper prudent supervision by competent entities exposed them to operational and governance risk. The lack of prudent regulation may also erode the confidence of members and other potential partners that is crucial for the development of the sector. The second effect of the lack of well-crafted laws is denying them the opportunity to expand their services to play a significant role in the financial sector without losing their identity as cooperatives. Therefore, enacting specific laws that deal exclusively with credit and saving cooperatives may lead to the creation of cooperative banks. Supervision by the Cooperative Agency and by the National Bank is recommended to improve the accessibility and inclusiveness of the financial sector. The introduction of cooperative banks may also help to diversify the ownership structure of the banking industry.

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⁵⁹ Supra note 50, Abdula, Pages 87-108.

⁶⁰ Ibid.

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Special Section: Cooperatives and other fields of law

COOPERATIVE RELATIONSHIPS AND FRENCH AND EUROPEAN COMPETITION LAW

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Abstract

This article examines the confrontation of relations between cooperative societies and their members with competition law. Competition law trivializes cooperative relationships when it comes to protecting the market. Thus, the terms of membership and exclusion, as well as the obligations imposed on cooperative members, are examined by French and European anti-competitive practices law, and in particular cartel law, objectively in function of their effects on competition, regardless of the cooperative specificities. On the other hand, cooperative law regains its place when cooperative relationships are assessed on a competitive level with regard to the individual situation of members; the French restrictive practices law (« pratiques restrictives ») is thus set aside, to preserve the cooperative pact.

Introduction

Applicable to economic activities, competition law is a pragmatic law, a law of behaviour: its scope is governed by a principle of legal neutrality, according to which « *the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed* »². Carrying out economic activities, cooperative societies are therefore, despite their specific legal status, subject like any other company to competition law, prohibiting anti-

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² Case C-41/90 Höfner, 23 April 1991, *Rec.* p. I-1979. Commercial code (FR), article L 410-1: « Les règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public. » (« The rules defined in this book apply to all production, distribution and service activities, including those carried out by public entities, in particular within the framework of public service delegation agreements. » (translated by myself).

competitive practices and, in French law only, restrictive practices (« pratiques restrictives ») committed against other market operators³.

What about the relationships that cooperatives have with their members when they are themselves businesses? In France, these relationships are organised by the legislative and regulatory cooperative texts, the statutes and the internal regulations of cooperatives: is competition law therefore intended to intervene, at the risk of being perceived as « a bull in a china shop »?

The answer cannot be unequivocal in this area. The anti-competitive practices law is sovereign when the cooperative organisation brings into play the imperative of protecting the market; in this context, cooperative relationships are trivialized in terms of competition (I). On the other hand, competition law, understood as the French restrictive practices law (« pratiques restrictives »), is discarded in favour of cooperative law which regains its full impact when it comes to assessing the strictly individual impact, on cooperators, of cooperative relations (II).

I - MARKET PROTECTION: A SOVEREIGN COMPETITION LAW

The national and European anti-competitive practices law, consisting essentially of the prohibition of cartels and abuses of a dominant position, aim to fight against business practices having an anti-competitive object and/or effect on the market⁴. In this context, the cartel law has been particularly mobilized to examine the validity of the elements of the cooperative organisation affecting the functioning of the market.

The belonging of a company to a cooperative society does not in itself remove its commercial, economic and financial autonomy⁵. On the contrary, cooperatives are considered in this context by French and European case law as associations of undertakings, covered by Article 101(1) of the TFEU, and whose decisions are susceptible, both in EU and national law⁶, to establish illegal cartels attributable to the

³ Recent examples of the condemnation of cooperatives for cartels aimed at fixing prices and/or sharing markets: Aut. conc. (French Autorité de la concurrence), 6 March 2012, n° 12-D-08; CA Paris (Court of Appeal Paris), 15 May 2014, Sté Primacoop et a., n° 2012/06498; Cass. Com. (French Court of cassation, commercial chamber), 8 décembre 2015, Président de l'Autorité de la concurrence, n° 14-19589, forthcoming publication; Case C-671/15 Président de l'Autorité de la concurrence, 14 November 2017; Cass. Com., 12 September 2018, n° 14-19589, forthcoming publication. Aut. conc., 26 July 2018, n° 18-D-15; Aut. conc., 17 December 2019, n° 19-D-24. Restrictive practices (« pratiques restrictives »), v. not. Cass. Com., 8 July 2008, Ministre chargé de l'économie / Galec, n° 07-16761, *Bull. Civ. IV*, n° 143; CA Versailles (Court of Appeal Versailles), 29 October 2009, GALEC, n° 08/07356.

⁴ TFEU, article 101 and Commercial code (FR), article L 420-1 (cartels); TFEU, article 102 and Commercial code (FR), article L 420-2 (abuses with a dominant position).

⁵ Cass. Com., 16 May 1995, GIE GITEM, *Bull. Civ. IV*, n° 147.

⁶ See for example, Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, *Rec. II-01931*; Cons. conc. (French Conseil de la concurrence), 17 September 1996, n° 96-D-53 (CA Paris, 13 June 1997, SA Allo Taxi).

cooperatives themselves⁷. Thus, « whilst the fact that an undertaking is organized in the particular legal form of a cooperative society does not in itself constitute conduct which restricts competition, such a mode of organization may, regard being had to the context in which the cooperative operates, nevertheless constitute a means capable of influencing the commercial conduct of the cooperative's member undertakings so as to restrict or distort competition on the market in which those undertakings carry out their commercial activities »⁸.

Four key elements of the cooperative organisation, presenting high competitive risks, were confronted with cartel law. The first concerns the membership and exclusion procedures implemented by cooperatives (A). The following three are made up of obligations imposed on members: non-compete obligations leading to a geographical distribution of cooperators (B), so-called cooperative loyalty exclusives (C) and the obligation to respect common prices within the framework of a network sales policy (D).

A - Membership and exclusion from the cooperative

The conditions of membership and the terms of exclusion of cooperatives may fall under the scope of the cartel law when they constitute a barrier to market entry⁹. Cooperatives do not receive any preferential treatment from European and French jurisprudence and can be sanctioned like any other type of business group¹⁰.

For example, a case before the French Conseil de la concurrence¹¹ has highlighted cartels the object and/or the effect of which is to limit market access and free competition from the conditions of membership and exclusion of an artisanal taxi cooperative. Thus, a refusal of an application for membership as well as the impossibility of joining the cooperative in the event of possession of private means of communication in the vehicle were deemed to be anti-competitive, because they were intended to prevent the development of an occasional transport offer competing with the taxi operators¹². Regarding the obligations imposed on the former members of the cooperative, the prohibition to use telecommunications means was considered to constitute a cartel creating barriers to market access,

⁷ There is no need to demonstrate that they were implemented by cooperatives separately, with autonomy, from their members. See for example, Aut. conc., 24 November 2016, n° 16-D-26.

⁸ Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraph 51; Case C-399/93 H. G. Oude Luttikhuis e.a., 12 December 1995, paragraphs 12 and 13.

⁹ Cass. Com., 22 February 2000, n° 97-17020, *Bull. Civ. IV*, n° 35.

¹⁰ See for example, Aut. conc., 11 May 2010, n° 10-D-15 (Economic Interest Group); Cons. conc., 22 April 1996, n° 96-D-22 (professional association).

¹¹ Replaced in 2009 by the French Autorité de la concurrence.

¹² Cons. conc., 17 September 1996, n° 96-D-53, confirmed by CA Paris, 13 June 1997.

because of its excessive nature in its duration and scope in relation to the nature and conditions of exercise of the activity concerned¹³.

B - Non-compete obligations and geographical distribution of cooperators

1) The qualification of a horizontal market-sharing cartel

In general, non-compete clauses are not unlawful per se, but they cannot be disproportionate in their scope or duration, and cannot lead to excessive restriction of competition by affecting the atomicity of suppliers and free access to the market. In this context, the clauses aiming to distribute the market geographically among the cooperators « must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers »¹⁴. But knowing that horizontal market-sharing agreements are hard core cartels that must be severely punished, the French and European competition authorities are very hostile towards these clauses: « une répartition territoriale du marché est présumée constituer une restriction de concurrence par objet dès lors que les opérateurs entre lesquels cette répartition est organisée, sont des concurrents au moins potentiels »¹⁵.

In the GIE GITEM decision of the French Cour de cassation, handed down twenty-five years ago, a EIG (Economic Interest Group) grouping together cooperatives was condemned for cartel, on the basis of clauses « aimed at enforcing a distribution between cooperators absolute territoriality and thus eliminate all competition between independent operators without strengthening their commercial dynamism »¹⁶. Thus, the French Conseil de la concurrence, then the French Autorité de la concurrence, have repeatedly sanctioned cooperatives for horizontal market sharing agreements. For example, a retail traders' cooperative was condemned for the implementation in its internal regulations of a clause on the geographical distribution of the activities of its cooperators « weakening competition between them by preventing them from operating freely in the zones on which they consider themselves competitive and might wish to develop their activity »¹⁷. Likewise, the French Autorité de la concurrence has sanctioned a cooperative having introduced in its statutes, its internal regulations and its membership agreements, non-compete clauses prohibiting its cooperators from canvassing clients referenced by others members and

¹³ Prohibition within a radius of 50 kilometers around the city of Cannes for three years.

¹⁴ Case C-250/92 Gottrup-Klim, 15 December 1994, *Rec.*, p. I-5641, paragraph 35.

¹⁵ « A territorial distribution of the market is presumed to constitute a restriction of competition by object since the operators between whom this distribution is organized are at least potential competitors » (translated by myself): *Aut. conc.*, 24 November 2016, n° 16-D-26, paragraph 72 (confirmed by CA Paris, 18 January 2018, G.I.F. SA, n° 2017/01703; *RTD Com.*, 2018 p. 399, D. HIEZ).

¹⁶ Translated by myself. « Visant à faire respecter entre coopérateurs une répartition territoriale absolue et à supprimer ainsi toute concurrence entre des opérateurs indépendants sans pour autant renforcer leur dynamisme commercial »: *Cass. Com.*, 16 May 1995, GIE GITEM, n° 93-16556, *Bull. Civ. IV*, n° 147.

¹⁷ Translated by myself. « Affaiblissant la concurrence entre eux en les empêchant d'opérer librement sur les zones sur lesquelles ils s'estiment compétitifs et pourraient souhaiter développer leur activité »: *Aut. conc.*, 24 November 2016, n° 16-D-26, paragraph 105.

respond to requests from these customers; this agreement « led to a severe limitation of the commercial autonomy of the members of the group, to reduce the alternatives available to customers and therefore to hinder the free formation of prices »¹⁸.

2) The lack of exemption

The exemptions on the basis of economic progress resulting from these geographical restrictions are extremely rare, if not non-existent, because they are granted by the judge only if there is no other means as effective as the restrictions of competition to obtain the economic progress in question¹⁹.

With regard specifically to retail traders' cooperatives, the argument according to which territorial restrictions would be necessary for the proximity between members and their customers, thus ensuring a quality service within the framework of a common commercial policy, is generally considered as inoperative by the French Autorité de la concurrence. Thus, in the « Groupement des Installateurs Français » case, the Authority considered that other means than territorial restriction could be proposed, such as the admission of new members to areas where the Group is still not very well established, as well that free cooperation between members, to ensure a part of subcontracting or a better after-sales service²⁰.

C - Exclusivity obligations and cooperative loyalty

Members are often held to exclusive sourcing obligations as customers or suppliers of their cooperative. The French and European competition authorities do not condemn these cooperative loyalty clauses per se, but apply the method followed for exclusivity clauses in general. Thus, they assess their conformity by engaging in a competitive balance, taking into account the economic context and their conditions of application: «The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned». In any case, they «must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers»²¹.

In this context, judges examine the competitive interest of cooperative loyalty clauses. Thus, about the exclusive supply obligation from a cooperative: «such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual

¹⁸ Translated by myself. « A conduit à limiter fortement l'autonomie commerciale des membres du groupement, à réduire les alternatives à la disposition des clients et donc à entraver la libre formation des prix »: Aut. conc., 28 October 2019, n° 19-D-21.

¹⁹ TFEU, article 101(3) and Commercial code (FR), article L 420-4.

²⁰ See for example Aut. conc., 24 November 2016, n° 16-D-26, paragraph 107 et seq.

²¹ Case C-250/92 Gottrup-Klim, 15 December 1994, paragraphs 31 and 35. See in French law: Cass. Com., 16 May 1995, GIE GITEM, n° 93-16556, *Bull. Civ. IV*, n° 147.

membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition»²². The same applies to the exclusive supply or delivery clauses by the cooperators: «Depending on the facts and actual circumstances in which the market in question operates, an exclusive supply agreement may, by guaranteeing to the producer sales of its products and to the distributor security of supply, be such as to intensify competition in terms of the prices and services offered to consumers on the market in question, thereby helping to improve the interplay of supply and demand in that market»²³.

But the value of exclusivity clauses must then be weighed against their potentially negative effects, in the light of the economic conditions in which they occur. For example, the European judge was able to consider as constituting an illegal agreement the exclusive purchase obligation imposed by a dairy cooperative on its members (and accompanied by the obligation to pay, in the event of resignation, a «not inconsiderable sum») on the basis of the fact that «the members now account for more than 90% of Netherlands cheese output» and that «the Cooperative is virtually the only supplier of rennet on the Netherlands market», which led to the restriction of the competition both on the national market and on the Community market²⁴.

In another case, an exclusive delivery clause was considered by the European judge to exercise «taken in its economic context, [...] an anti-competitive effect on the market. On the one hand, [...] the applicant has a strong position on the sales market for animal skins and, on the other, 75% of the applicant's members belong to its Emergency Assistance Scheme, which, as already stated, itself leads to rigidity in economic operators' conduct. Consequently, the stipulation in question does have a restrictive effect on competition by making it more difficult for the applicant's competitors to gain access to the Danish market in question»²⁵.

Conversely, the Court of Justice of the European Union validated the obligation of exclusive supply from an agricultural product distribution cooperative, estimating after analysis of the market that «it would not seem that restrictions laid down in the statutes, of the kind imposed on DLG members, go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers»²⁶.

²² Case C-250/92 Gottrup-Klim, 15 December 1994, paragraph 34.

²³ Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraphs 99 and 109.

²⁴ Case C-61/80 Coop. Stremsel-en Kleurselfabriek, 25 March 1981, *Rec.*, p. 851, paragraphs 12 and 13.

²⁵ Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraph 109.

²⁶ Case C-250/92 Gottrup-Klim, 15 December 1994, paragraph 40.

The competitive validity of cooperative loyalty clauses is therefore assessed as for any other exclusivity clause in the light of the economic context in which they operate, and not regarding their sole interest for the cooperative organisation.

D - Respect for common prices and network commercial policy

The practice of common prices as part of an overall policy is considered to strengthen cooperative networks compared to integrated networks. However, specialists in competition law have many reservations about this practice, with regard to the prohibition of price-fixing cartels. The French Conseil de la concurrence, consulted in 1999 on the common commercial policy carried out by retail traders cooperatives, indicated that this policy « cannot go so far as to limit the commercial freedom of these traders in terms of supply, expansion and price, when several members of one or more cooperatives concerned find themselves in competition on the same market. Likewise, it must not have the effect of protecting members against competition from third parties »²⁷.

However, French law enabled retail traders' cooperatives in 2001, and artisanal cooperatives in 2014, to « define and implement by all means a common commercial policy suitable for ensuring the development and activity of its partners, in particular [...] by carrying out advertising or non-advertising commercial operations that may include common prices »²⁸. Does this recognition by legislation then make it possible to justify the price agreements of these cooperatives on the basis of Article L 420-4, 1° of the French Commercial Code, which exempts « practices resulting from the application of a legislative text or a regulatory text adopted for its application »²⁹?

There is little room for doubt: legislation relative to cooperatives cannot be seen as a blank cheque to commit price-fixing cartels. There is no question for cooperatives to undermine the autonomy of their members by imposing a minimum price practice on them, even in the name of a coherent network policy. The gravity of price-fixing cartels, considered hard core in both French and European law, makes any exemption on the basis of Article L 420-4, 1° of the French Commercial Code inconceivable, especially in view of the reluctance of the French Autorité de la concurrence to grant individual exemptions.

²⁷ Translated by myself. « Ne saurait aller jusqu'à limiter la liberté commerciale de ces commerçants en matière d'approvisionnement, d'expansion et de prix, dès lors que plusieurs adhérents d'une ou de plusieurs coopératives concernées se trouvent en concurrence sur un même marché. De même, elle ne doit pas avoir pour effet de protéger les adhérents contre la concurrence de tiers »: Cons. conc., n° 99-A-18, 17 November 1999.

²⁸ Translated by myself. « Définir et mettre en œuvre par tous moyens une politique commerciale commune propre à assurer le développement et l'activité de ses associés, notamment [...] par la réalisation d'opérations commerciales publicitaires ou non pouvant comporter des prix communs »: Commercial code (FR), article L 124-1; with a similar formulation, article 1 of the Law n° 83-657 of 20 July 1983.

²⁹ Translated by myself. « Les pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application ». Article L 420-4, 1° of the Commercial code (FR) has no equivalent in EU law which only provides for an exemption for technical or economic progress (TFEU, article 101(3)).

Likewise, it is difficult to see how price-fixing cartels could be considered as the only means allowing any economic progress to be achieved and as such benefit from an exemption on the basis of Article L 420-4, 2° of the French Commercial Code and Article 101(3) of the TFEU. While competition law is fully intended to intervene to sanction attacks by the cooperative organisation on the proper functioning of the market, the situation is quite different when it comes to the protection of cooperators in their individual relations with their cooperative.

II - INDIVIDUAL RELATIONSHIPS: A DISCARDED COMPETITION LAW

The French law on restrictive practices (« pratiques restrictives ») is not intended, like the anti-competitive practices law, to protect the market. Its objective is to fight against practices establishing unbalanced power relations between economic partners and to establish transparent and loyal relations between professionals³⁰.

In the context of disputes with their cooperatives on their withdrawal or exclusion, cooperators have mobilized two French incriminations involving the liability of their author:

- the significant imbalance between the rights and obligations of the parties: it is « in the context of commercial negotiation, the conclusion or the execution of a contract [...] of submitting or attempting to submit the other party [and no longer the « trading partner » since the ordinance of 24 April 2019] to obligations creating a significant imbalance in the rights and obligations of the parties. »³¹ (Commercial code (FR), article L 442-6, I, 2 °, now article L 442-1, I, 2 ° since the ordinance n° 2019-359 of 24 April 2019);

- and the sudden break of established business relationships: the fact of « abruptly terminating, even partially, an established commercial relationship, in the absence of written notice which takes into account in particular the duration of the commercial relationship, with reference to commercial practices or inter-professional agreements. »³² (Commercial code (FR), article L 442-6, I, 5 °, now article L 442-1, II since the ordinance of 24 April 2019).

³⁰ Commercial code (FR), article L 442-1 et seq.

³¹ Translated by myself. « Dans le cadre de la négociation commerciale, de la conclusion ou de l'exécution d'un contrat [...] de soumettre ou de tenter de soumettre l'autre partie à des obligations créant un déséquilibre significatif dans les droits et obligations des parties. »

³² Translated by myself. « Rompre brutalement, même partiellement, une relation commerciale établie, en l'absence d'un préavis écrit qui tienne compte notamment de la durée de la relation commerciale, en référence aux usages du commerce ou aux accords interprofessionnels. »

French jurisprudence has refused to apply these two incriminations to cooperative relations, giving priority to cooperative law over competition law (A). The basis of this position seems to be the specificity of relations based on the dual quality of members (B).

A - The primacy of cooperative law over French law on restrictive practices

In two decisions concerning the termination of an established business relationship, the French Cour de cassation has given precedence to cooperative law over the restrictive practices law. Thus, in its decision of 8 February 2017, published in the Bulletin: « Vu l'article L. 442-6, I, 5° du code de commerce [devenu L 442-1, II] et l'article 7 de la loi du 10 septembre 1947; Attendu que les statuts des coopératives fixant aux termes du second de ces textes, les conditions d'adhésion, de retrait et d'exclusion des associés ces textes, les conditions dans lesquelles les liens unissant une société coopérative et un associé peuvent cesser sont régies par les statuts de cette dernière et échappent à l'application du premier de ces textes »³³.

Then in a decision of 16 May 2018: « les conditions dans lesquelles les liens unissant une société coopérative de commerçants détaillants et un associé peuvent cesser sont régies par les dispositions légales propres aux coopératives et ne relèvent pas des dispositions de l'article L. 442-6, I, 5° du code de commerce »³⁴.

These two decisions are based on the link between Article L 442-6, I, 5°, now L 442-1, II of the French Commercial code, and French cooperative law, which militates in favour of an implicit implementation of the adage *specialia generalibus derogant*³⁵. A provision of French restrictive practices law potentially protecting cooperators is thus erased in favour of cooperative law³⁶.

But the explanation cannot stop just there, especially since the French Cour de cassation used a different reasoning in a decision of 18 October 2017, published in the Bulletin, and relating both to the sudden termination of an established commercial relationship and on the significant imbalance: « l'arrêt énonce à bon droit que les dispositions de l'article L. 442-6, I, 2° et 5°, du code de commerce sont étrangères aux rapports entretenus par les sociétés en cause, adhérentes d'une société coopérative de commerçants

³³ « Considering article L. 442-6, I, 5° of the commercial code [now L 442-1, II] and article 7 of the Law of 10 September 1947; Whereas the statutes of cooperatives fixing under the terms of the second of these texts, the conditions of membership, withdrawal and exclusion of the partners these texts, the conditions under which the links uniting a cooperative company and a partner can cease are governed by the statutes of the latter and escape the application of the first of these texts » (translated by myself): Cass. Com., 8 February 2017, n° 15-23050, forthcoming publication (exclusion of a member of a cooperative of road freight transport companies).

³⁴ « The conditions under which the ties uniting a retail traders cooperative society and a partner may cease are governed by the legal provisions specific to cooperatives and do not fall under the provisions of Article L. 442-6, I, 5° of the Commercial Code » (translated by myself): Cass. Com., 16 May 2018, Société Système U centrale régionale Est, n° 17-14236.

³⁵ See for example M. BEHAR-TOUCHAIS, « L'exclusion brutale d'un associé coopérateur: quand le droit spécial chasse le droit plus général », *Bull. Joly*, 2017, p. 324 (regarding Cass. Com., 8 February 2017).

³⁶ For a critical approach, H. BARBIER, « De la légitimité douteuse de l'adage *specialia generalibus derogant* pour articuler les droits spéciaux entre eux », *RTDCiv.*, 2017, p. 372 (regarding Cass. Com., 8 February 2017).

détaillants avec cette dernière »³⁷. No reference this time to cooperative law, it is the relations between members and their cooperative that are put forward by the judge.

Admittedly, the French Cour de cassation answered the appeal which relied on the concepts of commercial relationship and of commercial partner to claim the application of Article L 442-6, I, 2° and 5°, of the French Commercial code (today Articles L 442-1, I, 2° and L 442-1, II). Nonetheless, by pointing out that restrictive practices law does not apply to cooperative relationships, it draws attention to what could be the basis of its case law.

B - The specificity of relationships based on the dual quality of members

Cooperative relationships can certainly have a commercial dimension, as the cooperators are clients or suppliers of their cooperative. To stop at this observation would be reductive, however, since it would ignore the dual quality of cooperative members. The cooperators are also associates; they participate in the governance of the cooperative, have the right to an equitable sharing of its profits and contribute to its losses. Cooperative relations thus include a social dimension, unrelated to the market, which takes them outside the scope of restrictive practices law³⁸.

What makes the richness of cooperative relations, and it is in our opinion fundamental to understanding the jurisprudence of the French Cour de cassation, is that beyond their double dimension, they form an inseparable whole, based on a subtle balance between the interests of each, cooperative and associate cooperative members. Within the framework of cooperative law, this balance is achieved thanks to the contractual freedom expressed in the statutes and internal regulations of cooperatives³⁹. An application of the French restrictive practices law would disturb this balance, thus placing the burden of protecting the sole applicant cooperator on the cooperative community⁴⁰.

³⁷ « The judgment rightly states that the provisions of Article L. 442-6, I, 2° and 5°, of the Commercial Code are foreign to the relations maintained by companies in question, members of a retail traders cooperative society with the latter » (translated by myself): Cass. Com., 18 October 2017, n° 16-18864, forthcoming publication.

³⁸ M. CHAGNY, « Vers un principe d'interprétation stricte du droit des pratiques restrictives et son exclusion des relations « hors Marché » », *RTDCom.*, 2018, p. 633 (regarding Cass. Com., 18 October 2017).

³⁹ Balance according to the cooperative activity, the characteristics of the members, the market, etc. The decision of 8 February 2017 relates to article 7 of the law of 10 September 1947, which refers to the statutes the task of determining in particular the terms of membership, withdrawal, delisting and exclusion of cooperative members. V. L. GODON, *Rev. des sociétés*, 2018, p. 250, emphasizing the importance of the concept of “contrat-organisation” (regarding Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717).

⁴⁰ D. HIEZ, « L'incompatibilité de l'identité coopérative avec l'application de l'article L. 442-6, I, 5°, du code de commerce à l'exclusion d'un coopérateur », *Rev. des sociétés*, 2017, p. 636 (regarding Cass. Com., 8 February 2017); M. BEHAR-TOUCHAIS, « La limitation du champ d'application de l'article L. 442-6, I, 2° du Code de commerce par la règle *specialia generalibus derogant* », *JCP G*, 2017, 763 (regarding Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717); G. PARLEANI, « Le coopérateur n'est pas un simple « partenaire économique », ou le cantonnement du droit des pratiques restrictives », *AJ Contrat*, 2018, p. 31 (regarding Cass. Com., 18 October 2017).

And it would be paradoxical to qualify as a restrictive practice, suffered by a company in a market, an act resulting from a social pact to which the applicant member has freely consented.

The specificity of the cooperative relationship based on the dual quality has been highlighted by case law regarding the application of Article L 420-2 of the French Commercial code. This provision prohibits in French law the abuse of economic dependence (« abus de dépendance économique »), a hybrid practice because it ranks among anti-competitive practices but applies to individual relations between a customer and a supplier⁴¹. The judges rejected the application of Article L 420-2 of the French Commercial code to relations between the cooperative and its members: « après avoir rappelé les dispositions des articles 1, 2 et 7 de la loi du 11 juillet 1972 relative aux sociétés coopératives de commerçants détaillants, devenus les articles L. 124-1 et suivants du code de commerce, et notamment que ces sociétés ont pour objet d'améliorer par l'effort commun de leurs associés les conditions dans lesquelles ceux-ci exercent leur activité commerciale, la cour d'appel a pu retenir qu'en tant qu'associé coopérateur de la SCAPEST, la société Pontadis ne pouvait invoquer à l'égard de celle-ci le bénéfice des dispositions de l'article L. 420-2.2 du code de commerce »⁴². The relations between a cooperative and its members cannot be reduced to a client-supplier relationship: associate and cooperator, the member participates in the common effort and benefits from the services of the cooperative. Beyond *affectio societatis*, it is the rule of dual quality that is thus spotlighted by the French Cour de cassation.

French case law is therefore unambiguous: competition law, when it touches practices impacting individual relations between undertakings, is not intended to intervene in cooperatives. The same goes for relations within another type of auxiliary business group, the IEG (Economic Interest Group). The French Cour de cassation thus opposed, in a decision of 11 May 2017 published in the Bulletin, to the implementation of the incrimination of significant imbalance in the context of the withdrawal of a member of EIG: « Vu les articles L. 251-1, L. 251-8, L. 251-9 et L. 442-6, I, 2°, du code de commerce; attendu que sont exclues du champ d'application de l'article L. 442-6, I, 2° du code de

⁴¹ Commercial code (FR), article L 420-2, 2nd paragraph: « Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées aux articles L. 442-1 à L. 442-3 ou en accords de gamme. » (« In addition, when it is liable to affect the functioning or the structure of competition, the abusive exploitation by a company or a group of companies of the state of economic dependence in which it is located is prohibited. regard a customer or supplier company. These abuses may consist in particular of refusal to sell, tied selling, discriminatory practices referred to in Articles L. 442-1 to L. 442-3 or range agreements », translated by myself).

⁴² « After having recalled the provisions of articles 1, 2 and 7 of the Law of 11 July 1972 relating to cooperative companies of retail traders, which have become Article L. 124-1 et seq. of the Commercial Code, and in particular that these companies aim to improve, through the common effort of their partners, the conditions under which they carry out their activity commercial, the Court of Appeal was able to hold that as a cooperative partner of SCAPEST, the company Pontadis could not invoke with regard to the latter the benefit of the provisions of Article L. 420-2.2 of Commercial code » (translated by myself). Cass. Com., 4 July 2006, Société Pontadis, n° 03-16443 (v. CA Reims, 5 May 2003, SA Scapest et autres, *Rev. des sociétés*, 2003, p. 865, B. SAINTOURENS); CA Versailles, 12^e ch., 27 March 1997, *Rev. des sociétés*, 1997, p. 796, B. SAINTOURENS.

commerce les modalités de retrait du membre d'un groupement d'intérêt économique, prévues par le contrat constitutif ou par une clause du règlement intérieur de ce groupement »⁴³. By reference to the statutes and internal regulations of the group, it is the social pact to which its members have adhered that is put forward by the Court⁴⁴. Thus, in EIGs like in cooperatives, the restrictive practices law is not intended to call into question the decisions of social organs expressing the collective will of members, outside the sphere of the market.

Conclusion

Competition law is perfectly legitimate to protect the market against anti-competitive damages resulting from the organisation of cooperative relations. In this context, an economic pragmatism is fully exercised: there is no compatibility or incompatibility in principle of the cooperative status with the anti-competitive practices law. This law is neutral when it comes to the legal status of market players and assesses the effects of their behaviour on competition on a case-by-case basis depending on the economic circumstances⁴⁵.

On the other hand, when the imperative to protect the market is not in question, the social pact to which the members of cooperatives (such as those of EIGs) have freely consented cannot be disrupted by the implementation of a French restrictive practices law intended to settle individual conflicts between customers and suppliers on a market: « The very societary grounds for the decision adopted by the French Cour de cassation only serves as a reminder of the irreducible specificity of membership in a group which aims to develop or facilitate the economic activity of its members »⁴⁶

⁴³ « Considering articles L 251-1, L. 251-8, L 251-9 and L 442-6, I, 2 °, of the Commercial Code; Whereas the terms of withdrawal of a member from an economic interest group, provided for by the constituting contract or by a clause of the internal regulations of this group » (translated by myself): Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717, forthcoming publication; D., 2017, p. 1583, E. CHEVRIER; *RTDCom.*, 2017, p. 593, M. CHAGNY; D., 2017, p. 2335, E. LAMAZEROLLES et A. RABREAU; *AJ Contrat*, 2017, p. 337, F. BUY et J.-C. RODA; *Contrats Concurrence Consommation*, July 2017, n° 7, comm. 147, N. MATHEY; *JCP E*, 2017, 1304, N. DISSAUX; *RTDCiv.*, 2017, p. 643, H. BARBIER; *Rev. des sociétés*, 2018, p. 250, L. GODON. If only the terms of withdrawal are covered, there is no doubt that the solution thus identified by the French Cour de cassation is intended to apply to all relations between a IEG and its members, as the visa of Articles L 251-1 and L 251-8 of the Commercial Code seems to indicate (M. BEHAR-TOUCHAIS, *JCP G*, 2017, 763).

⁴⁴ And the absence of a stipulation in the articles of association or the internal regulations of a notice in the event of the withdrawal of an EIG does not justify the application of Commercial code (FR), article L 442-1, II: Cass. Com., 3 April 2007, Société Maury, n° 06-10526; *Contrats concurrence consommation*, 2007, comm. n° 171, M. MALAURIE-VIGNAL.

⁴⁵ The same goes for the case law on the European State aid law (TFEU, article 107 et seq.), which refuses to condemn per se measures aimed at compensating for the handicaps of which the cooperative status would be the source: Case C-78/08 Ministero dell'Economia e delle Finanze, 8 September 2011, *Rec. I*-p. 7611, paragraph 55 et seq.; *Rev. des sociétés*, 2012, p. 104, G. PARLEANI. For a conviction on the basis of a distortion of competition, see Case C-76/15 Vervloet, 21 December 2016, paragraph 101: « the extension of the guarantee scheme provided for by Belgian legislation to shares in cooperatives operating in the financial sector has the effect of conferring an economic advantage on those cooperatives in relation to other economic operators which are, in the light of the objective pursued by that scheme, in a factual and legal situation comparable to that of those cooperatives and, therefore, has a selective character ».

⁴⁶ Translated by myself (« La motivation très sociétaire adoptée par la Cour de cassation ne fait que rappeler l'irréductible spécificité de l'adhésion à un groupement qui a pour but de développer ou de faciliter l'activité économique de ses membres »): G. PARLEANI, « Le coopérateur n'est pas un simple « partenaire économique », ou le cantonnement du droit des pratiques

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Legislation

A NEW PARADIGM FOR COOPERATIVE SOCIETIES UNDER THE NEW BELGIAN CODE OF COMPANIES AND ASSOCIATIONS

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Abstract

The Belgian law on cooperative societies has been substantially modified following a broader reform of company law in 2019 and induces a change of paradigm: the legislator indeed took this opportunity to modify a regime of flexibility and “neutrality” in relation to the cooperative principles of the cooperative society form to limit said form to the companies wishing to follow the cooperative model and principles.

Key words: new legislation – change of paradigm – definition of the cooperative society in Belgian law

I. INTRODUCTION

1. Overview – The Belgian legislator has recently implemented a radical reform of the legislation applicable to companies and associations, under the Act of 23 March 2019 introducing the Belgian Code of companies and associations and miscellaneous provisions (hereinafter: the “Law of 23 March 2019”)⁴ – as recently amended by an Act of 28 April 2020 (the “Law of 28 April 2020”) – completed by the Royal Decree of 29 April 2019 executing the Belgian Code of companies and associations⁶ and the Act of 17 March 2019 adapting some tax measures to the new Belgian Code of companies and associations⁷.

In this context, the legislator has modified its approach to the law on cooperative societies. Since 1873, companies’ laws have maintained a ‘neutral’ structure, malleable depending on very different cooperative purposes (*infra* §0). They had the disadvantage that numerous cooperative societies were not attracted by a cooperative spirit, but merely by the flexibility of this kind of company under Belgian law (*infra* §0). This had led the legislator to reinforce the constraints of this structure (*infra* §§0 and 0). The

¹ Partner LIME

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⁴ Belgian Monitor (hereinafter: *M.B.*), 4 April 2019, pp. 33239 et seq.

⁵ Act of 28 April 2020 transposing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and including miscellaneous provisions relating to companies and associations, *M.B.*, 6 May 2020, pp. 30488 et seq.

⁶ *M.B.*, 30 April 2019, pp. 42246 et seq.

⁷ *M.B.*, 10 May 2019, pp. 45450 et seq.

Code of companies and associations (hereinafter the “CCA”) aims to give a ‘substantial’ definition of the cooperative society according to its purpose (*infra* §0), while offering an alternative to ‘false’ cooperative societies through the limited liability company (*infra* §0) (0).

It seemed interesting to analyse this definition and establish a parallel with the European Regulation on the European cooperative society (0).

We will then examine various provisions applicable to the operation of a cooperative society for which the CCA relies on the rules applying to the new limited liability company (hereinafter “LLC”) and when necessary adapts certain rules: a cooperative society now has ‘equity capital’ rather than share capital like public limited companies ((b), 0); the securities that it can issue are subject to a *numerus clausus* but their regime is quite flexible ((b), 0); rules of governance are generally residual ((b), 0) and the variability of shareholding (admission, resignation or exclusion) is organised as it previously was, with however more flexibility ((b), 0).

This system is completed by a mechanism of accreditation, which has become quite complex (0).

2. The legal approach of the cooperative society before the CCA – It was the Act of 18 May 1873 containing Title IX, Book 1st, of the Commercial Code relating to companies, that regulated the cooperative society for the first time in Belgian law with about twenty articles.

The first bill introduced what was, at the time, a substantial reform of corporate law, did not make any reference to cooperative societies and this corporate form was only added after parliamentary debates⁸.

The legislator, facing a fairly recent phenomenon with very diverse characteristics, intended to set up a quite neutral body of rules, which did not “restrict the shareholders’ freedom” and did not place “any limit [...] on the field of cooperative society”⁹, while introducing certain technically essential provisions such as the ones on variability of capital, while creating moreover an extremely flexible legal regime, which had very few mandatory rules¹⁰.

The cooperative society was defined as “a company constituted by shareholders, the number or contributions of which are variable and the shares of which are non-transferable to third parties”¹¹.

⁸ Those debates are summarised in J. GUILLERY, *Commentaire législatif de la loi du 18 mai 1873 sur les sociétés commerciales en Belgique*, Bruxelles, Bruylant, 1878, pp. 215 et seq., regarding arguments in favour of the recognition of a distinct corporate form; C. RESTEAU, *Traité des sociétés coopératives*, Bruxelles, Larcier, 1936, p. 24 ; J. VAN RYN, *Principes de droit commercial*, t. II, Bruxelles, Bruylant, 1957, p. 53 ; J. T’KINT and M. GODIN, *Les sociétés coopératives*, Bruxelles, Larcier, 1968, p. 10.

⁹ Free translation of “*qui ne “restreignait pas la liberté des associés” et n’apportait “aucune limite [...] au domaine de la société coopérative”*”: Report Guillery (24 March 1870), *Parliamentary Document* (hereinafter: “Doc. parl.”), House of Representatives (hereinafter: “Ch. repr.”), ordinary session (hereinafter: “sess. ord.”) 1869-1870, nr. 130, p. 9.

¹⁰ Report drawn up on behalf of the commission, 24 mars 1870, J. GUILLERY, *Commentaire législatif de la loi du 18 mai 1873 sur les sociétés commerciales en Belgique*, Bruxelles, Bruylant, 1878, pp. 166-167.

¹¹ Free translation of “*celle qui se compose d’associés dont le nombre ou les apports sont variables et dont les parts sont incessibles à des tiers*”: Article 85 of the Act of 18 May 1873. T. TILQUIN and V. SIMONART, *Traité des sociétés*, t. I, Bruxelles, Kluwer, 1996, p. 20, nr. 14.

3. The debate on ‘true’ or ‘false’ cooperatives – This neutrality, which seemed to be an advantage¹², has nevertheless been much criticised since then.

Indeed, for a long time, the doctrine has been underlining that the regulation on cooperative societies so conceived has led to the fact that “the legal system constitutes [...] a too large attire that businessmen are prompt to wear only wanting to take benefit from the facilities and advantages of cooperative societies offered by the legislator without having any cooperative ideal in mind”¹³.

The doctrine was thus led to try and make a distinction between the notions of ‘true’ and ‘false’ cooperative¹⁴: ‘true’ cooperative societies pursued a cooperative ideal¹⁵ while the ‘false’ cooperative societies were private limited companies or public liability companies ‘disguised’ as cooperative societies. These ‘false’ cooperative societies nevertheless abided by the legal provisions and constituted genuine cooperative societies in accordance with the governing law. Their variable capital and the flexibility of this social form were particularly interesting for shareholders working closely on the company’s activities, especially in professional firms¹⁶.

However, flexibility had also caused the cooperative corporate form to be misused regarding tax and social security provisions¹⁷.

4. Rigidification of legal provisions – The debate had never really been settled: modifications of the legal regime of cooperative societies introduced over time mainly intended to tighten up their legal regime by setting up various constraints to limit the risks linked to the activities of some ‘false’ cooperative societies.

Thus, in 1984, the legislator stated that he wanted to “[...] rethink the cooperative society and provide for [...] guarantees assuring a healthy management”¹⁸ and implemented a new regulation offering more guarantees to third parties.

¹² In fact, Guillery explains that the regulation proposed for cooperative societies was voluntarily large because the French legislator, by a law of 24 July 1867, willing to be too precise, completely failed to realise its goal of regulating cooperative societies, which preferred to continue using the old systems instead of integrating the new one, considered as too restrictive : Report drawn up on behalf of the commission, 24 March 1870, J. GUILLERY, *Commentaire législatif de la loi du 18 mai 1873 sur les sociétés commerciales en Belgique*, Bruxelles, Bruylant, 1878, p. 164 ; E. WAELBROECK, *Commentaire législatif et doctrinal de la loi du 18 mai 1873 contenant le titre du Code de commerce relatif aux sociétés*, Bruxelles, Bruylant-Christophe & cie, 1874, p. 382.

¹³ Free translation of “*le système légal constitue [...] un vêtement trop large que s’empressent d’endosser des hommes d’affaires qui, sans le moindre idéal coopératif, veulent uniquement profiter des facilités et avantages dont le législateur a entouré les sociétés coopératives*”: J. T’KINT and M. GODIN, *Les sociétés coopératives*, Bruxelles, Larcier, 1968, p. 11, nr. 27; FREDERICQ, *Traité de droit commercial belge*, t. V, 1950, p. 946; J. VAN RYN, *Principes de droit commercial*, t. II, 1st ed., p. 55, nr. 963.

¹⁴ J. VAN RYN, *Principes de droit commercial*, t. II, 1st ed., pp. 59 and 57, nr. 966, calling companies which did not even implement a system of opened society, “disguised cooperative societies” (“*sociétés coopératives travesties*”).

¹⁵ As a consequence, when necessary, those companies requested an accreditation of the National Cooperation Council: *infra* § 0.

¹⁶ P. VAN OMMESLAGHE, « Les sociétés coopératives, les sociétés civiles professionnelles et interprofessionnelles et les sociétés de moyens », *Les sociétés commerciales*, Bruxelles, éd. du Jeune Barreau, 1985, pp. 320 and 321; J. STEENBERGEN, « Professionele vennootschappen. Het aanwenden van vennootschappen bij de uitoefening van een vrij beroep », *T.P.R.*, 1994, pp. 219 et seq.

¹⁷ See P. NICAISE and K. DEBOECK, *Vade mecum des nouvelles sociétés coopératives*, Bruxelles, Creadif, 1992, p. 15, for cooperative societies only motivated by the concern of avoiding the application of social law and that have led to the legislator’s reaction under the Act of 20 July 1991 containing social and various provisions (*infra* § 0).

In 1991, the legislator also created two types of cooperative societies, namely the “limited liability cooperative societies” (“*sociétés coopératives à responsabilité limitée*”) and the “unlimited liability cooperative societies” (“*sociétés coopératives à responsabilité illimitée*”) ¹⁹, the limited liability cooperative societies being regulated by requirements similar to those imposed to other limited companies²⁰.

These reforms followed the explosion in the number of cooperative societies in Belgium due to the flexibility of their legal regime compared to the rigidity of the one applicable to limited liability companies (in particular following the large transposition in Belgian law of the second European directive on company law²¹): from 3,928 cooperative companies in 1980, Belgium went up to 39,260 companies ten years later²².

5. Accreditation by the National Cooperation Council (“*Conseil National de la Coopération*”) – The creation of a National Cooperation Council, under the terms of the Act of 20 July 1955 regarding the setting up of a National Cooperation Council²³ and of the Royal Decree of 8 January 1962 setting the conditions of accreditation of cooperative societies’ groups and cooperative societies²⁴ was another way to tackle the identification of ‘true’ cooperative societies (*infra* 0).

¹⁸ Free translation of “[...] *repenser la société coopérative et prévoir [...] les garanties pour assurer une saine gestion*”: Act of 5 December 1984 modifying the laws on commercial companies, coordinated upon 30 November 1935 (Parliamentary Documents), *Pasin.*, 1984, p. 2095.

¹⁹ Article 164 of the Act of 20 July 1991 on social and various other provisions (“*loi du 20 juillet 1991 portant des dispositions sociales et diverses*”) and former Article 141, §2 of the coordinated laws on commercial companies (“*lois coordonnées sur les sociétés commerciales*”), which became Article 352 of the Companies Code.

²⁰ Parliamentary works on the Act of 20 July 1991 underlined that “other forms of limited liability company offer those guarantees, since they have to meet a range of specific requirements such as minimal share capital, incorporation by notarial deed, the obligation of drafting a financial plan, the founders’ and directors’ specific liability in case of capital increase [...] [However], the current legislation (on cooperative societies) imposes none of those conditions to the cooperative society” (“*d’autres formes de société à responsabilité limitée offrent ces garanties, étant donné qu’elles doivent satisfaire à une série d’exigences spécifiques comme, par exemple, celle du capital social minimum, la création par acte authentique, l’obligation d’établir un plan financier, la responsabilité spécifique des fondateurs et des gestionnaires en cas d’augmentation de capital. [...] [Or.] la législation actuelle (sur les sociétés coopératives) n’impose le respect d’aucune de ces conditions par la société coopérative*”) (Act on social and other various provisions [art. 160-176], Report on behalf of Commission in charge of economic and commercial law matters by Me Merckx-Van Goey, *Doc. parl.*, Ch. repr., sess. ord. 1990-1991, nr.1695/9, 10 July 1991, p. 3) (“*Projet de loi portant des dispositions sociales et diverses [art. 160 à 176], Rapport fait au nom de la commission chargée des problèmes de droit commercial et économique par Mme Merckx-Van Goey*”).

²¹ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *OJ*, L 26, 31 January 1977, p. 1 et seq.; B. SMETS and J. P. VINCKE, *La Société Coopérative*, Bruxelles, collection I.P.C.F., Standaard, 2000, p. 10.

²² P. NICAISE, *Le nouveau droit des sociétés coopératives – La loi du 20 juillet 1991*, Bruxelles – Louvain-la-Neuve, Bruylant-Academia, 1992, p. 5.

²³ *M.B.*, 10 August 1955, pp. 4865 et seq.

²⁴ *M.B.*, 19 January 1962, pp. 398 et seq.

II. CODE OF COMPANIES AND ASSOCIATIONS (2019)

6. Approach of the CCA – It was initially planned to drop, purely and simply, the cooperative society form and stipulate that any LLC could adopt a ‘variable capital’ as the former cooperative society and could eventually submit an accreditation request to the National Cooperation Council²⁵.

This solution was finally abandoned as the legislator rightly decided to keep a ‘true’ cooperative society²⁶.

To this end, the legislator of the CCA also adopted a new approach for the cooperative society and implemented a change of paradigm: the intention was to reserve the form of cooperative society to entities based on the “cooperative model”²⁷, to introduce, in this context, a definition inspired by the Regulation on the European cooperative society (*infra* § 0)²⁸ and to refer, in the parliamentary preparatory works, to principles of the International Cooperative Alliance (hereinafter the “ICA”)²⁹, even if no article of Book 6 of the CCA, containing the rules applicable to cooperative societies, expressly requires compliance with the ICA’s cooperative principles (*infra* § 0).

7. Accreditation – The legislator maintains the possibility for a cooperative society to be accredited by the National Cooperation Council (CCA, art. 6:1, § 3, and 8:4)³⁰. It is then named an “accredited cooperative society” (“*société coopérative agréée*” or “*SC agréée*”) (CCA, art. 8:4).

Maintaining this specific accreditation as an accredited cooperative society seems to mean that a difference remains between the ‘usual’ cooperative society and the accredited cooperative society, eager to fulfil additional cooperative criteria, which is then likely to obtain an accreditation (*infra* § 0)³¹.

²⁵ O. CAPRASSE and M. WYCKAERT, « Limitation du nombre de sociétés : qu’en est-il des sociétés de capitaux (SA, SPRL, SCRL) ? », *La modernisation du droit des sociétés/De modernisering van het vennootschapsrecht*, Bruxelles, Larcier, 2014, p. 73, nr. 11; Report drawn up on behalf of the economic and commercial law Commission (“*Rapport fait au nom de la Commission de droit commercial et économique*”), *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/011, 14 November 2018, pp. 27-28.

²⁶ Act introducing the Code of companies and associations, Explanatory Memorandum (“*Projet de loi introduisant le Code des sociétés et des associations, Exposé des motifs*”), *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 11 and Report drawn up on behalf of the economic and commercial law Commission, *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/011, 14 November 2018, p. 51.

²⁷ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 11 (“the cooperative society recovers its initial particularity, namely running an enterprise on the grounds of the International Cooperative Alliance (ICA) cooperative model, which can also be found in Regulation nr. 1435/2003”) (“*la société coopérative (SC) recouvre sa particularité initiale, à savoir mener une entreprise sur la base d’un modèle coopératif de l’International Cooperative Alliance (ICA), que l’on retrouve également dans le règlement n° 1435/2003*”), p. 14 (“dedicated to companies leading an enterprise on the grounds of the cooperative ideal as specified in ICA’s principles”) (“*réservée aux sociétés qui mènent une entreprise sur la base de l’idéal coopératif tel que précisé dans les principes de l’ACT*”), pp. 25, 190 and 91 and Report drawn up on behalf of the economic and commercial law Commission, *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/011, 14 November 2018, pp. 11, 135 and 138; A. FRANÇOIS and F. HELLEMANS, « Shaken, not stirred? Een eerste analyse van de definities, de basisbeginselen in de structure van het nieuwe Wetboek van vennootschappen en verenigingen », *Le projet de Code des sociétés et associations*, Bruxelles, Larcier, 2018, p. 43.

²⁸ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 191.

²⁹ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 11.

³⁰ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 192.

³¹ Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, pp. 65-67.

A cooperative society can also request its accreditation as a social enterprise (“cooperative society accredited as a social enterprise” or “CS accredited as a SE” (*“société coopérative agréée comme entreprise sociale”* or *“SC agréée comme ES”*) (CCA, art. 6:1, § 3, and 8:5, § 1st), or request those two accreditations simultaneously (in that case, only its short name allows to distinguish it : “CSSE” instead of “CS accredited as SE”) (*“SCES agréée”* instead of *“SC agréée comme ES”*) (CCA, art. 8:5, §§ 1st and 2) (*infra* § 0 and 0).

The combination of those accreditations is not optimal (*infra* § 0).

8. LLC with ‘variable equity’ – In order to consolidate the new system, the legislator offers an alternative to the shareholders of more ‘capitalistic’ existing cooperative societies: the LLC (“SRL”) with rights of resignation and exclusion³², meaning that “the flexibility, which nowadays makes the cooperative society attractive, can from now on be found in the LLC”³³ and therefore that “the ‘false cooperatives’ will no longer have to adopt this form and can become LLC”³⁴.

Parliamentary preparatory works more specifically mention professional companies in this respect³⁵.

Many existing cooperative societies, when realizing that they do not meet the definition of Article 6:1 of the CCA, will need to be transformed into LLC, on a voluntary basis before 2024 or *ipso jure* on 1st January 2024³⁶, it being understood that the rules applicable to LLC are already applicable, from 1st January 2020, to existing cooperative societies which clearly do not meet the definition of the new cooperative society even though their articles of association³⁷ still mention the cooperative form.

It is however difficult to identify the extent of this movement at this stage.

9. Deletion of the unlimited liability cooperative society – The form of the unlimited liability cooperative society no longer exists.

Article 6:2 of the CCA provides that “cooperative society’s shareholders are only liable for their contribution”³⁸. All unlimited liability cooperative societies must therefore take another legal form.

Article 41 of the Law of 23 March 2019 states that, until its transformation into another legal form and as from 1st January 2020, the provisions of the CCA regarding partnership will be applicable to the existing unlimited liability cooperative societies. Furthermore, if no transformation has occurred, any

³² For details on limited liability companies with resignation and removal rights: T. TILQUIN, « La démission et l’exclusion : ébauche d’une SRL à capitaux propres variables », A.-P. ANDRÉ-DUMONT and T. TILQUIN (coord.), *La société à responsabilité limitée*, Bruxelles, Larcier, 2019, pp. 245-277 ; for examples of statutory clauses, see T. TILQUIN, « Les clauses de démission et d’exclusion (SRL – SC) », *Le nouveau droit des sociétés et des associations*, Bruxelles, Larcier, 2019, pp. 319 et seq.

³³ Free translation of “*la flexibilité, qui constitue aujourd’hui l’attrait de la société coopérative, se retrouvera désormais également dans la SRL*”: Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, pp. 14, 15 and 21.

³⁴ Free translation of “*les fausses coopératives ne devront plus adopter cette forme et pourront devenir des SRL*”: Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, pp. 14, 15 and 21.

³⁵ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, pp. 186 and 190.

³⁶ Art. 41 of the Law of 23 March 2019.

³⁷ or “*statutes*”.

³⁸ Free translation of “*les actionnaires d’une société coopérative n’engagent que leur apport*”: CCA, art. 6:2.

unlimited liability cooperative society will be automatically transformed into a partnership on the 1st January 2024.

10. Changes in terminology – The terminology used in the new Code has undergone various modifications:

- following the deletion of the unlimited liability cooperative society form, all cooperative societies will be henceforth called “cooperative societies” or “CS”³⁹;
- owners of shares in a cooperative society were, under the terms of the former Companies Code, called “partners” (“*associés*”); the CCA proceeds to a major modification in this regard, naming them now “shareholders” (“*actionnaires*”); however following the adoption of the Law of 28 April 2020, amending the CCA, each cooperative society may choose any other terminology it deems fit (“*associés*”, “*coopérateurs*”, “*sociétaires*” or any other similar term)⁴⁰;
- ‘shares’ are no longer called “parts” but are called, in this respect, “shares” (“*actions*”) in the CCA, as is the case for limited companies, subject to the new possibility, for each cooperative society, to however still use the former terminology as a consequence of the amendment introduced by the Law of 28 April 2020⁴¹.

These last modifications are explained by a will to harmonise the vocabulary used for limited liability companies (PLC, LLC and CS) (“*SA*”, “*SRL*”, “*SC*”) and especially by the assimilation of the legal regime of the cooperative society to the LLC’s⁴², though it is not really appropriated.

III. DEFINITION: ARTICLE 6:1 OF THE CCA

11. Preliminary observation – The modification of the definition of the cooperative society is the main change brought by the Code of companies and associations in comparison with the existing system in Belgian law: the new definition initially proposed 43 aimed at limiting the use of the cooperative form to companies inspired by the traditional cooperative model, “driven by a cooperative ideal”, while introducing elements in terms of purpose, organisation and relationship with its shareholders (CCA, art. 6:1) (*infra* 0).

The cooperative anchorage is strengthened by the obligation to express in the articles of association, the cooperative purpose and the cooperative values of the company (*infra* 0).

A. Definition

12. A new definition: Article 6:1 of the CCA – The definition of the cooperative society under the terms of Article 6:1 of the CCA includes the following components, that can helpfully be compared to the

³⁹ CCA, art. 1:5, § 2, and 6:1 *in fine*.

⁴⁰ Article 118 of the Law of 28 April 2020 amending article 6:2 CCA.

⁴¹ Article 119 of the Law of 28 April 2020 amending article 6:6 CCA.

⁴² Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 193; X. DIEUX, « Le nouveau Code des sociétés (et des associations) : une “anonymisation” silencieuse », *R.D.C.-T.B.H.*, 2018/9, p. 937.

⁴³ The definition finally adopted and included in Book 6 is broader than the initial definition which did not seem to take entirely into account the various expressions of the cooperative trend in Belgium: T. TILQUIN, « La société coopérative, ‘outil de disruption’ », *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, p. 119; T. LOFFET and M. BERNAERTS, « Les associés de la société coopérative », *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, pp. 81 et seq.; E.-J. NAVEZ and A. NAVEZ, *Le Code des sociétés et des associations. Présentation et premiers commentaires*, Bruxelles, Larcier, 2019, p. 174.

definition specified in Article 1st of Regulation (EC) nr. 1435/2003 of the Council of 22 July 2003 on the statute for a European cooperative society⁴⁴ (hereinafter the “Regulation nr. 1435/2003”):

CCA (art. 6:1, § 1 st)	Regulation nr. 1435/2003 (art. 1 st , § 3)
Principal purpose – “ <i>shall have as its principal purpose the satisfaction of its shareholders or third interested parties’ needs and/or the development of their economic and social activities</i> ” ⁴⁵	Principal object – “ <i>shall have as its principal object the satisfaction of its members’ needs and/or the development of their economic and social activities</i> ”
Double quality – “ <i>in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the cooperative society carries out or commissions</i> ” ⁴⁶	Double quality – “ <i>in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions</i> ” ⁴⁷
	Interactions between cooperative societies – “ <i>may also have as its object the satisfaction of its members’ needs by promoting, in the manner set forth above, their participation in economic activities, in one or more SCEs and/or national cooperatives</i> ”
Interactions with mother companies and third parties – “ <i>may also have as purpose the satisfaction of its shareholders or mother companies and their shareholders or third interest parties’ needs</i> ” ⁴⁸	
Subsidiaries – “ <i>whether or not through the intervention of subsidiaries</i> ” ⁴⁹	Subsidiaries – “ <i>an SCE may conduct its activities through a subsidiary</i> ”

⁴⁴ O.J.E.U., L 207, 18 August 2003, pp. 1-24.

⁴⁵ Free translation of “*a pour but principal la satisfaction des besoins et/ou le développement des activités économiques et/ou sociales de ses actionnaires ou bien de tiers intéressés*”.

⁴⁶ Free translation of “*notamment par la conclusion d’accords avec ceux-ci en vue de la fourniture de biens ou de services ou de l’exécution de travaux dans le cadre de l’activité que la société coopérative exerce ou fait exercer*”.

⁴⁷ Art. 1st, § 4 of Regulation nr. 1435/2003: “an SCE may not extend the benefits of its activities to non-members or allow them to participate in its business, except where its statutes provide otherwise”.

⁴⁸ Free translation of “*peut également avoir pour but de répondre aux besoins de ses actionnaires ou de ses sociétés mères et leurs actionnaires ou des tiers intéressés*”.

⁴⁹ Free translation of “*que ce soit ou non par l’intervention de filiales*”.

Stakeholding – “to have as its object to promote their economic and/or social activities by a participation in one or more other companies ” ⁵⁰	
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13. Cooperative purpose – The Belgian legislator was influenced by the European legislator who underlined that “a European cooperative society [...] should have as its principal object the satisfaction of its members’ needs and/or the development of their economic and/or social activities, in compliance with the following principles : its activities should be conducted for the mutual benefit of the members so that each member benefits from the activities of the SCE in accordance with his/her participation [...]” (recital nr. 10 of Regulation nr. 1435/2003).

14. Traditional activities – Historically, it should be remembered that three kinds of cooperative societies developed as from the end of the 19th century and inspired the Belgian legislator in 1873: the consumer cooperative society (mainly in England); the manufacturing or production cooperative society (mainly in France); and the credit cooperative society (mainly in Germany)⁵¹.

Companies have been developing under the cooperative form, inspired by these models, in Belgium for many years. These companies can be distinguished from others in that the members of the entity, the shareholders, are also the clients, employees or suppliers of said entity.

Cooperative societies are still developing nowadays in these traditional sectors⁵², such as NewB very recently in the banking sector or many initiatives in the food sector.

15. New evolutions – However, the object of cooperative societies has evolved around new activities and new categories of shareholders, probably linked to the evolution of the predominant economic model itself, to the new relationships’ digitalisation creates within the economy or to the economic operators’ new concerns:

- (i) numerous initiatives over the last few years have demonstrated that the status and the nature of the interest of co-operators may vary: they can be both services producers and clients, or producers and consumers; the cooperative society can be “*multisociétale*”, in that it associates several stakeholders in the same project...;

⁵⁰ Free translation of “avoir pour objet de favoriser leurs activités économiques et/ou sociales par une participation à une ou plusieurs autres sociétés”.

⁵¹ J. VAN RYN, *Principes de droit commercial*, t. II, Bruxelles, Bruylant, 1957, pp. 54 and 55; Discussions at the House of Representatives, session of 24 November 1868, J. GUILLERY, *Commentaire législatif de la loi du 18 mai 1973 sur les sociétés commerciales en Belgique*, Bruxelles, Bruylant, 1878, p. 208.

⁵² Cooperatives Europe, the European division of the International Cooperative Alliance mentions that in 2012 cooperative banks have more than 16 million members in Germany, pursuing its strong tradition of credit cooperative society : Cooperatives Europe, « Co-operatives for Europe: Moving forward together », available on https://coopseurope.coop/sites/default/files/CoopsEurope_Brochure_HiResApril.pdf (consulted on 27 February 2020), April 2012, p. 3.

- (ii) the use of cooperative societies based on IT platforms has diversified and deals with sustainable development, applications to local communities, goods exchanges between producers and consumers, etc.⁵³;
- (iii) existing cooperative societies often do not limit their services to their sole members;
- (iv) the cooperative form is also used in investment structures. The regulated real estate investment company (“*société immobilière réglementée*” - “*SIR*”) created by the Act of 22 October 2017⁵⁴ is one example enshrined in Belgian law. This company must take the form of a cooperative society and exclusively carry out an activity consisting in detaining and providing end users with real property for housing and caring for the elderly and disabled people, as well as hosting and teaching children and pupils⁵⁵, while obtaining financing only from investors⁵⁶. In this model, the primary beneficiaries of the society’s activities are therefore not its shareholders;
- (v) finally, cooperative societies are more and more present in “sectors traditionally linked to the non-profit association form”⁵⁷ and “figures seem to indicate an evolution of the traditional use of cooperative societies for exclusively mutual benefit purposes towards a broader diversity, including models with more general interest”⁵⁸. The Belgian legislator expressly targets this kind of company when requesting that the accreditation as social enterprise depends on the existence of a main purpose consisting in a “positive societal impact for human being, environment or society”⁵⁹, “in the general interest”⁶⁰, even though this accreditation can only be granted to cooperative societies (CCA, art. 8:5 – *infra* § 0).

⁵³ See, for instance, in France, the report « Enjeux et perspectives de la consommation collaborative », interministériel du prospective et d’anticipation des mutations économiques ; in Dutch law: I.S. WUISMAN, « Twitter: naar een multi-stakeholder coöperatie en de commons », *De coöperatie anno 2017, Ars Notariatus*, Malines, Kluwer, 2018, pp. 87 et seq.; T. TILQUIN, « La société coopérative, ‘outil de disruption’ », *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, p. 119 et seq.

⁵⁴ Act of 22 October 2017 modifying the Act of 12 May 2014 related to regulated real estate investment companies, *M.B.*, 9 November 2017.

⁵⁵ Articles 76/5, 76/6 and 76/7, § 2, of the Act of 12 May 2014 related to regulated real estate investment companies.

⁵⁶ Article 76/3 of the Act of 12 May 2014 states that the regulated real estate investment company with social purpose “collects its financial resources exclusively by an offer made to persons belonging to the following categories: 1° retail investors, (a) provided that the maximum amount that can be subscribed within the offer is limited so that at the end of the offer, any co-operator who has subscribed to the offer does not own shares in the regulated real estate investment company with social purpose for a nominal value not within the limits determined by the King, by a decree taken on the advice of the FSMA, and (b) provided that the King has exercised this authorisation. When doing so, the King shall take into account the investors’ interests, namely considering that the shares of the regulated real estate investment company with social purpose are not admitted to trading on a regulated market; 2° eligible investors” (free translation of “*recueille exclusivement ses moyens financiers au moyen d’une offre effectuée auprès de personnes appartenant aux catégories suivantes : 1° les investisseurs de détail, (a) pour autant que le montant maximal pouvant être souscrit dans le cadre de l’offre soit limité de manière à ce qu’à l’issue de l’offre, aucun coopérateur ayant souscrit celle-ci ne possède de parts de la société immobilière réglementée à but social pour une valeur nominale ne respectant pas les limites déterminées par le Roi, par arrêté pris sur avis de la FSMA et (b) pour autant que le Roi ait exercé cette habilitation. Dans l’exercice de cette habilitation, le Roi prend en compte les intérêts des investisseurs, considérant notamment le fait que les parts de la société immobilière réglementée à but social ne sont pas admises à la négociation sur un marché réglementé ; 2° les investisseurs éligibles*”).

⁵⁷ Free translation of “*champs traditionnellement liés à la forme associative non-lucrative*”: F. DUFAYS and S. MERTENS, *Belgian Cooperative Monitor*, Leuven-Bruxelles, Cera-Febecoop, 2017, available on https://cdn.nimbu.io/s/hcjwsxq/assets/1511945222786/2411_Belgian%20Cooperative%20Monitor%20def_FR.pdf (consulted on 27 January 2020), p. 8.

⁵⁸ Free translation of “*les chiffres semblent indiquer une évolution de l’usage traditionnel des coopératives à des fins exclusives d’intérêt mutuel vers une plus grande diversité, incluant également des modèles plus porteurs d’intérêt général*”: F. DUFAYS and S. MERTENS, *Belgian Cooperative Monitor*, Leuven-Bruxelles, Cera-Febecoop, 2017, available on https://cdn.nimbu.io/s/hcjwsxq/assets/1511945222786/2411_Belgian%20Cooperative%20Monitor%20def_FR.pdf (consulted on 27 January 2020), p. 15.

⁵⁹ Free translation of “*impact sociétal positif pour l’homme, l’environnement ou la société*”: CCA, art. 8:5.

16. A step in the right direction – The definition of the cooperative society provided in the initial version of the text of Article 6:1 was probably too restrictive and based on a traditional vision of the cooperative society, also inspired by Regulation nr. 1435/2003.

As explained though, cooperative societies nowadays pursue multiple activities and usually involve various stakeholders in the same project. The amendments introduced during the parliamentary process have made it possible to broaden this initial vision and the object that any cooperative society can legally pursue by introducing notions such as “interested third parties”, allowing the possibility to take into consideration the new models of cooperative societies oriented towards multiple stakeholders, including third parties, or towards a wider goal, such as the social economy, or “investment structures”.

However, the final text remains essentially oriented towards the double quality of shareholders and towards the contractual relationship between the society and its shareholders (the idea being that the services of the society benefit first of all its shareholders) whereas it would probably have been more in line with these emerging new phenomena of cooperative societies not to focus the definition of the cooperative society on this double quality.

17. Mother companies, subsidiaries and stakeholding – The Belgian legislator has tried to take into account, at least partly, the reality of existing Belgian cooperative societies and in particular groups of cooperative societies or the so-called “second tier” cooperative societies (defined by Regulation nr. 1435/2003 as cooperative societies constituted by members which are themselves cooperative societies⁶¹). If the European legislator is indeed talking about the second-tier cooperative societies and promoting interactions between cooperative societies, it does not explicitly take into consideration groups of cooperative companies or the idea that a cooperative society can pursue the satisfaction of mother companies rather than only the satisfaction of its own direct shareholders, as we can see in the above mentioned chart comparing the definitions provided by Article 6:1 of the CCA and by Article 1 of the Regulation nr. 1435/2003.

A cooperative society can also, both according to Belgian law and to the Regulation nr. 1435/2003, conduct its activities through the intervention of subsidiaries. In Belgium, some credit institutions are constituted under the form of a public limited company (in principle to allow them to meet the regulatory requirements specific to their sector more easily) and provide services to users who do not directly become its shareholders but become shareholders of a cooperative society which is itself a shareholder of the public limited company. Services are then offered by a subsidiary of the cooperative society and not directly by the cooperative society itself.

Finally, the new definition of the cooperative society also enables Belgian cooperative societies to support the action of another cooperative society by becoming a shareholder: the shareholding society could hence become an “investor” or a supplier for example.

These various possibilities are similar to the ICA’s principle of “cooperation between cooperative societies” without the Belgian legislator imposing them to do so.

18. Other principles from Regulation nr. 1435/2003 – The provisions of Regulation nr. 1435/2003 provide for other miscellaneous rules, in most cases subsidiary, such as the equality between partners at

⁶⁰ Free translation of “*dans l’intérêt général*”: CCA, art. 8:5.

⁶¹ Recital nr. 9 of Regulation nr. 1435/2003.

the general shareholders' meetings (art. 59.1 to 59.4) ; the distribution of a profit under the form of rebates (art. 66) ; fair net profits distributions (art. 66) ; "one man, one vote" principle (art. 59) ; indivisible reserves (art. 65.3) ; the research of limited profit and disinterested distribution of net assets (art. 75).

Most of these rules derive from the ICA's cooperative principles but were not included in the new Belgian Code. Indeed, except for the modification of the cooperative society's definition, the legislator has chosen not to impose the respect for cooperative principles to all cooperative societies to offer them more flexibility. Some of these principles can however be found in the accreditation requirements (*infra* §§ 0 et seq).

B. Materialisation of the cooperative purpose expression

19. Principle – According to a technique of transparency and information which is often used in company law, the legislator ensures that the definition is respected by providing the obligation to express in writing the cooperative purpose and the values of each entity, which reinforces the idea that the cooperative society adheres to the cooperative ideal. For this purpose, Article 6:1, § 4 of the CCA provides that "the cooperative purpose and the values of the cooperative society are described in the articles of association and, as the case may be, completed by a more detailed explanation in the internal rules or a charter"⁶².

This way of proceeding avoids the need to insert cooperative principles directly into the legislative text, while encouraging companies willing to adopt the cooperative society form to respect them or at least a part of them to prove its "cooperative purpose". It offers hence a great flexibility to cooperative societies.

20. Articles of association – As a consequence, the cooperative society must, in any case, state the cooperative purpose and values it defends in its articles of association.

In practice, this information may be written in the statutory provision concerning the cooperative society's object, to which the purpose would be inherent and which would be stipulated directly after the reference of the cooperative society's object, in the same provision of the articles of association; or it can also be stipulated in a distinct provision, which we usually prefer and which easily enables confirmation of compliance with Article 6:1, § 4 of the CCA. This last approach also prevents confusing the cooperative purpose with the society's object.

In this respect, the ICA principles are a source of inspiration: should the organisational reality of a cooperative society meet those principles, it would be considered as a 'true cooperative' respecting the cooperative purpose. However, one should not overstate the importance of those principles in consideration of this provision. They can in fact be subject to different approaches. For instance, they could provide that all members do not have the same voting power ("democratic member control") or that a certain number of conditions should be filled to become a shareholder of the cooperative ("voluntary and open membership"). Those different approaches are expressly authorised by other provisions of the Book 6.

Just some of those principles can also be adopted while also adopting more contemporary

⁶² Free translation of "*la finalité coopérative et les valeurs de la société coopérative sont décrites dans les statuts et, le cas échéant, complétées par une explication plus détaillée dans un règlement intérieur ou une charte*": CCA, art. 6:1, § 4.

principles (*supra* § 0).

21. Internal rules and charter – The CCA allows for the articles of association to be further detailed in internal rules or a charter⁶³ describing the cooperative purpose and the society's values, its functioning or, for example, the shareholders' rights⁶⁴ in more details.

- (a) Internal rules – Article 6:69, § 2 of the CCA offers the possibility for “supplementary and complementary provisions regarding shareholders' rights and the operation of the company”⁶⁵ to be included in internal rules, “including for topics for which the present Code requires a statutory provision”⁶⁶ or “affecting the shareholders or members' rights, organs' powers or the organisation and functioning of the general shareholders' meeting”^{67,68}. Internal rules must be approved in accordance with the quorum and majority requirements for amending the articles of association, and their existence must be authorised by the articles of association⁶⁹.
- (b) Charter – The cooperative society can also establish a charter based on governance charters. This Charter can also contain the purpose and the values of the concerned cooperative society.

IV. A FEW TECHNICAL ASPECTS OF THE NEW LEGISLATION

A. Deletion of the notion of capital

22. Equity capital – As the Belgian legislator was heavily inspired by the rules applicable to the new LLC, the CCA has also abolished the legal concept of capital for cooperative societies⁷⁰.

The cooperative society has hence “equity capital” (“*capitaux propres*”), constituted by contributions in cash or in kind.

The accounting rules of the Royal Decree of 29 April 2019 and tax measures of the Law of 17 March 2019 also take this change into account.

The articles of association may stipulate that part of the equity capital is not available for

⁶³ Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 66.

⁶⁴ CCA, art. 6:1, § 4, and 6:69, § 2.

⁶⁵ Free translation of “*dispositions supplémentaires et complémentaires concernant les droits des actionnaires et le fonctionnement de la société*”.

⁶⁶ Free translation of “*y compris [dans] les matières [pour lesquelles le présent Code exige une disposition statutaire]*”.

⁶⁷ Free translation of “*touchant aux droits des associés, actionnaires ou membres, aux pouvoirs des organes ou à l'organisation et au mode de fonctionnement de l'assemblée générale*”.

⁶⁸ Topics which cannot be covered by the internal rules for other companies (CCA, art. 2:59, 2° and 3°); the explanatory memorandum refers for instance to “the acquisition of the shareholder's quality, the number of shares to hold, the rights and duties attached to the shares (including a non-competition clause), the formalities for convening, the way the number of votes is determined at the general meeting, the requirements for second degree voting, the calculation of the withdrawal amount, the grounds for exclusion, etc.” (free translation of “*l'acquisition de la qualité d'actionnaire [le] nombre d'actions à détenir [les] droits et devoirs attachés aux actions (en ce compris une clause de non-concurrence) [les] formalités de convocation [la] manière dont le nombre de voix est déterminé à l'assemblée générale [les] prescriptions en matière de vote au second degré [le] calcul de la part de retrait [les] motifs d'exclusion, etc.*”): Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, pp. 73-74.

⁶⁹ CCA, art. 6:69, § 2, and 2:59.

⁷⁰ For a concise feedback on historical reasons of the introduction of capital and its deletion in the CCA, see, for instance, D. BRULOOT and H. CULOT, « De kapitaal BV – La SRL sans capital », *Le projet de Code des sociétés et associations – Het ontwerp Wetboek van vennootschappen en verenigingen*, Bruxelles, Larcier, 2018, pp. 94 et seq.

distribution⁷¹, as was the “fixed part” of the capital of the former “limited liability cooperative society” (hereinafter: “LLCS”) (there are indeed no legal obligations to create reserve funds). Prescribing for ‘unavailable’ equity capital enables the reconstitution of the classical LLC structure and also the limiting of outflows (*infra* § 0) in the interest of the cooperative society.

1. Protection of assets

23. Incorporation – Regarding the process of incorporation of the company, Article 6:4 of the CCA replaces the minimum capital requirement with an obligation for the founders to ensure that the company has “equity capital which, having regards to other sources of finance, is sufficient in the light of the planned activity”⁷².

The amount of equity capital is not determined by law: founders are totally free to decide but they must be able to justify “the amount of initial equity capital in the light of the company’s planned activity for a period of at least two years”⁷³ in a financial plan⁷⁴.

Other financing sources can also be considered (bank credit, bond issues, crowdfunding, etc.)⁷⁵.

The shares issued by the company must be fully and unconditionally subscribed (CCA, art. 6:6 and, during the existence of the company, art. 6:106). However, the payment of contributions can be adapted (CCA, art. 6:9). It is for example possible to provide that no contribution is to be paid up when the company is incorporated.

24. Traditional rules of assets protection – It can be generally stated that many rules previously related to the concept of capital still exist⁷⁶ though they have been reformulated⁷⁷.

This is the case with the obligation to subscribe in full the issued shares (CCA, art. 6:6 and 6:106), the regulation on acquisition of own shares (CCA, art. 6:7 and 6:107), the drawing up of evaluation reports on contributions in kind (CCA, art. 6:8 and 6:110), the deposit of contributions in cash on a special account (CCA, art. 6:10), the strict conditions of financial assistance (CCA, art. 6:118) or the alarm bell procedure (CCA, art. 6:119)⁷⁸. The control of contributions in kind will certainly raise some difficulties for industry contributions, which are now authorised (CCA, art. 6:11) (*infra* § 0). However,

⁷¹ This is in fact what the transitional law stipulates: art. 39, § 2, last indent, of the Law of 23 March 2019.

⁷² Free translation of “*capitaux propres qui, compte tenu des autres sources de financement, sont suffisants à la lumière de l’activité projetée*”.

⁷³ Free translation of “*le montant des capitaux propres de départ à la lumière de l’activité projetée de la société pendant une période d’au moins deux ans*”: CCA, art. 6:5, § 1st.

⁷⁴ The content of this is expressly stipulated by art. 6:5, § 2 of the CCA.

⁷⁵ P. DE WOLF, « La SRL, une société sans capital mais dotée de règles (strictes) de protection des tiers », *La société à responsabilité limitée*, Larcier, 2019, p. 46.

⁷⁶ H. CULOT and N. TISSOT, « Le cadre juridique de la société coopérative et les perspectives d’avenir », *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, p. 40 ; D. BRULOOT and H. CULOT, « De kapitaallose BV – La SRL sans capital », *Le projet de Code des sociétés et associations – Het ontwerp Wetboek van vennootschappen en verenigingen*, Bruxelles, Larcier, 2018, p. 97.

⁷⁷ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 13.

⁷⁸ H. CULOT and N. TISSOT, « Le cadre juridique de la société coopérative et les perspectives d’avenir », *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, p. 40. Article 2:52 of the CCA also provides for a ‘permanent’ control in case of serious and consistent facts likely to jeopardize the continuity of the enterprise.

the control of quasi-contributions has been removed⁷⁹.

All these rules can be found in the title relating to the incorporation of the company (title 2 of Book 6 of the CCA) or in the title relating to its assets (title 5 of Book 6 of the CCA). Although they have often been associated with the concept of capital⁸⁰, the abolition of this notion has not therefore led to the deletion of these rules.

25. Distributions and related operations – The absence of the classic reference to “capital” prompted the legislator to provide for measures to be complied with for the purpose of any “distribution” made by the company: a liquidity test and a solvency test must be carried out (CCA, art. 6:114, 6:115 and 6:116).

(i) Liquidity test – The liquidity test consists, for the administrative organ, to ensure that after distribution, the company will be able, in the light of developments that can reasonably be expected, to continue to pay its debts as they become due for a period of at least twelve months as from the date of distribution (CCA, art. 6:116, indent 1).

The application of this test is subject to a report drawn up by the administrative organ, which is filed with the clerk’s office of the competent business court. The financial data included in the report are assessed by the statutory auditor.

This system is not very practical in a company with many shareholders: it is difficult to figure out how the formalities provided for the cooperative society’s distributions could be complied with at short intervals. In practice, this means that the articles of association must provide for due dates on which repayments are grouped together, which is not always ideal.

(ii) Solvency test – The company’s net assets, calculated on the basis of the last approved annual accounts or a more recent situation, may not be or become negative as a result of such a distribution or become lower than the unavailable amount fixed by the articles of association (CCA, art. 6:115).

Both tests must be applied for any distribution (profits’ distribution at the annual general shareholders’ meeting, distribution of interim dividends⁸¹, distribution of directors’ fees⁸²) and for any refund of contributions to shareholders⁸³, including when they intervene upon resignation⁸⁴ or exclusion⁸⁵ of a shareholder as well as in the case of financial assistance⁸⁶.

The statutory clauses relating to profits’ distribution will in principle cover these new tests.

⁷⁹ Which constitutes a difference with the regime of public liability companies for which a control of the quasi-contributions remains stipulated: CCA, art. 7:8 to 7:10.

⁸⁰ D. BRULOOT, « Het nieuwe Nederlandse B.V.-recht: overzicht en Belgische aandachtspunten », *TRV*, 2014, p. 471.

⁸¹ Which can now be distributed by the administrative organ as the CCA offers the possibility to provide, in the articles of association, for a delegation of powers to the administrative organ to distribute interim dividends: CCA, art. 6:114, indent 2.

⁸² X. DIEUX and P. DE WOLF, « Le nouveau Code des sociétés (et des associations) : Capita Selecta », *J.T.*, 2019, p. 516.

⁸³ D. BRULOOT and H. CULOT, « De kapitaallose BV – La SRL sans capital », *Le projet de Code des sociétés et associations – Het ontwerp Wetboek van vennootschappen en verenigingen*, Bruxelles, Larcier, 2018, p. 110.

⁸⁴ Article 6:120, §1, 6° of the CCA provides it expressly: “the amount to which the shareholder is entitled in case of resignation, is a distribution as referred to in Articles 6:115 and 6:116” (“*le montant auquel l’actionnaire a droit en cas de démission est une distribution telle que visée aux articles 6:115 et 6:116*”).

⁸⁵ CCA, art. 6:123, § 3, referring to art. 6:120.

⁸⁶ CCA, art. 6:118.

2. Shares

26. Determination of shareholders' rights and obligations – In principle, the division of the company's capital as related to the individual part of each share in the capital played a role in determining by default the shareholders' rights and obligations⁸⁷.

The disappearance of the notion of “capital” does not prevent the determination of each shareholder's rights and obligations, it will however be done on the basis of the shareholder's contributions and on the statutory and conventional provisions.

The notion of “nominal value” is also, as the one of capital, abolished. The “subscription price”⁸⁸ will now be used, namely for provisions regarding the entry and exit of shareholders (contributions made, withdrawal amounts) and for rights of certain categories (various categories of shares, now named “classes”, may be created and different rights and obligations in terms of subscription price may be provided).

However, more attention will have to be paid when drafting such statutory clauses: the founders and shareholders' freedom of choice is now almost unlimited and is encouraged by a legal regime almost entirely “suppletive” (only applicable by default)⁸⁹.

27. Powers – The administrative organ has the power to issue shares unless the articles of association stipulate that the general shareholders' meeting is competent in this field (CCA, art. 6:108).

Nevertheless, this power is limited to the issue of shares of an existing share class unless the general shareholders' meeting decides otherwise, by a decision taken in accordance with the rules on amendment of the articles of association (CCA, art. 6:108).

It is necessary that the articles of association provide for the terms and conditions of a share issuance by the administrative organ and determine, where applicable, a maximum amount of shares that can be issued this way (CCA, art. 6:108, § 1st).

The administrative organ must report on this subject to the general shareholders' meeting once a year (CCA, art. 6:108)⁹⁰. It must also update the register of shares (CCA, art. 6:108, § 2, last indent).

28. Admission – The principle of admitting only existing shareholders (should they want to acquire new shares) and third parties meeting the criteria specifically defined in the articles of association remains applicable (CCA, art. 6:105 and 6:106). The articles of association may furthermore provide for admission procedures⁹¹.

The wording of Article 6:106 of the CCA now seems to require that the articles of association provide for the possibility of refusing an applicant: otherwise, an applicant fulfilling the statutory

⁸⁷ T. TILQUIN and V. SIMONART, *Traité des sociétés*, t.3, Bruxelles, Kluwer, 2005, pp. 135 and 136, nr. 1914 and pp. 140-143, nr. 1921-1927.

⁸⁸ Notion used in Article 6:108, last indent, of the CCA on the issue of new shares.

⁸⁹ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 141.

⁹⁰ This report contains a range of information mentioned in Article 6:108, §2 of the CCA, which can be modalized by the articles of incorporation.

⁹¹ It can however not be provided that such an admission would lead to amending the articles of incorporation: CCA art. 6:106.

requirements should automatically be accepted. If the articles of association provide for such a possibility, the refusal must be motivated (CCA, art. 6:106).

B. Securities

1. Form and types of securities

29. Restrictive *numerus clausus*: shares and bonds – The *numerus clausus* of the securities that a cooperative society may issue (registered shares with voting rights⁹² and bonds) has been kept⁹³.

As for cooperative societies which are regulated companies in terms of Article 3, 42°, of the Law of 25 April 2014 on the status and control of credit institutions and stock exchange companies⁹⁴, this *numerus clausus* is extended: they “may issue any other security that their legal status allows them to issue, whether dematerialised or not”⁹⁵. The explanatory memorandum mentions “debt securities allowed by their status”⁹⁶. A second extension has been provided by the Law of 28 April 2020 for cooperative societies subject to a “special regulatory status”⁹⁷ that can issue other securities if (i) their issuance is authorised by their regulatory status (*i.e.* by another legislation than the CCA⁹⁸) and (ii) it is compatible with their cooperative purpose⁹⁹. It is uncertain which cooperative societies, except for cooperative societies active in the insurance sector¹⁰⁰, may meet these criteria as of today but it might open possibilities in the future.

The limitation provided for in the CCA is rather unfortunate since it inhibits any creativity in the financing of unregulated cooperative societies. The explanatory memorandum of the CCA states that “a CS can assume a debt with specific characteristics (such as voting rights or an observer who may participate to meetings of the administrative organ)” but specifies that this applies “provided it does not take the form of a prohibited security”¹⁰¹.

⁹² Each cooperative society must issue, at least, three registered shares with a voting right: CCA, art. 6:39.

⁹³ For a criticism of the existence of this *numerus clausus*: T. LOFFET and M. BERNAERTS, « Les associés de la société coopérative », in, *La société coopérative : nouvelles évolutions*, Bruxelles, Larcier, 2018, p. 109; E.-J. NAVEZ and A. NAVEZ, *Le Code des sociétés et des associations. Présentation et premiers commentaires*, Bruxelles, Larcier, 2019, p. 180.

⁹⁴ *M.B.*, 7 May 2014, pp. 36794 et seq.

⁹⁵ Free translation of “*peuvent émettre tout autre titre que leur statut légal leur permet d’émettre, dématérialisé ou non*”: CCA, art. 6:19.

⁹⁶ Free translation of “*titres de dette permis par leur statut*”: Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 69.

⁹⁷ Free translation of “*statut réglementaire special*”: article 120 of the Law of 28 April 2020 amending art. 6:19 CCA.

⁹⁸ Act transposing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and including miscellaneous provisions relating to companies and associations, justification of the amendment nr. 129 of P. Prévot et al., *Doc. Parl.*, Ch. repr., sess. ord. 2019-2020, nr. 55-0553/004, 28 January 2020, p. 143.

⁹⁹ Article 120 of the Law of 28 April 2020 amending article 6:19 CCA.

¹⁰⁰ These societies are directly mentioned in the parliamentary proceedings: Act transposing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and including miscellaneous provisions relating to companies and associations, justification of the amendment nr. 129 of P. Prévot et al., *Doc. Parl.*, Ch. repr., sess. ord. 2019-2020, nr. 55-0553/004, 28 January 2020, p. 143.

¹⁰¹ Free translation of “*une SC peut assumer de la dette ayant des caractéristiques spécifiques (tel que, p.ex., des droits de votes ou un observateur qui peut participer aux réunions de l’organe d’administration), pour autant qu’elle ne prenne pas la forme d’un titre interdit*”: Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 69.

30. Industry contributions – A contribution in industry may be remunerated in shares (CCA, art. 6:11), whereas profit shares, which often remunerated that kind of contribution, were previously forbidden.

The possibility to make industry contributions may interest some cooperative societies but requires a very precise drafting of the related statutory provision¹⁰².

Moreover, to date, there are significant accounting and tax uncertainties surrounding the creation of shares as consideration for an industry contribution¹⁰³.

31. Transfer – In principle, shares are freely transferable between shareholders (CCA, art. 6:52) whereas transfers to third parties are submitted to the following conditions : the proposed acquirer must belong to one of the categories referred to in the articles of association and must meet the statutory requirements to become a shareholder (CCA, art. 6:54).

As was already the case, the articles of association (or issuance conditions for bonds), or even shareholders' agreements, can modify these rules. These modifications must be drawn up carefully. Indeed, if a company wants to keep a certain room for manoeuvre, even when the proposed acquirer fulfils all the statutory requirements, it is recommended that the articles of association provide for a refusal of such transfer, the reasons for which must therefore be given (CCA, art. 6:54).

The administrative organ is by default competent for deciding on transfers of shares (CCA, art. 6:54). This competence could however be given to the general shareholders' meeting.

A transfer of shares made irregularly is not enforceable against the company and third parties¹⁰⁴.

2. Rights attached to shares

32. Participation in the profits or in the balance of liquidation proceeds – The articles of association should stipulate whether each share gives the right to an equal part of the profits and balance of liquidation proceeds or whether different systems are applicable as is often the case in the articles of association of existing cooperative societies¹⁰⁵.

33. One share, one vote – The articles of association may provide for certain voting arrangements (the default rule is that each share is entitled to one vote¹⁰⁶), it being understood that each share must have at least one voting right as issuing shares without any voting right is forbidden¹⁰⁷.

The principle of multiple voting is however admitted¹⁰⁸.

¹⁰² Article 6:11 of the CCA, being 'suppletive' (only applicable by default), only targets the contributor's non-culpable non-performance: it is therefore recommended provide for the consequence of culpable non-performance in the articles of association. X. DIEUX and P. DE WOLF, « Le nouveau Code des sociétés (et des associations) : Capita Selecta », *J.T.*, 2019, p. 514.

¹⁰³ D. GARABEDIAN and R. THONET, « La société à responsabilité limitée (SRL) et l'impôt », *La société à responsabilité limitée*, Bruxelles, Larcier, 2019, pp. 327-328.

¹⁰⁴ E.-J. NAVEZ and A. NAVEZ, *Le Code des sociétés et des associations. Présentation et premiers commentaires*, Bruxelles, Larcier, 2019, p. 183.

¹⁰⁵ CCA, art. 6:40.

¹⁰⁶ CCA, art. 6:41.

¹⁰⁷ CCA, art. 6:19 and 6:40; D. VAN GERVEN, « De coöperatieve vennootschap, de erkende vennootschappen, de feitelijke vereniging, de VZW, de IVZW en de stichtingen », *R.D.C.-T.B.H.*, 2018/9, p. 1073.

The articles of association could also provide for a vote per member.

34. Limitation of the number of votes – Article 6:44 of the CCA states that “the articles of association may limit the number of votes that each shareholder has at meetings, as long as this limitation is imposed on any shareholder irrespective of the securities in respect of which they take part in the vote, without prejudice to any special rights attributed to a shareholder taking into account his quality”¹⁰⁹.

This principle of equality between shareholders in case of limiting voting rights did not exist in the Belgian Code of companies for cooperative societies, nor in the first drafts or amendments of Book 6 of the Code of companies and associations. It seems to have been added to ensure consistency between the systems applicable to public limited companies, limited liability companies and cooperative societies.

While it is questionable whether it is possible to provide for a limitation on the number of votes that would apply to a class of shareholders as a whole, differentiation based on the ‘quality’ of the shareholder (e.g. their status, qualifications, interests, role within the company, etc.) is in any case authorised in cooperative societies¹¹⁰, which in principle allows for a voting ceiling for a group of shareholders having the same quality¹¹¹.

35. Class of shares – The first indent of Article 6:46 of the CCA does not modify the existing rules regarding the classes of shares.

On the contrary, the second indent now states that rights may be attributed to shareholders based on their qualities without taking into account shares they hold and that these specific rights do not require the creation of a specific class of shares.

This implies that preferential rights could, for instance, be allocated to the cooperative’s founders without the specific voting rules for modifications of share classes applying.

This also implies that these rights are attached to the person of the shareholder and are not transferable: if a founder transfers a share, the rights they were granted on the basis of their status as a founder will not be transferred to the acquirer who is not a founder¹¹².

¹⁰⁸ Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 71.

¹⁰⁹ Free translation of “[l]es statuts peuvent limiter le nombre de voix dont chaque actionnaire dispose dans les assemblées, à condition que cette limitation s’impose à tout actionnaire quels que soient les titres pour lesquels il prend part au vote, sans préjudice des droits spéciaux attribués à un actionnaire, en tenant compte de sa qualité.”

¹¹⁰ The explanatory memorandum on this Article stipulates that “the text is that of Article 5:45. However, certain rights can be attributed to the quality as a shareholder, such as for instance a founder or an investor, in cooperative society. The text confirms that possibility” (“[l]e texte est celui de l’article 5:45. Dans une SC il est toutefois admissible que certains droits soient attribués à la qualité d’un actionnaire, tel que, p.e. un fondateur ou un investisseur. Le texte confirme cette possibilité”): Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 71.

¹¹¹ For those questions regarding the applicable provisions to public liability companies, see. I. CORBISIER, « La société et ses associés », *Droit des sociétés : les lois des 7 et 13 avril 1995*, Bruxelles, Bruylant, 1995, pp. 192-196; M. WYCKAERT, « Overdrachtsbepelingen en stemovereenkomsten », *De nieuwe Venootschapswetten van 7 en 13 april 1995*, Kalmthout, Biblo, 1995, pp. 118-120.

¹¹² Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-/021, 26 February 2019, p. 71.

C. Governance

36. Administrative organ – The administration regime is very flexible.

The cooperative society is administered by one or more directors, appointed by the general meeting, whether or not acting as a college (collegial decisions), who are natural or legal persons (CCA, art. 6:58, §1st, indent 1).

The administrative organ may entrust one or more persons, each acting individually, jointly or collegially, with the company's day-to-day management as well as with the representation of the company regarding its management (CCA, art. 6:67, indent 1).

The administrative organ may also create, on the basis of mandates and delegation under ordinary law, an executive committee which will, in principle, have broader powers than those of the day-to-day management.

37. General shareholders' meeting – The provisions regarding the general shareholders' meeting fall within the classic organisation of general shareholders' meetings under Belgian law.

38. Committees – Though the Code does not stipulate anything, it is totally possible to create various advisory committees, as the case may be, emanating from the board of directors or other interested parties, such as users or investors, scientists... whose role and organisation will be defined in its articles of association or in its internal rules¹¹³.

D. Resignation and removal

39. Principles – Provisions related to shareholders' resignations and removals have not been subject to major changes. Alongside resignations, exclusions and assimilated situations such as the death or bankruptcy of a shareholder, the Belgian legislator has however also decided to earmark clauses of quality.

40. Resignation – From now on, the articles of association of a cooperative society can no longer forbid a shareholder to resign (CCA, art. 6:120, § 1st, indent 1st), except founders who cannot do so before the third financial year of the company, even if it is permitted by the articles of association (CCA, art. 6:120, § 1st, indent 2).

Except for these two new mandatory rules, the CCA offers a greater freedom to the authors of articles of association: the other rules provided for are "suppletive" (only applicable by default) and allow (i) to resign at another time except during the first six months of the financial year, (ii) to fix freely the effective date of this resignation, (iii) to fix freely the time for paying the withdrawal amount or (iv) to determine the withdrawal amount (CCA, art. 6:120, § 1st).

41. Removal – As for resignation, the articles of association cannot forbid the possibility, for a company, to exclude a shareholder (CCA, art. 6:123, § 1st).

¹¹³ Act introducing the Code of companies and associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 72.

The removal decision will be taken by the general shareholders' meeting or by the administrative organ, when foreseen by the articles of association (CCA, art. 6:123, § 1st).

Such a decision shall mandatorily be based on "serious grounds" ("*justes motifs*") or on other grounds detailed in the articles of association and shall follow a strict procedure defined by the CCA (CCA, art. 6:123).

42. Death, bankruptcy and other related situations – As was already the case in the former Companies Code, death, bankruptcy, liquidation, collective debt settlement and judicial protection of a shareholder entail in principle the application of the rules provided for the resignation of a shareholder.

The articles of association can provide for specific rules in these different specific cases, derogate to the principle or define other *intuitu personae* situations.

43. Loss of quality – The so-called "quality clauses" ("*clauses de qualité*") are now expressly acknowledged by the Belgian legislator (CCA, art. 6:122).

These clauses commonly used in practice provide that the conditions a shareholder must fulfil to be admitted in the cooperative society, continue to be applied throughout their presence in the society, for otherwise the concerned shareholder will lose their 'quality' of shareholder.

These clauses must be drafted very carefully, but all cooperative societies may now foresee such clauses in their articles of association, without them risking being requalified as removal clauses¹¹⁴.

44. Withdrawal amount – The withdrawal amount granted to the exiting shareholder is assimilated to a distribution. The solvency and liquidity tests should hence be applied for each exit (CCA, art. 6:120, § 1st, indent 2), which leads to heavy formalities for a company which is in principle promoting the variability of its shareholding.

45. Report to the general shareholders' meeting and update of the register – In addition to reports on each distribution, the administrative organ must draft an annual report for the general shareholders' meeting and update the shares register (CCA, art. 6:120, § 2).

It is regrettable that no specific term has not been provided for updating the register as it is an important document of the company that is supposed to reflect the composition of its shareholding at any moment. The absence of update will however not prevent the concerned shareholder's exit from becoming effective, save for any statutory provisions to the contrary.

V. ACCREDITATIONS

46. The "three" accreditations of the CCA – Book 8 of the CCA is dedicated to companies' accreditation. In addition to very specific accreditations, such as "forestry group" and "agricultural enterprise" ("*groupement forestier*" and "*entreprise agricole*") which we will not analyse, "three" other accreditations, reserved for cooperative societies, are listed: (i) the simple accreditation ("accredited CS" ("*SC agréée*") – CCA, art. 8:4), (ii) the accreditation as social enterprise ("CS accredited as SE" ("*SC*

¹¹⁴ M. BERNAERTS, « La délicate rédaction des clauses d'exclusion et de perte de qualité », *R.P.S.-T.R.V.*, 2018, pp. 579 et seq.

agréee comme ES) – CCA, art. 8:5, § 1st) and (iii) the double accreditation combining the accreditations (i) and (ii) (“CSSE accredited” (“*SCES agréee*”) – CCA, art. 8:5, §2).

47. The accredited cooperative society – In the 1950’s, the legislator considered that it would be beneficial to create a particular status of ‘accredited’ cooperative society and adopted the Act of 20 July 1955 (*supra* § 0) creating the National Cooperation Council, whose purpose was to spread the cooperative principles and preserve the cooperative ideal¹¹⁵. The CCA has kept this accreditation (CCA, art. 8:4).

The National Cooperation Council accredits cooperative societies, affiliated to a national group or not, whose articles of association and actual functioning comply with the provisions of Article 5 of the Act of 20 July 1955 and with the rules specified in Article 1, §1st, of the Royal Decree of 8 January 1962, namely voluntary and open membership; the main purpose of providing shareholders with an economic and social benefit; the equality or limitation of voting right in the general shareholders meeting; the setting of economic advantages; the use of a part of the resources for informing and training its members.

An accredited cooperative group or accredited cooperative society that no longer abides by those principles is dissolved or is struck off the list of accredited cooperative groups and accredited cooperative societies (art. 7 of the Royal Decree of 8 January 1962).

48. The cooperative society accredited as social enterprise – The previous Companies Code had created the status of “society with social purpose” (“*société à finalité sociale*”) for companies which did not aim at enriching their shareholders and which were pursuing a “social purpose” (“*but social*”)¹¹⁶.

A new dichotomy between companies and associations, based on the distribution of profits to shareholders, from now on prevents any company from stipulating a total lack of distribution (doing so, it would be requalified as association) and the form of “society with social purpose” has been abolished¹¹⁷. However, the legislator has created a specific accreditation as “social enterprise” (“*entreprise sociale*”)¹¹⁸ to respond to the expectations of the social economy sector.

The requirements which a cooperative society must meet when requesting an accreditation as social enterprise are very similar to those for the accredited cooperative society¹¹⁹, except as for its principal purpose: the principal purpose of an accredited cooperative society must concern its

¹¹⁵ The Cooperative National Council’s mission is to “study and promote all measures specific to principles and cooperative ideal as defined by the International Cooperative Alliance (ICA)” (free translation of “*étudier et promouvoir toutes mesures propres à les principes et l’idéal coopératif tels que définis notamment par l’Alliance coopérative internationale*”). It also “submits all opinions and proposals regarding questions related to the cooperative activity to a minister, within its field of competence, to the Central Economic Council, upon request or on its own initiative by way of reports expressing the different points of view expressed among its members” (free translation of “*adresser à un ministre et, dans les matières de son ressort, au Conseil central de l’Économie, soit à leur demande, soit d’initiative et sous forme de rapports exprimant les différents points de vue exposés en son sein, tous avis ou propositions concernant des questions relatives à l’activité coopérative*”) (art. 1, 9° and 2° of the Act of 20 July 1955).

¹¹⁶ Art. 661, first indent, 2° of the Companies Code.

¹¹⁷ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, pp. 8-9.

¹¹⁸ Act introducing the Code of companies and associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 9. However, this accreditation can only be requested by cooperative societies whereas any form of company could previously be with a “social purpose”.

¹¹⁹ We talk about conditions related to voting rights, directors’ remuneration, limited shares, distribution of profits and liquidation surplus, drawing up of an annual special report and accreditation request: Royal Decree of 8 January 1962 fixing the accreditation conditions for groups of cooperative societies and cooperative societies and Royal Decree of 28 June 2019 fixing the accreditation conditions as agricultural enterprise and social enterprise.

shareholders whereas the main purpose followed by a cooperative society accredited as a social enterprise must be “to generate a positive societal impact for the people, the environment or the society in the general interest.”¹²⁰

49. The double accreditation – Article 8:5, § 2, of the CCA targets the company “which is both an accredited cooperative society regarding Article 8:4 and a company accredited as a social enterprise regarding paragraph 1st”¹²¹.

The company, which would have requested and obtained those two accreditations, shall add the terms “accredited” (“*agrée*”) and “social enterprise” (“*entreprise sociale*”) to its name, which could create a confusion with the society accredited as social enterprise. Only its shortened name will enable third parties to make a distinction (“accredited CSSE” instead of “CS accredited as SE”) (“*SCES agrée*” instead of “*SC agrée comme ES*”).

This problem of vocabulary is accompanied by a discussion on the very need for a double accreditation. In fact, the main difference (and, actually, the only real one) between the accredited CS and the CS accredited as SE, is the purpose followed by the concerned company and a company cannot have as a main purpose at the same time “to provide its shareholders with an economic or social benefit to satisfy their professional and private needs”¹²² and “not to provide its shareholders with an economic or social benefit to satisfying their professional and private needs”¹²³.

If a company having a double accreditation is forbidden to follow the second mentioned purpose¹²⁴, it seems that there is no difference between the “CS accredited as an SE” and the “accredited CSSE”. The double accreditation seems therefore, at this stage at least, unnecessary. A modification of the requirements for each accreditation, or of the advantages each accreditation, could however take place in the future and change this situation.

VI. CONCLUSION

The main element of the reform of the legal regime of cooperative societies in Belgium is certainly the new definition of these societies.

¹²⁰ Free translation of “*dans, l'intérêt général, de générer un impact sociétal positif pour l'homme, l'environnement ou pour la société*”: art. 6, § 1st, 1° and 2° of the Royal Decree of 28 June 2019 fixing the accreditation conditions for agricultural enterprise and social enterprise and art. 8:5, § 1st, 1°, of the CCA.

¹²¹ Free translation of “*qui est tant une société coopérative agrée visée à l'article 8:4 qu'une société agrée en tant qu'entreprise sociale visée au paragraphe 1^{er}*”.

¹²² Free translation of “*procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels et privés*”: CCA, art. 8:4/

¹²³ Free translation of “*ne consiste pas à procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels et privés*”: CCA, art. 8:5, § 2.

¹²⁴ Article 1, § 8, of the Royal Decree of 8 January 1962 fixing the accreditation conditions for groups of cooperative societies and cooperative societies stipulates that the condition on the main purpose of the accredited cooperative society does not apply to the « cooperative societies with social purpose that fulfil the conditions provided for in Articles 661 to 664 of the Companies Code and other accreditation conditions in the present decree », which can be transposed to target accredited cooperative societies as social enterprises willing to have a double accreditation. See also A. FRANÇOIS and F. HELLEMANS, « Shaken, not stirred? een eerste analyse van de definities, de basisbeginselen en de structuur van het nieuwe Wetboek van vennootschappen en verenigingen », *Le projet de Code des sociétés et associations – Het ontwerp Wetboek van vennootschappen en verenigingen*, Bruxelles, Larcier, 2018, p. 33; M. D'HERDE, « Van VSO naar CV erkend als SO: geslaagde restyling, of doorgeslagen striptease ? », *R.P.S.-T.R.V.*, 2018/8, pp. 833-836.

Henceforth, the cooperative will become (anew) a form of company reserved for enterprises and projects that are, to a greater or lesser extent, driven by the cooperative ideal.

This will have to be translated in practice, in the first place, by a careful and detailed definition of the company's object, its values and its cooperative purpose, which will have to be expressed in the articles of association of any cooperative society, and, where appropriate, detailed and specified in a charter or internal rules. In concrete terms, this will lead in the months and years to come to the necessity for many "false" cooperatives to change their societal form to become, a priori, a limited liability company ("SRL").

On a more technical level, it will be necessary to be attentive to the disappearance of the notions of "share capital", "fixed and variable parts", "nominal value" of the shares, and to the legal consequences which are related to them.

For the rest, the organisation of cooperative societies is, for the remainder, not greatly affected (subject to certain adjustments in terminology or some aspects of the entry and exit clauses), but it is nonetheless burdened by certain new provisions inspired by the limited liability company ("SRL") regime (conflict of interest procedure, double test of liquidity and solvency before any distribution, etc.).

BASQUE LEGISLATION ON COOPERATIVES IN LIGHT OF THE NEW BASQUE COOPERATIVE LAW

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SUMMARY: 1. INTRODUCTION. 2. GENERAL PROVISIONS. 3. CONSTITUTION AND REGISTRATION OF BASQUE COOPERATIVES. 3.1. Constitution of the cooperative. 3.2. Basque Cooperatives Register. 4. MEMBERS. 4.1. Member categories 4.2. Acquisition and loss of member status. 4.3. Rights and obligations. 5. GOVERNING BODIES. 5.1. General Assembly. 5.2. Administrative body. 5.3. Supervisory committee and other bodies. 6. ECONOMIC REGIME. 6.1. Share capital and other financing models. 6.2. Results of the financial year: determination, allocation and accounting aspects. 7. STATUTORY AND STRUCTURAL CHANGES. 8. DISSOLUTION AND LIQUIDATION. 9. COOPERATIVE CATEGORIES. 10. THE SMALL COOPERATIVE SOCIETY. 11. COOPERATION BETWEEN COOPERATIVES: COOPERATIVE ASSOCIATIONISM AND COOPERATIVE INTEGRATION AND GROUPING. 12. COOPERATIVES AND THE PUBLIC ADMINISTRATION. 13. THE HIGHER COUNCIL OF BASQUE COOPERATIVES. CONCLUSIONS. BIBLIOGRAPHY.

Abstract

On 20 December 2019, Law 11/2019 was approved, on Basque Cooperatives, the current regulation for these organisations in their applicable territorial field, in other words, the Basque Autonomous Community. The analysis of this law is highly interesting, whether taking account of the importance and referential nature of the Basque cooperative movement, or of the new features and clarifications introduced by said Law, which may certainly be controversial. This work reviews the legislation applicable to Basque cooperatives, highlighting the new features introduced by the new law.

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KEY WORDS: Cooperatives law; Basque Country; general provisions; constitution and registration; members; governing bodies; economic regime; statutory and structural changes; dissolution and liquidation; cooperative categories; cooperation between cooperatives, cooperatives and the public administrations; Higher Council of Basque Cooperatives.

ABBREVIATIONS

BCL (Basque cooperative law)

CCL (Capital Companies Law)

CPOPIP (Cooperative Promotion and Other Public Interest Purposes)

CRF (Compulsory Reserve Fund)

HCBC (Higher Council of Basque Cooperatives)

RBCL (Regulation of the Basque Cooperatives Law)

1. INTRODUCTION

Law 11/2019, of 20 December, on Basque Cooperatives (Basque Cooperatives Law, BCL), came into force on 30 January 2020. The new law has been enacted by virtue of the exclusive competence of the Basque Autonomous Community with respect to cooperatives (art. 10.23 of Organic Law 3/1979, of 18 December, on the Basque Statute of Autonomy).

It is important to underline the interest of the new law, not only because of the new features it introduces, but also because Basque cooperativism, and particularly worker cooperatives, are a reference of world cooperativism, given their dynamic nature and their social and economic weight.

Technically speaking, the new Basque Cooperatives Law amends and revises Basque cooperative legislation. While the law is obviously based on its regulatory background³, there is no general observation of substantial changes in legislative policy, or in the legal model of the Basque cooperative. Even so, we must highlight, as we will see during this study, that the new law goes further than mere revision, introducing a number of new features that carry a certain amount of weight.

The main law to be revised is, without a doubt, Law 4/1993, of 24 June, on Basque Cooperatives, which has been in effect for more than 25 years. The new law's statement of purposes underscores the need to

³ Such as Decree 58/2005, of 29 March, including the Regulation of the Basque Cooperatives Law (RBCL), part of whose content is currently binding.

revise the different legislative texts born around Law 4/1993, in order to systematise Basque cooperative legislation and offer legal certainty to the interpretation and application of said regulations. The period from the moment Law 4/1993 came into effect, more than 25 years ago, has included, among other interesting new features, the boom in economic globalisation, which has obliged cooperatives to adapt to the situation. It is therefore advisable to technically update cooperative legislation in order to bring it into line with contemporary cooperative dynamics, and to offer legal certainty, both to internal relations between the cooperative and its members, and with respect to non-member third parties.

As reference parameters for proceeding with said update, the new Basque cooperative law has taken into account the evolution of comparative law in the commercial and cooperative areas.

The process of drawing up the law has been laborious. In 2017 a draft was presented and discussed by the Higher Council of Basque Cooperatives (HCBC), a public body made up of representatives of the Basque Country, of the cooperative federations, and of the Basque universities). In 2018 the bill was submitted to public consultation. In 2019 the bill was presented in the Basque Parliament and, after the relevant discussion at the parliamentary headquarters, on 20 December 2019 the law was finally approved, with a vote in favour by four Parliamentary groups (the Basque Nationalists; Euskal Herria Bildu; the Basque Socialists; and the Basque People's Party), and the abstention of another parliamentary group (Elkarrekin Podemos).

The challenge to be addressed consisted of adapting cooperative legislation without losing the essence of the cooperative identity, an identity which the International Co-operative Alliance (ICA), a non-governmental organisation which represents the cooperative movement worldwide, summarised in its definition of a cooperative as *an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise*. At this point, we should mention the very positive fact that the new law includes, for the first time, an explicit reference to the ICA, and to the cooperative principles and values enumerated by the organisation, as the universal framework providing the inspiration for Basque cooperative legislation.

Also worthy of positive appreciation is the fact that the new law includes the cooperative in the context of the social economy, in keeping with Law 5/2011, of 29 March, on Social Economy, which highlights the cooperative as the main reference of the type of companies making up said economic sector, based on the idea of placing priority on persons over capital.

The law contains 4 titles⁴, including 16 sections, whose principal aspects and new features we explain below.

2. GENERAL PROVISIONS

The cooperative concept remains unchanged with respect to the stipulations of Law 4/1993: *The cooperative is that company which develops an enterprise which has the priority purpose to promote the economic and social activities of its members and to satisfy their needs with the active participation of the same, observing the principles of cooperativism and attending to the community in the area around it.* (art. 1.1).

What is innovative and, as we understand, highly appropriate, is that the new law places the Basque cooperative in the framework of the ICA cooperatives, when it establishes that *the cooperative will have to adjust its structure and operation to the cooperative principles of the International Cooperative Alliance, which will be applied in the framework of this law* (art. 1.2).

We believe that it is highly appropriate for the structure and activity of Basque cooperatives to adapt to the principles of the ICA, which summarise the essence of universal cooperativism, and this precautionary measure can act as a guarantee against false cooperatives, when a pseudo-cooperative strays from the principles delimiting the true cooperative nature.

Said principles also serve to limit the type of economic activity of cooperatives, which can be of any kind, except when expressly forbidden by the law due to incompatibility with the cooperative principles (art. 1.3).

Also underlined is the necessary autonomy of the cooperative with respect to all kinds of institutions, public or private. In fact, this is the fourth cooperative principle.

A minimum social capital of 3,000 euros is established, fully paid up from the moment the cooperative is constituted (art. 4). The amount seems reasonable; it is the same as was required previously and coincides with the sum required for limited companies.

As in Law 4/1993, the registered address of cooperatives subject to the BCL must be located within the Basque Autonomous Community, at the place where the activities are preferentially carried out with their members or where both the administrative and business management are centralised (art. 3). Remember that according to Final Provision 1 the BCL area of application covers cooperatives with their registered

⁴ The cooperative society; special provisions; cooperatives and the public administration; and cooperative associationism.

address in the Basque Autonomous Community which proceed with their principal cooperative activity in that territory.

With respect to the scope of the cooperative activity, when article 1.1 indicates that *its priority purpose will be to promote the economic and social activities of its members*, it is allowing cooperative operations with non-member third parties, a possibility expressly stipulated in art. 5, *with no other limitations than those established by the law and the cooperative articles of association*, meaning that adaptation to the respective legal limits of the different types of cooperative will be required.

3. CONSTITUTION AND REGISTRATION OF BASQUE COOPERATIVES

3.1. Constitution of the cooperative

No major new introductions have been made to the section on constitution of the cooperative, which revolves around the promoters who make up the constituent assembly, and the articles of association that said assembly must approve.

The cooperative will be constituted by means of public deed, which must be executed within two months counting from the date of the constituent assembly, and shall be recorded in the Basque Cooperatives Register, at which time it will acquire legal personality (art. 11).

As interesting new features, regarding the minimum content of the articles of association, we must underscore the *guarantees and bodies established to respect the members' right to information* (art 13.1 o). This is an appropriate inclusion, in order to guarantee the condition, indispensable for the cooperative to function correctly, that members receive sufficient information of their cooperative's activities.

Also included, as another fitting new feature, is the stipulation that *cooperatives with more than 50 members shall draw up a model to prevent offences by the cooperative, as well as establishing the mechanisms required for its monitoring. Equally, specific means must be incorporated to guarantee that the cooperative is an environment free of sexist violence* (art. 13.1 q).

3.2. Basque Cooperatives Register

In keeping with the previous section, constituting a cooperative requires that it be registered in the Basque Cooperatives Register the moment it will acquire legal personality.

Thus, *the Basque Cooperatives Register is a public register, assigned to the Basque Government department holding competence in labour matters* (art. 15).

Registration of the principal recordable actions will have constituent nature (constitution, merger, division, dissolution, reactivation and transformation into cooperatives). In all other cases registration in the register will have a declaratory nature.

There is one new feature, in keeping with the current state of technology, whereby the Register is obliged to promote the use of electronic means in its relations with citizens, and with the organisations interested in accessing its data (art. 16.3).

4. MEMBERS

4.1. Member categories

Both natural and legal persons may be members of Basque cooperatives (art. 19.1), including the public administrations and their instrumental bodies (art 19.7), although in all cases account must be taken of the particularities which each category of cooperative may imply in this respect.

The current BCL maintains the different member categories recognised by Law 4/1993. A distinction is therefore made between cooperative members, collaborators, inactive or non-user members and shareholders with voting right.

Cooperative members are those people whose condition of member is directly related to effective participation in the cooperative activity, whether as a worker or as a user (art. 19.3). In other words, these are members who carry out the cooperative activity. These include members who work for the cooperative (not in worker cooperatives, art. 21) and the worker members of worker cooperatives, whose cooperative activity consists of providing their personal work in the cooperative, and to whom we refer below.

Together with the above, as previously indicated, Basque legislation, following the trend of cooperative legislation in general, has gradually recognised other categories of members whose connection is not mainly based on development of the cooperative activity, such as collaborating members⁵ (art. 19.5), inactive or non-user members⁶ (art. 31), and shareholders with voting rights⁷ (art. 19.6). By way of a new feature, an indication is made whereby the articles of association may regulate the situation of a person who takes leave of absence and has temporarily ceased activity (art. 31.4). Regarding these member categories (although the BCL says nothing in the case of members on leave of absence in art. 31.4) we

⁵ Natural or legal persons, public or private, who, without being able to fully proceed with the cooperative purpose, may collaborate in achieving said purpose.

⁶ Those who, for any justified cause, and having the minimum seniority established in the articles of association, stop using the services provided by the cooperative or no longer proceed with the cooperative activity, particularly due to the retirement of members who work for the cooperative or member workers.

⁷ Minority members of mixed cooperatives.

underline the limitation of votes to which they may have the right at the general assembly, in order to guarantee that the majority of the votes correspond to the cooperative members (also in art. 37.4, which does in this case refer to members on leave of absence).

Also allowed, to a limited extent, are fixed-term employment relationships, which deserve special attention in the case of member workers (in worker cooperatives) or members who work for the cooperative (not in worker cooperatives, art. 26.2), inasmuch as the law has considered these necessary with a view to covering economic needs which are temporary and not contradictory to the nature of cooperatives.

4.2. Acquisition and loss of member status

The articles of association will establish the necessary requirements to acquire member status and acceptance or denial will not be decided for causes representing discrimination in relation to the social object (art. 20). Remember that to acquire cooperative status, members must have the capacity to develop the cooperative activity which, on the other hand, will be largely related to the category of cooperative in question.

Based on the voluntary, open nature of cooperatives, members have the right to voluntarily resign at any time, notwithstanding the obligation to give due notice (which cannot be more than 3 months for natural persons and 1 year for legal persons) or the eventual duty of permanence (which cannot be longer than 5 years) indicated in the articles of association. Failure to comply with such duties will entail the consideration of unjustified resignation, a qualification which will also come into effect when the member intends to proceed with activities which compete with those of the cooperative or when other cases anticipated in the articles of association occur (art. 26). Furthermore, on losing the requirements to be a member, their resignation will be mandatory, which can equally be justified or non-justified (art. 27). Furthermore, in the cases of very serious offences as stipulated in the articles of association, an agreement can be adopted as to their expulsion (art.28).

The current BCL brings almost nothing new with respect to acquiring and losing member status. Here emphasis must be placed on the duty of the administrators to formalise the resignation within 3 months of receiving notice; the resignation will be justified in the event that said deadline elapses without qualification (art. 26.6).

On the other hand, the current BCL maintains the possibility of suspending or forcing the resignation of worker members or members who work for the cooperative (not in worker cooperatives), for reasons of an economic, technical, or organisational nature or due to production-related matters or situations of force

majeure, (currently art. 30), extending the authority to make a decision of this kind to the Governing Council if so established in the articles of association. In such cases, it permits the refund of required capital contributions by means of monthly payments over a period of up to 2 years (previously, both voluntary and compulsory contributions had to be returned immediately).

4.3. Rights and obligations

Cooperative legislation details the obligations (art. 22) and rights (art. 23, and specifically the right to information in arts. 24 and 25) applicable to members; here we must remember that these are also binding under the corporate disciplinary regulations of the articles of association – with the new BCL preventing the sanctioning of members for infringements not anticipated in the articles of association⁸ (art. 29). This is a question clearly impregnated by the nature of these organisations and their governing principles, while it should be noted that the rights and obligations are not tied to capital contributions, but to the actual members and to the cooperative activity.

Among other questions we can underline the right and obligation to participate in cooperative activity, in the terms established in the articles of association, and the right to obtain cooperative dividends, where appropriate. Law 4/1993 already indicated that the articles of association should stipulate the modules or minimum norms of participation, and that, in the event of justified cause, the administrators could relieve the members of said obligation as appropriate. Under the current BCL, this participation can be effectively produced by means of albeit limited participation, when so anticipated in the articles of association, in other organisations with which the cooperative cooperates or participates and in which it has a special interest connected to its corporate purpose. This is not really a new feature in the legal system, given that it was a possibility already anticipated in the RBCL (art. 1.1). The latter also clarifies that the legal references to participation in the cooperative activities could have a long-term basis for the purposes of its measurement (art. 1.2 RBCL).

The current BCL maintains the duty of loyalty for members, forbidding the carrying out of activities which compete with the cooperative's corporate purpose, unless authorised, and establishing the duty of confidentiality with respect to information whose disclosure may be harmful to the cooperative. Also basically maintained, notwithstanding that stipulated in relation to the content of the articles of association, is regulation of members' right to receive information, giving them the right to access the

⁸ Previously, minor offences could be stipulated in the Internal Regulations. The new BCL introduces a number of changes with respect to corporate disciplinary regulations; thus, as the start date for calculating the statute of limitations for offences, it indicates the date on which the offence was committed (and in the case of continual or permanent offences, the date on which the offensive behaviour ended), while previously it was the day that the directors became aware of the offence and, in any event, twelve months after the offence was committed. Thus, in this point the legislation offers greater guarantees to the members.

company's most relevant documentation and to request information and clarifications on different questions, limiting the cases where information can be denied.

With respect to the governing bodies, attending meetings of the general assembly and other bodies is not only stipulated as a right, but also as an obligation⁹; the same applies to positions for which they were elected, which they must also accept unless they have a justified cause for refusing.

Finally, with respect to the economic regime, the duty of paying contributions to the share capital is required in the conditions stipulated, while the possibility of resignation entails the right to refund of such contributions in the terms indicated below. Furthermore, allocation of the corresponding losses must be assumed, an aspect to which we will also return at a later date.

5. GOVERNING BODIES

The BCL considers the necessary cooperative bodies to be the general assembly and the administrative body, as well as the supervisory body in cooperatives with 100 members or more. Likewise, the articles of association can regulate another series of bodies anticipated in the law (such as the governing council and the appeal committee) and can also establish others (art. 32).

The new BCL expressly includes the duty of cooperative bodies to strive to achieve a balance between members and to establish measures in regard to gender equality and work-life balance, a duty which can be extended to their structures of association (art. 32.4).

5.1. General assembly

a) Concept and competences

The general assembly is constituted as a meeting between the members convened to deliberate and reach agreements on the matters falling within its authority; obeying the agreements of the general assembly is mandatory for all members. It has the exclusive right to reach agreements on the questions anticipated by the BCL¹⁰, and the provision of Law 4/1993 remains in place inasmuch as the general assembly is

⁹ Legal obligation which, although it can be understood from the point of view of the principle of the democratic control of cooperatives by their members, is nevertheless surprising, given that it is a well-known fact that this is an obligation which is largely ignored. In fact, as indicated below, legislation itself recognises the low attendance of general assemblies by members to be a problem, particularly in certain kinds of cooperatives, whose regulations include a third call for such meetings.

¹⁰ a) Appointment and dismissal of persons belonging to other governing bodies and the implementation of liability action against them; b) Appointment and dismissal of accounts auditors; c) Examination of company management, approval of the annual accounts and of the distribution of profits or allocation of losses; d) Establishment of new compulsory contributions, of the interest to be yielded by contributions and by membership or periodical payments; e) Issue of different types of funding; f) Changes in the articles of association; g) Constitution of second-degree cooperatives and similar organisations, as well as merging and separation between them (delegable competence); h) Merger, division, transformation and dissolution of the

allowed to debate on all matters of cooperative interest, but can only reach mandatory agreements in matters not considered by the BCL to be the exclusive competence of another administrative body (art. 33). This fundamentally reinforces the position of the administrative body.

b) Categories of assemblies, how they are convened, constituted and function

The general assemblies will be ordinary (mainly convened to examine the company management, approve the annual accounts and make decisions as to the distribution of profits and allocation of losses, without prejudice to the inclusion of other subjects) and extraordinary (art. 34).

Without prejudice to the potential plenary assembly, convening the meeting corresponds to the administrative body¹¹. The ordinary general assembly must be convened within the first 6 months from the date of the fiscal year (with respect to this, the new BCL has introduced a small change, given that the previous version referred to the deadline for convening the meeting as being the date on which it was convened and not on which it was held, meaning that the actual date of the meeting is more precise). The announcement will be made public between 10 and 60 days prior to the meeting date and the law, like its previous version, offers several ways to convene the meeting in order to ensure that all members receive notice (announcement posted at the company headquarters and at the centres in which it goes about its activity, individual communications, announcement in newspapers with widespread circulation in the case of cooperatives of 500 members or more), also placing emphasis on the use of new technologies, such as an announcement on the corporate website and the potential telematic management of a notice system for members (art. 35).

Generally speaking, the assembly will take place in the official company premises, although exceptions are allowed; in order to enable the participation of members, the current BCL expressly anticipates participation by videoconference or similar system in the case of members who are at a geographical distance. The assembly will be validly constituted, in the first call to meeting, when the majority of the votes are present and, in the second call, 10% of the votes or 100 votes. The possibility of a third call to meeting, anticipated in the previous version of the BCL for consumer and agricultural (and food) cooperatives, currently extends to education cooperatives, when the assembly can be held no matter how many votes are present and represented, leaving the interval anticipated in the articles of association between the second and third call (art. 36). The law's statement of purposes justifies the measure based on the participatory logic and sociological reality of these cooperatives.

company; i) All decisions representing, according to the articles of association, a substantial change in the economic, organisational or functional structure of the cooperative; j) Approval of or changes in the cooperative's internal regulations; k) All other agreements established by the law.

¹¹ Without prejudice of the power of the members or the supervisory committee to press for a meeting in the legally established terms.

Also with a view to enabling the cooperative to function, when it has more than 500 members or circumstances arise which seriously and permanently prevent the presence of all members at the general assembly, is the continued possibility of functioning by means of an assembly of delegates, elected at preparatory meetings (art. 40).

c) Agreements

Basque legislation generally respects the cooperative principle of “1 member, 1 vote” in first-degree cooperatives although, in keeping with the tendency of cooperative legislation, a plural or proportional vote is allowed, given that the voting rights of legal members who are cooperatives, companies controlled by the latter and public bodies can be proportional to the cooperative activity or to the complementary services in the framework of inter-cooperation. At the same time, limits are placed on the maximum number of votes that can be held by non-cooperative members (a third of the total votes; remembering that non-cooperative member votes are also limited), with the statutory regulation also anticipating the duty to abstain in the case of conflicting interests. The current BCL also expressly anticipates, in the line we have been indicating, voting by means of telematic procedures (art. 37).

As a general rule, agreements will be adopted by more than half of the validly cast votes, requiring a majority of two-thirds in the event of agreement on transformation, merging, division and dissolution of the cooperative, provided that the number of votes present and represented are fewer than 75% of the total cooperative (art. 38).

Agreements taken at the general assembly will be recorded in the minutes (in the terms of art. 39), and can be contested in accordance with art. 41 when they are contrary to the law, to the articles of association or when they harm, to the advantage of one or several members or third parties, the cooperative interests. Regarding this latter question, with a view to ensuring the legal certainty of the traffic of these organisations (and considering that the specific aspects of the cooperative are not compromised), the current BCL has chosen to bring its regulation closer to that stipulated in the Capital Companies Law (CCL)¹² (for example, by eliminating the distinction between void and voidable agreements, or by extending the expiry period for actions to 1 year, rather than 40 days, the period stipulated in the previous law, which coincided with that stipulated for associations), to which it also refers in certain aspects, without prejudice to the typical particularities of these companies, such as the possible intervention of the supervisory committee. The occasional change is introduced in this point, such as the reduction in the percentage of member votes required to request suspension of the agreement in the document instituting the proceedings (which previously stood at 20% in all cases, a percentage which remains in place for cooperatives of less than 10 members, but is reduced to 15% in those of up to 50 members and to 10% for

¹² Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Capital Companies Law.

the remainder), which we highlight for its implicit recognition of (and endeavour to adapt to) the problems of member participation and involvement, which generally increase with the size of the cooperative.

5.2. Administrative body

a) Concept, competences and form

The new BCL contains a wider range of new features with respect to the administrative body, some of which are certainly worthy of note.

According to art. 42.1, the administrators are the body exclusively responsible for managing and representing the cooperative and also exercise all powers not expressly reserved by the law or the articles of association to other corporate bodies. Once again, we must note the extent of the competences held by this body.

Following cooperative legislative tradition, the administration will correspond to the governing council, a body of collegiate nature, with the articles of association establishing the number of members (or, where appropriate, according to the new legal text, the minimum and maximum number, with the general assembly having the task of establishing said number in each case, although there must be at least 3 members; art. 47.1). Exceptionally, when the number of cooperative members is no greater than 10, the articles of association can anticipate the existence of a sole administrator (art. 43.1). Basque legislation has therefore chosen to continue without including (except for the case of small cooperatives) the possibility of naming two or more administrators who act with joint faculties (each being able to act independently), or joint Administrators (who must act together).

b) Composition

This body must also be made up either completely or in the majority of members, permitting in the case of the governing council that part of its members be elected from among non-members, although to a limited extent (art. 43.2; which currently raises the limitation from a quarter of its members to a third), thereby enabling the professionalisation, even if partial, of this body. The members will be elected for a period of between 2 and 5 years, remembering that they are obliged to accept the position and that refusing it is not a decision they can make of their own accord. Concerning this latter point, we must stress that the new BCL establishes the duty to furnish reasons for refusing the position and their submission in writing, a justification with regard to which the governing council or, where appropriate, the general assembly or the appeal committee will come to a decision. It also clarifies the effects of non-justified refusal, in which case compensation could be demanded from the administrator (in general, arts.

46 and 47, which develop these aspects). As a new feature, co-option is allowed, i.e. the temporary appointment of members by the governing council itself in the case of a minority number of vacancies, when no replacements are available (art. 43.7). Similarly, the new BCL makes limited inroads to the system of incapacities and prohibitions, basically including a series of technical improvements, such as clarification that the prohibition of minors will only affect those who have not been emancipated, or the provision on persons condemned for certain crimes or affected by legal incompatibilities (art. 44).

With respect to the administrative body, the new BCL seeks to underline the incorporation of gender equality criteria, given that, as well as continuing to permit the articles of association to enable composition of the governing council in such a way as to reflect circumstances such as its varying geographical implementation, the different activities developed by the cooperative, or the distinct categories of members and the proportion existing between them, establishing the corresponding assignation of positions, it must also include express reference to the balanced representation of women and men (art. 47.6).

c) Adopting agreements and *modus operandi*

As a general rule, agreements adopted by the governing council will be decided when more than half of the attendees vote in their favour. Each director will have one vote (with the chair holding a casting vote), although in certain cases a favourable qualified majority of at least two thirds of the votes is required (art. 48; which currently clarifies that blank votes and abstentions will not count). The new law expressly anticipates participation in the governing council by means of videoconference or a similar system, a measure which is not however new, but was already mentioned in RBCL art. 19. The agreements adopted by the administrative body can be contested in accordance with art. 52.

Unless forbidden by the articles of association, either an executive committee or one or more managing directors can be appointed (art. 48.5). With a view to increasing the degree of professionalism among the governing council, the secretary does not have to be a member or board member under the new law (art. 47.2; in Law 4/1993, said position had to be held by a board member).

However, here the most interesting changes correspond to the duties of diligence and loyalty, bringing them into line with the capital companies law, which has also been the object in the last decade of important changes and developments in the matter¹³. On the one hand, we highlight the circumstance of having decided to dedicate a specific article to the duties of the administrators, which, while it can be considered as somewhat limited, particularly when compared to the CCL regulation in this matter, must

¹³ On changes referring to the cooperative administrative body, briefly in IRASTORZA and LÓPEZ, 2020, who applaud the measures, understanding that they respond to real needs to modernise and professionalise these companies, particularly taking account of the difficulties that have appeared in recent years, without relinquishing their essential values and principles.

be approached from the angle that this question previously had no separate regulation, having been no more than a mention included when regulating their responsibility. We therefore appreciate a systematic improvement, as well as the assigning of greater importance to the duties inherent to the position of administrator.

On the other hand, the contents of these duties approach those of capital companies, on imposing the discharging of their duties with the degree of diligence exercised by a reasonable business person, given the nature of the position and the functions attributed to each one (eliminating the provision of Law 4/1993 whereby the duty of diligence must be estimated with more or less rigour depending on whether or not payment is received for the position). It also imposes the carrying out of their position with the loyalty of a faithful representative, working with good faith in the cooperative's best interests, and being unable to exercise their powers for purposes other than those for which they were granted. Express mention of the duty to secrecy in regard to confidential data is maintained, while conflicts of interest with the cooperative are expressly regulated (developing the duty of abstaining from proceeding with activities which compete with those of the cooperative or represent a conflict with its interests and their dispensation), as well as the protection of business discretion in the area of strategic and business decisions (art. 49). Nevertheless, this is an approach limited to the CCL. Thus, no express mention is made of questions such as how to demonstrate appropriate dedication, the right and obligation to compile information on cooperative matters and the duty to know their situation or, above all, the system of self-contracting (beyond operations arising from their condition of member), or other issues related to potential conflicts of interests by the administrators and, where appropriate, by people related to them. We believe it would be interesting to develop these subjects, provided that account is taken of the typical characteristics of these companies, and that a balance is maintained when regulating the different aspects related to them¹⁴. However, all of the above does not necessarily imply losing the essence of cooperatives, but rather developing their regulation with a view to clarifying certain relevant aspects of their legal system; this said, we must remember that the duties of diligence and loyalty are inherent in the position of administrator, independently of whether or not they are expressly stipulated in the law, and of whether or not all of their expressions are regulated. This said, as we have defended on other occasions, the question is not necessarily to establish a more rigid system for administrators, given that all of the aforementioned must not be incompatible with taking account of the particularities of the cooperative administrative body and its composition¹⁵.

The regulation of these duties is complemented by arts. 51 and 52, on the responsibility of members and exercising of the corresponding actions. Thus, the administrators will be held jointly and severally liable

¹⁴ In this respect, we advocate not assigning excessive complexity to cooperative legislation.

¹⁵ See GRIMALDOS, 2013 or VILLAFÁÑEZ, 2016.

for harm caused by actions contrary to the law or to the articles of association, or by those carried out in breach of the duties inherent in the position, with the new law clarifying that for this to occur there must be a combination of deceit and misconduct. Mention should be made of the express extension of this responsibility to de facto administrators, a new feature of the current BCL, defined as *both the person who, without having been appointed administrator, effectively carries out the functions corresponding to the position and, where appropriate, the person under whose instructions the company administrators act*, excluding the creditors who provide financial support to the cooperative establishing a series of conditions or requirements, unless proof exists to the contrary. Equally noteworthy, as a new feature included by the BCL, together with certain adjustments of a technical nature, is the obligation to return to the cooperative all wealth unjustly obtained as a result of an eventual infringement of the duty of loyalty.

The possibility of remunerating the position is also the object of legal development in the new BCL (art. 45), similarly clearly inspired by? the current text of the CCL, starting with its gratuitous nature (without prejudice to repayment of the expenses originated by their position) but allowing it to be remunerated. However, to pay said remuneration it must be expressly authorised in the articles of association, together with the criteria for establishing such remunerations, with the general assembly having the task of establishing their annual amount (Law 4/1993 stopped at affirming that the articles of association or, failing these, the general assembly, could assign remunerations to the board members). Furthermore, it adds that the remuneration must bear reasonable proportion with the importance of the cooperative, with its economic situation at any given time and, above all, with the effective services provided by the administrators when fulfilling their position. With the objective of reinforcing transparency in this matter, all of the aforementioned must figure in the annual report¹⁶.

5.3. Supervisory committee and other bodies

a) Supervisory committee

This is a body specific to cooperatives, which comparable cooperative legislation generally envisages with different names and functions (e.g. intervention; arts. 38 and 39 of Law 27/1999, of 16 July, on cooperatives¹⁷). Under Basque legislation (arts. 53 to 56) this body will be mandatory in cooperatives with 100 or more members, and optional in the remainder. Without directly intervening in the company management, the committee is assigned important powers of information, being able to revise the cooperative's annual accounts and books (note that the new BCL reinforces this body's power of control

¹⁶ On the payment of cooperative directors (including the possibility of taking into account whether or not the position receives payment when establishing the due diligence), see GARCÍA ÁLVAREZ, 2015.

¹⁷ Spanish law (not applicable to cooperatives subject to the scope of application of the BCL).

over the accounting media used and proposals made in regard to the results of the year), supervise and qualify documents of representation and solve doubts or incidents on the right of access to general assemblies, having the power to convene the latter in the cooperative's interests when the administrators have failed to do so, contest company agreements, inform the general assembly of questions put to them, invigilate the process of choosing and appointing the members of the other bodies, and suspend administrators involved in procedures of legal incapacity or prohibition.

It will have at least 3 members, a possibility in principle limited to cooperative members, although the articles of association can allow up to half of its members to be non-cooperative members who meet the appropriate requirements of reputation, professional qualification and technical or business experience in relation to the body, as well as the inclusion of a representative of the salaried employees with a work contract. Its period of duration will be established in the articles of association and cannot coincide with that of the administrators, a measure seeking to achieve greater independence between the two bodies. Generally-speaking, the *modus operandi* of this body will be as established in the articles of association or in the internal regulations.

b) The social committee

This is an optional body which can be provided for and regulated by the articles of association; it has the task of representing worker members (in worker cooperatives); or members who work for the cooperative (not in worker cooperatives), in both cases they are the exclusive members of the body, with the basic functions of informing, advising and consulting administrators in the aspects that affect the working relations of the worker members and members who work for the cooperative (not in worker cooperatives), or, where appropriate, of the salaried employees (art. 57). The new BCL eliminates the limitation of this body to cooperatives with more than 50 worker members or members who work for the cooperative (not in worker cooperatives), a limitation which was unjustified.

c) The appeal committee

The appeal committee is a body which can be envisaged in the articles of association. It has the power to review, on request by an affected member, the penalty agreements adopted in the first instance within the cooperative for serious or very serious offences and, in certain cases, non-disciplinary agreements. It will be made up of full members who meet the requirements of seniority, cooperative experience and aptitude stipulated in the articles of association, obeying the regulations established by the law and the articles of association (in art. 58). The new BCL makes no changes in this respect.

6. ECONOMIC SYSTEM

a. Share capital and other financing models

a) Share capital contributions: categories and legal system

According to the BCL, the cooperative share capital will be constituted by its members' contributions to its net worth, accredited by means of registered certificates, which will not have the consideration of marketable securities, or by means of a shareholding book. The total maximum contribution by each member is generally limited to a third of the share capital, with the legally envisaged exceptions (art. 60).

The law maintains the traditional distinction between compulsory contributions, necessary to become a member (which may vary for the different categories of member or according to their natural or legal condition, or for each member, in proportion to the commitment or potential assumed use of the cooperative activity; regulated in art. 61), and voluntary contributions (which can be accepted by the company bodies in the terms of art. 62).

Since 2006, Basque legislation has also distinguished between contributions with the right to refund in the event of resignation, and contributions whose refund can be unconditionally refused by the assembly or governing council, as stipulated in the articles of association (art. 60.1)¹⁸. This is a classification which responds to the problem arising from introduction to the legal system of the International Accounting Regulations, given that the right to the refund¹⁹ of contributions means that they would be accounted for as financial liabilities. In the case of contributions whose refund can be rejected, said accounting effect would be avoided²⁰. Furthermore, also for reasons of financial stability, when in a financial year the amount of contribution returns is greater than the percentage of share capital established in the articles of association, new refunds may be subject to the favourable agreement of the governing council (art. 60.2).

The introduction of this classification was accompanied by certain complementary regulations, such as the necessary agreement of the general assembly for the compulsory transformation of the contributions into those whose refund can be unconditionally refused (and the possibility, justified, of resignation by the dissenting member), as well as preferential remuneration, priority refund in the event of the company going into liquidation, or some kind of particularity with respect to the transformation of contributions in cases where the owners of the contributions whose refunds have been refused were to have resigned. The new BCL introduces a number of new features in this respect, such as the need to change the company

¹⁸ Classification introduced in Law 4/1993 by Law 8/2006, of 1 December, making a second amendment to the Basque Cooperatives Law, which has gradually been incorporated into the other cooperative laws in Spain.

¹⁹ In fact, it would make more sense to refer to the liquidation of contributions than to their refund, given that, to establish the amount of money to be refunded to the member, account must be taken of the losses assigned or to be assigned, the effect of potential updates, and eventual deductions to be made in the case of unjustified expulsion and dismissal.

²⁰ Regarding the incidence of the new accounting regulations (particularly IAS 32) on cooperatives, see, among others, VARGAS, 2007.

articles of association when the capital contributions are transformed and the possibility that the articles of association can envisage the duty to reject refund of the contributions when their repayment means that the cooperative will have insufficient coverage of the ratio or reference established.

When the refund is not rejected, the maximum deadline for its payment will generally be 5 years (art. 66, which currently also anticipates refund due to a reduction in the share capital or in the cooperative activity, an aspect already envisaged in the RBCL).

The contributions can yield interest, with the legal interest being limited to the amount of money plus 6 points, with said payment being conditioned to the existence of sufficient net excesses or unrestricted reserves to satisfy it (art. 63). Added to this is the update of the contributions in the terms of art. 64, whereby the capital gain could be allocated to updating the capital or to increasing the reserves (except in the case of the existence of uncompensated losses). Without prejudice to being an open company and of variable capital, the transmission of contributions is regulated both *inter vivos* and *mortis causa* (art. 65).

b) Other financing models

In order to financially strengthen these organisations and to enable the development of their business projects, cooperative legislation envisages the possibility of using means of financing other than capital contributions, permitting myriad manners, an aspect with which special care must be taken in order not to violate the cooperative principles, particularly referring to their democratic control by the members. Thus, art. 68.4 anticipates the issuing of bonds, participating shares, shared accounts and voluntary financing by members or third parties by means of any legal modality, with no right to vote, whose recompense can be total or partially established according to the cooperative results and to the deadline and conditions established.

The BCL expressly regulates the possibility of establishing admission and periodical quotas, which will not be added to the share capital and will not be refunded and which, like capital contributions, can be different for members (art. 68.1 and 2).

Reference is also made to the delivery of goods by members or the providing of services for managing the cooperative and, in general, payments to obtain the cooperative services, commonly known as “economic management mass”, in reference to which Basque law explains that they do not include the cooperative share capital or its net worth, meaning that they cannot be seized by its creditors (art. 68.3).

We will particularly stop for a moment at modes of subordinate financing (regulated in art. 60.6; special shares as a modality of these, in art. 67). These are financing operations which, as their name suggests, rank behind all common lenders when it comes to debt priority. Furthermore, when their maturity does not occur until liquidation of the cooperative they will have the consideration of share capital (although,

unless otherwise agreed to, the capital contributions system is not applicable to them), and they can be refunded or acquired in portfolio by means of financial backstop guarantee mechanisms equivalent to those established for equity interests or shares in capital companies or in the terms established in the regulations (the system of subordinate contributions with consideration of share capital is developed in RBCL art. 10). These are contributions which can have a fixed, variable or participatory yield, which will be represented by means of shares or book entries, which can have the consideration of negotiable instruments, which will be preferentially offered to members or salaried employees, and which will not attribute the right to vote at the general assembly or to participate in the administrative body.

The leading Basque cooperatives (such as Eroski and Fagor) have made effective use of this financial instrument, whose commercialisation has been questioned, inasmuch as these are complex, high-risk financial instruments, and as clients would arguably not have been given sufficient information²¹. This is what prompted the 2019 BCL to include, with a view to protecting investors and consumers in matters of financial investment, that *once sufficient information has been overseen and approved by the competent economic authorities with a view to authorising their issue, the responsible organisations established by the competent supervisory body will guarantee the reception of said information by third party non-member purchasers*²².

6.2 Results of the financial year: determination, allocation and accounting aspects

a) Determination of the results and distribution of surpluses

Basque cooperative legislation generally follows the accounting regulations and criteria established for trading companies in relation to the determination of surpluses, with the particularities established for these companies containing the occasional specific regulation (e.g. with respect to deductible items for the determination of net surpluses, art. 69.2).

Contrary to what happens with most Spanish cooperative laws, which generally establish a differentiation in the results of the financial year based on their origin, whose destination or allocation differs (thus, in Spanish legislation: cooperative, extra-cooperative and extraordinary results; arts. 57 and 58), the BCL allows for the joint accounting of all results and, therefore, the same treatment for all of them. Based on

²¹ On this question, MARTÍNEZ BALMASEDA, 2015. Different legal rulings dictated on the commercialisation of this kind of financing have considered the complaints made by the purchasers against the commercialising financial organisations, especially taking account of the purchasers' profile (normally consumers, without the necessary financial knowledge to give their valid consent). Here, for example, we have Sentence 20/2014, of 27 January, dictated by Bilbao Commercial Court no. 1.

²² The BCL statement of purposes indicates that, with respect to the subordinate financing operations submitted to the competent financial authority, *it should be remembered that, for their subscription, the current requirements must be fulfilled, guaranteeing sufficient, clear and understandable information. An obligation to inform must be observed by the organisations providing investment services in order to meet the requirements of transparency and informative rigor in regard to consumers wishing to purchase said financial instruments.*

the aforementioned, the available surpluses will be allocated to the cooperatives' specific contributions or funds: the Compulsory Reserve Fund (CRF), intended to consolidate, develop and guarantee the cooperative, regulated in art. 71), and the Contribution for Education and Cooperative Promotion and Other Public Interest Purposes (CPOPIP, regulated in art. 72), according to the percentages established by the law and the articles of association (as a general rule, at least 20% and 10% respectively). The remainder will be at the disposal of the general assembly, which can distribute it as follows: return to members in proportion to the cooperative activity; assignment to the voluntary reserve funds, which will be distributable or non-distributable; and, where appropriate, participation of salaried employees (not members) in the cooperative results, without prejudice to its recording in the accounts as an expense (art. 70).

Neither the CRF (to which the eventual deductions from compulsory contributions to the share capital will be also allocated, in the event of resignation by the members and admission fees) nor the CPOPIP (which will also benefit from the members' economic penalties) can be distributed among the members; nor, in the case of the latter, can they be seized, given that only the obligations contracted to fulfill its purposes will be met (also in art. 59.1).

The new BCL barely introduces anything new to this point, although account must be taken of the changes introduced by Law 6/2008, of 25 June, in relation to the CPOPIP (previously known, in line with the other Spanish cooperative laws, as the Fund for Education and Cooperative Promotion). The new name reflects the legal amendments introduced to said fund, which on the one hand clarified its nature (it is not an actual cooperative fund, but a compulsory contribution to one or several of the legally anticipated purposes, which better explains why it cannot be seized), and on the other hand extended its possible purposes (including the training and education of members and salaried employees on cooperativism, cooperative activity and questions not related to the work position; the promotion of intercooperative relations; the promotion of matters related to education, culture, professional subjects and care in the social environment and society; and the dissemination of cooperativism in that society; the promotion of Basque language use; and the promotion of new cooperative societies). The current BCL adds amongst the possible purposes of public interest the training and education of members and salaried employees in order to foster an effective policy for advancing towards equality between women and men in cooperative societies.

b) Allocation of losses and system of responsibility

One particularly controversial issue with respect to the cooperative legal system is the system of members' responsibility, especially in relation to the system of allocating losses within such organisations. To address this subject, our basis must be the fact that limited or unlimited responsibility

for corporate debts does not constitute a typical feature of cooperatives, meaning that in this respect the legislative options are varied, as a comparative study of cooperative legislation demonstrates. This said, part of the doctrine understands that the eventual limited responsibility for company debts will be without prejudice of the losses allocation system, distinguishing between responsibility for external debts (which will be limited, where appropriate) and for internal debts due to the assigned losses (which can be unlimited). One element taken into consideration for this purpose is the potential connection of the losses to the cooperative activity, understanding that the losses generated in development of the cooperative activity would in fact correspond to its members²³. This is a complex issue which has been approached in different ways by the different cooperative laws, an analysis which exceeds the purpose of this work.

Regarding Basque cooperative legislation, it had already been decided in Law 4/1993 to opt for the limited responsibility of members, even in the case of resignation, underlining in its statement of purposes that this was a mandatory rule²⁴. This said, the anticipated allocation of losses to the members prompted a questioning of the true scope of said limitation, with the result of diverse doctrinal positions. According to part of the doctrine, the system of allocating losses had to be interpreted together with the members' limited responsibility, understanding that these would be losses that could be allocated to the capital, always taking into account the particularities of cooperative legislation in this respect (notably, the participation of members in the results depending on their share in the cooperative activity). The bankruptcy proceedings of the Fagor Electrodomésticos S.Coop. cooperative in 2013 revived doubts as to the interpretation of this issue, due to the possibility that the members would have to personally respond for the millions of loss accumulated by the organisation, which did not finally happen²⁵.

This said, one of the aspects of the current BCL worthy of note, although it makes no truly substantial changes to the system of responsibility and allocation of losses, is precisely that it endeavours to clarify, with more forceful wording if possible, that it follows the criterion supported by the aforementioned part of the doctrine. Thus, on the one hand, with the new wording of current art. 59, express reference is made to the universal responsibility of the cooperative, thereby stressing that said cooperative, as an independent legal person, has its own net worth, and that said net worth must therefore respond to the

²³ Following this criterion, art. 69 of the Comunitat Valenciana Cooperative Law (Legislative Decree 2/2015, of 15 May), for example, envisages the allocation to members of losses arising from cooperative activity with the members (and not of all losses). The same idea is followed in art. 61 of the Madrid Community Cooperative Law (Law 4/1999, of March 30).

²⁴ The 1982 Basque Cooperative Law indicated that: *1. Unless an express provision exists in the articles of association, the members' responsibility in regard to company debts will be limited to their subscribed Capital contributions, whether or not they are paid up. 2. The articles of association can also establish the joint or joint and several nature of the responsibility. In the event that no express mention is made of this matter, the responsibility will be considered as being joint in nature* (art. 4).

²⁵ Nevertheless, and although it may come as a surprise, in the Fagor Electrodomésticos bankruptcy procedure, the question of members' liability was not raised, and the option was not brought up by the creditors or the bankruptcy court (at least formally), meaning that there is no court decision in this respect. Regarding the different doctrinal positions, and in relation to law 4/1993, see MARTÍNEZ BALMASEDA, 2014. Furthermore, arguing that the cooperative system of assigning losses cannot detract from the limited liability of members regulated in the law itself, among others (and also especially referring to Basque legislation): GADEA, 2012 or VILLAFANEZ, 2014.

company debts (safeguarding the amount of the CPOPIP). At the same time, it maintains reference to the limited responsibility of members to the subscribed share capital, and to the fact that, once the amount of the contributions to be refunded has been established, resigning members will have no responsibility whatsoever with respect to debts contracted by the cooperative prior to their resignation. The new BCL clarifies, however, that all of this must be without prejudice to the responsibility to meet the obligations assumed with the cooperative which do not disappear with the loss of member status.

On the other hand, regarding regulation of the allocation of losses (art. 73), the essential regulation remains in place, introducing certain adjustments to the body of regulations, making use of the CRF for this purpose more flexible, and underlining that the allocation of losses to members must not interfere with their limited responsibility. This means that losses can be allocated to the compulsory reserve funds and, in a limited fashion, to the CRF (with the maximum being the average percentage of the amount assigned to the legally compulsory funds in the last 5 years of positive surpluses, although, as a new feature in cooperative legislation, when the CRF represents more than 50% of the share capital, the amount exceeding said percentage can also be used to compensate losses). Any sums not compensated by means of the aforementioned must be allocated to members in proportion to their cooperative activity (which will be applied directly, either by means of deductions in their contributions to the capital or of other financial investments, or by charging them to returns over the following 5 years. In the event that uncompensated losses remain, these must be satisfied by the member, with the new BCL increasing the deadline to 1 year from the 1 month envisaged in Law 4/1993, thereby enabling fulfillment of this obligation). Losses can also be allocated to a special account, for amortisation set off against future positive results within no more than 5 years.

The new BCL adds that, once the deadline established has elapsed without compensation, said losses will be satisfied by means of new contributions agreed to by the general assembly or by means of the new contributions required to maintain the condition of cooperative member, with the members being obliged to resign when their contributions fall below the minimum established in the articles of association and they fail to make the new contributions. This latter clarification coincides with that envisaged in art. 61.e (also in Law 4/1993), when it indicates that if, due to the allocation of losses or economic penalty, the capital contribution of members were to fall below the minimum amount stipulated for this purpose in the articles of association or, failing this, by the general assembly, the affected members will have to make the necessary contribution until reaching the stipulated amount in order to maintain their member status. In the same line, in relation to the refund of contributions, the new BCL (art. 66.3) clarifies that the losses charged to resigning members will be up to the limit of their capital contributions.

If the cooperative is insolvent, Spanish bankruptcy proceedings will apply²⁶.

c) Company documentation, accounting and accounts auditing

According to art. 74.1, Basque cooperatives must keep, in order and up to date, the following books: a) Register of members; b) Register of share capital contributions; c) Register of the minutes of company bodies; d) Inventory and balance sheet book and Daily ledger; and e) Any others required by other legal provisions.

Generally speaking, said organisations are subject to commercial company regulations in these aspects, taking account of their particularities (as in, for example, Order EHA/3360/2010, of 21 December, approving the accounting regulations for cooperative societies; or in the BCL itself, e.g. the duty to deposit the annual accounts with the Basque Cooperatives Register) (arts. 75 and 76). These are questions to which the new law makes a series of minor changes, more technical in nature, with a view to adapting the text of the law to accounting regulations and corporate legislation in these areas, and to clarifying the odd aspect, such as the fact that the administrators must produce the annual accounts within no more than 3 months from the end of the financial year. It includes a reference to the obligation of having an external audit carried out on the annual accounts and the management report when the directors fail to meet the deadlines established in the regulations (referring, at least, to the net business turnover, the total amount of the assets according to the balance sheet and the average number of jobs resulting from the Auditing Law²⁷ or its implementing regulations). It also stipulates, in the event that the audit is requested by a minority of the members, that the latter must pay for its costs (without prejudice to their refund in the event of detecting substantial irregularities or errors in the accounts). The obligation to appoint a legal advisor is maintained when the annual accounts must be submitted to an external audit (figure regulated in art. 77).

Furthermore, for organisational reasons, cooperatives can have sections which develop, within the corporate purpose, specific economic-social activities with autonomy of management, a possibility recognised as a general norm by the different cooperative laws. The BCL specifies that the sections must keep their independent accounts, without prejudice to the general cooperative accounts, all of which will have no effect on the company's general and unitary responsibility and will not alter the system of powers assigned to the administrators. The sections must be envisaged and regulated in the articles of association (art. 6).

²⁶ Law 22/2003, of 9 July, Bankruptcy.

²⁷ Law 22/2015, of 20 July, Auditing.

7. STATUTORY AND STRUCTURAL CHANGES

The system of changes in the articles of association remains the same in the new Law, requiring agreement by the general assembly (with the exception of a company change of address within the same municipality, which can be agreed upon by the administrators; art. 79), according to the requirements stipulated in art. 78 with respect to convening the general assembly, publicising the changes and the members' right to separation.

On the other hand, the BCL dedicates different articles to mergers (arts. 80 to 87), division (art. 88) and transformation (arts. 89 and 90), with respect to which interesting new features are introduced, on authorising structural changes not previously envisaged²⁸.

With respect to mergers, it allows the cooperative to amalgamate either by means of a merger between several cooperatives with a view to constituting a single new cooperative, or by means of one or more cooperatives being absorbed by another that already exists, emphasising, among other questions, that all of the compulsory funds of disappearing cooperatives will be added to those of the new or absorbing cooperative²⁹. The new BCL, as well as introducing certain technical improvements with respect to mergers, contains a new regulation on special mergers. While Law 4/1993 limited this possibility to the merger between employee-owned companies and worker cooperatives and between agricultural cooperatives and agrarian processing companies (assumptions in which the absorbing or resulting company is a cooperative), the current BCL permits civil and trading companies or organisations of any kind to merge with cooperatives, by means of absorption (where the cooperative can be either absorbing or absorbed) or by means of constituting a new company. In the same line, the current BCL permits the division or segregation of a cooperative in favour of a non-cooperative organisation due, in accordance with the preamble of the law, to the confirmation of its need in business practice. Both in the case of special mergers and of division in favour of a non-cooperative organisation, the CRF, the CPOPIP and other non-distributable funds will be allocated as indicated below for cases of transformation.

With respect to transformation, the BCL refers both to the supposition of a cooperative transforming into a civil or trading company (art. 89) and to the possibility of any civil or trading company, association, group or other kind of non-cooperative organisation becoming a cooperative (art. 90). In the former case

²⁸ The changes introduced in this area are welcomed in IRASTORZA and LÓPEZ, 2020, who indicate that the new structural mechanisms envisaged offer alternatives to cooperatives in serious difficulties which, thanks to these solutions (previously unviable), will not necessarily be condemned to disappear from the business world.

²⁹ To do this it will be necessary to draw up the merger project according to the BCL, make the legally required information available to members, for the agreement to be adopted by the general assemblies of each of the cooperatives participating in the merger (to do which the qualified majorities indicated above will be required), and for the agreements to be formalised in a single public deed, which must be recorded in the Cooperatives Register. The right to the separation of members who oppose the agreement (which will be a justified resignation) is recognised, and the right to objection of the creditors is regulated. Without prejudice to the specific aspects envisaged by the BCL for divisions, the latter will generally be governed by the rules regulating the merger.

the possibility of transformation is limited to cases involving a combination of *business needs requiring corporate solutions which are inviable in the cooperative legal system in the opinion of the administrators, who will draw up a report on the subject*, requiring approval by the general assembly in the qualified majorities indicated above. The new BCL maintains the essence of the regulation for transforming cooperatives (requirements, procedure, right to separation of dissenting members), and introduces the occasional change to this point, such as when it eliminates the reference to the supervisory committee with respect to estimating that there is a cause of transformation, or on envisaging that the administrative body's report be communicated to the HCBC, although without it being necessary to obtain their approval (requirement in Law 4/1993). A change is also made to the regulation on transferring non-distributable funds, generally indicating that the CRF and voluntary funds that are non-distributable according to the articles of association must be made available to the HCBC, taking account of the losses pending compensation or potential capital gains of the balance sheet (excluding voluntary reserve funds, with respect to which a specific allocation or application has been established), and the CPOPIP will have the application envisaged in the articles of association, or, failing this, as envisaged for cases of cooperative liquidation.

There is no change to the system of transformation into a cooperative which, for obvious reasons, will largely depend on the regulations of the organisation intending to become a cooperative. We stress that the transformation will not change the system of member responsibility with respect to corporate debts incurred prior to the transformation, unless expressly consented to by the creditors.

8. DISSOLUTION AND LIQUIDATION

The BCL basically maintains the stipulation of the previous law with respect to dissolution and liquidation of the cooperative, regulating the causes of dissolution in art. 91³⁰, which will generally require agreement of the general assembly in the terms of art. 92.

The stipulation of the previous law is maintained in this point, adapted to the terminology of the Bankruptcy Law. This same adaptation has been made in art. 101 (reference to the application of bankruptcy legislation to cooperatives), and seems to have been intended to indicate that *in the case of bankruptcy proceedings, and provided that the liquidation phase has been initiated* (Law 4/1993 said in

³⁰ Cooperatives can be dissolved for the following reasons: 1) Having completed the term established in the articles of association; 2) Conclusion of the company purpose or the obvious impossibility of fulfilling it; 3) Stoppage or inactivity of the company bodies or unjustified interruption of the cooperative activity for a period of 2 consecutive years; 4) A reduction in the number of members to below the legal minimum, when said situation remains in place for more than 12 months; 5) A reduction in the share capital to below the minimum established in the articles of association, without it being reestablished in a period of 12 months; 6) Merger or total division; 7) Setting in motion of the cooperative liquidation stage in bankruptcy proceedings; 8) Agreement by the general assembly; 9) Any other reason established in the laws or in the articles of association.

the case of bankruptcy) reactivation can only be agreed to if the cooperative reaches an agreement with its creditors (art. 92.5), wording which is rather surprising given that bankruptcy legislation envisages the agreement and liquidation stages as alternatives, with the latter of the two being opened directly on request by the bankrupt party or following failure of the agreement stage, without the formality of an agreement after it has been opened being envisaged. Furthermore, the possible reactivation of the bankrupt party in liquidation is not without conflict, and although on certain occasions a reference has been made to this possibility, it has been for cases where all pending debts have been satisfied (meaning an end to the bankruptcy proceedings due to disappearance of the insolvency)³¹. It would therefore have been more appropriate to eliminate the possible reference to reactivation of the cooperative in bankruptcy liquidation (which would not mean that said possibility was forbidden).

The BCL stops at aspects such as the actual liquidation process (art. 92), the appointment of liquidators (art. 94), their functions and the manner of their transmission (arts. 95 and 96), and the possibility of commissioning an audited settlement, either on request by 20% of the members, or by the Basque Government based on the importance of the liquidation (art. 97).

One of the most important changes introduced by the new law is the possibility of appointing liquidators who are not members. Thus, the general assembly, when choosing liquidators, will do so preferentially (but not necessarily) from among the members, in an odd number. This new feature endeavours to respond to the reality of completely destructured cooperatives and/or those which have no members with the capacity or willingness to proceed with the liquidation tasks. Furthermore, when there are several liquidators, the general assembly will establish their operating conditions (according to Law 4/1993, they had to operate in collegiate fashion).

The regulations on awarding the remaining assets (art. 98) endeavour to reflect the particularities of the economic system of these organisations with respect to the different categories of capital contributions and to the cooperative funds, although in our opinion an opportunity has been lost to improve the wording of this question, in such a way as to guarantee that there can be no mistaken interpretation. This stems from the literal wording of the BCL, according to which, *The remaining assets cannot be awarded or distributed until all company debts have been fully satisfied, their allocation has been carried out and the payment of non-mature credits has been secured. Having satisfied these debts, the remainder of the company assets will be awarded in the following order: a) The CPOPIP will be made available to the HCBC (...)*. The wording of this precept can certainly give rise to the understanding that in the case of liquidation the CPOPIP can be used to satisfy the company debts. However, taking account of the character, the purpose and the unseizable nature of the CPOPIP, it must be understood that, also in the

³¹ FERNÁNDEZ ABELLA, 2018.

case of liquidation, its amount can only be used to satisfy the obligations incurred to fulfill its purposes, with the remainder being directly made available to the HCBC³².

Having satisfied the company debts as indicated, it will then be possible to proceed with refunding the capital contributions, giving preference to resigned members who had been refused refund. A priority is also established for the reimbursement of voluntary over compulsory contributions. Once the capital contributions have been paid out, the shares of members in the distributable voluntary reserve funds will be refunded (according to the rules established in the articles of association or by agreement of the general assembly and, failing this, to shares in the cooperative activity) in order, finally, to make available to the HCBC the amount remaining from the liquidated assets and from the CRF³³.

Having completed liquidation and distribution of the company assets, the next step is to cancel entries referring to the cooperative in the Basque Cooperatives Register, although the documentation referring to the company must be kept for a period of 6 years, either stored by the Register or, as a new feature of the current BCL, by the liquidators who assume the duty to keep said documentation. Furthermore, the current BCL expressly allows the document to be stored in electronic format or by electronic means (art. 100).

9. COOPERATIVE CATEGORIES

The law regulates different cooperative categories, while also offering the possibility of constituting cooperatives even if their socioeconomic activity means they cannot be included in the legal enumeration, in which case the regulations of the cooperative category closest to them will apply (art. 102.1). The specific regulations will be preferentially applied to each cooperative category; alternatively, for matters not envisaged by said regulations, the common cooperative regulations will apply (art. 102.3)³⁴.

Undoubtedly, in the Basque case, the most common category is the worker cooperative³⁵. Said cooperatives are born on the initiative of people who form an association in order to create cooperative jobs whereby they proceed with any economic or professional activity enabling them to jointly produce goods and services for non-member third parties (art. 103.1).

³² See GADEA, 2012 and VILLAFÁÑEZ, 2014.

³³ Remember that, having satisfied the company debts, the liquidators must draw up a final balance sheet together with a plan of allocation for the company assets, according to that indicated above, which, following the compulsory reports, will be subject to approval of the general assembly, an approval which must be duly published and is open to contestation (art. 99).

³⁴ The types of cooperative regulated by the law, according to their cooperative activity or other criteria such as the corporate purpose, sector or the personal conditions of their members are: worker cooperatives; consumption; education; agriculture and food; community-run; housing; financial; health; services; junior; social integration; and business development.

³⁵ To take a deeper look at work in worker cooperatives, provided by member workers and employees, BENGOETXEA, 2019; DE NIEVES, 2005; LÓPEZ, 2006.

Once again the law explicitly stresses, like its predecessor, that the nature of the relationship connecting members with their cooperative is associative rather than labour-related (art. 103.1).

The self-management model is maintained to establish the working conditions, with the sole heteronomous legal requirement that payment for work (equivalent to the wage earned by salaried employees) must be at least equal to the minimum wage. Furthermore, the law introduces, as an interesting new feature, the rule that *in any case, the cooperative will respect its own established labour systems, decent working conditions and the minimum labour standards established by the International Labour Organisation* (art. 105.3). This provision, guaranteeing decent work as a minimum standard, can help to combat the labour exploitation by means of false cooperatives.

Just as other cooperative categories can carry out operations with non-member third parties, the work, which constitutes the cooperative activity in worker cooperatives, can be provided by non-member salaried employees. Previously the limit for employees stood at 25% of the total work hours/year carried out by members. The new law increases the threshold to 30%.

The law itself stresses that *the purpose of worker cooperatives is to provide jobs for their members* (103.4). The labour activity of non-members must therefore constitute an exception, and the rise in the maximum threshold heads in the opposite direction with respect to cooperative employment. And this, as indicated in the statement of purposes, *for operational reasons*.

Furthermore, with arguable justification, the list of ways to get around the 30% limit is now longer. Thus, as well as the assumed principle, already included in Law 4/1993, of salaried employees who explicitly refuse to become worker members, and others such as the salaried employees who enter the cooperative for reasons of legal substitution, new cases are added such as employees with disabilities, work placement and training contracts, or employees assigned to the user companies, when the cooperative acts as a temporary employment agency.

Education cooperatives (arts. 109 to 111) hold a great deal of quantitative and qualitative importance in the Basque Country, above all due to the social movement of the *ikastolas*, the Basque schools constituted in cooperative form.

The law anticipates three types of education cooperatives: consumer cooperatives, when the cooperative activity lies with the users of the education service (fathers, mothers, students); worker cooperatives, where the cooperative members are the teaching staff and non-teaching services providers; and the integral cooperative, when the two aforementioned collectives are cooperative members, i.e. both those who provide the education service and those who receive it.

The new law reinforces the figure of the housing cooperative (arts. 117 to 122). This is a model with a peculiar legal system, different from both the system of subsidised public housing, and from the model of non-cooperative private development.

By reason of different experiences resulting from malpractice, the law endeavours to ensure that it is truly the cooperative members who guide the process of building and managing the houses, taking account of the fact that often they don't even know one another. It is therefore expressly established that *in any case, the corporate purpose must be directly developed, at least in its basic aspects, by the cooperative, without prejudice to the work being enabled or complemented in any manner by non-member third parties contracted by the cooperative. Said contracts must be favourably reviewed by the legal advisor of the cooperative* (art. 117.1).

While a management body, external to the cooperative, can exist to give it advice, the bottom line is that it is the cooperative which must drive the real estate development process. Thus, all contracts drawn up between the cooperative and said management bodies must be authorised by a legal advisor, whose action is envisaged to strengthen the protagonism of the housing cooperative. Generally speaking, the opinion of said person is required for all fundamental legal-economic activities to be developed by the cooperative.

Operations with third parties must adapt to the limit, habitual in cooperative law, of 30%.

We must stress the boost of the new law with respect to the secure tenancy formula, similar to the rental of private housing, together with the traditional awarding of homeownership. In this model, the use of which is growing and would appear to have great potential in comparative law, the cooperative owns the houses and rents them to cooperative members.

Regarding transport cooperatives (art. 129), to prevent the malfunctions to have occurred in practice, as well as to clarify legal systems, two different types are envisaged. They can either be worker cooperatives, when the haulier works according to the cooperative format, or services cooperatives, when the cooperative provides services to different companies dedicated to transport activities, who are the cooperative members.

One new category in the law is that of junior cooperatives (art. 132). These are cooperatives for producing goods and services, similar to worker cooperatives, but promoted by students as a training instrument and way to acquire academic knowledge in the context of the education system.

These cooperatives are therefore temporary in nature, limited to the education cycle. In the event of continuing their activity after its promoters have obtained their academic qualifications, they will become ordinary worker cooperatives.

In the case of social cooperatives (arts. 133 and 134), previously limited to the employment of people with disabilities, the space opens to include people in a situation of social exclusion. It is consistent and plausible to offer the cooperative formula to two collectives with a protected employment system: special employment centres, for people with disabilities; and insertion companies, for persons in a situation of social exclusion.

Lastly, we must stress the new business development cooperative (art. 135) as a cooperative instrument for supporting people with entrepreneurial projects, offering support in the shape of guidance, training and tutoring.

10. THE SMALL COOPERATIVE SOCIETY

The small cooperative society was previously regulated in a specific law, and the new law integrates this into its contents (arts. 136-145), with good reason, with hardly any changes.

This is a worker or community cooperative, with a minimum of two and a maximum of ten worker members (worker cooperatives), or members who work for the cooperative (community cooperatives), of indefinite duration.

Small cooperatives, during the first five years from their constitution, can hire salaried employees and worker members for a fixed duration, totaling no more in number than the members working for an indefinite duration. After these five years, the limits to hire employees will be those generally established in this new law, indicated above, in the comment on worker cooperatives.

In any case, the number of employees hired by the small cooperative society can be no more than five.

11. COOPERATION BETWEEN COOPERATIVES: COOPERATIVE ASSOCIATIONISM AND COOPERATIVE INTEGRATION AND GROUPING

Basque legislation also deals with cooperation between cooperatives in its two aspects: cooperative associationism and economic collaboration.

Thus, on the one hand cooperatives will be able to constitute unions (based on the sector of activity), federations (based on the cooperative category), confederations or other formulas of association in order to defend and promote their interests, which will be promoted by the public authorities. The BCL deals with these in its arts. 163 and 164, with a regulation of minimums, in favour of freedom of association, applying, in accordance with its new text, the BCL generally and subsidiarily, and in any case in matters

relating to accounting and auditing (we must also remember the duty to procure the balanced presence of members and the establishment of means to achieve gender equality and work-life balance in their bodies).

Thus, cooperative unions, federations and confederations (which, together with the cooperatives themselves and the HCBC will make up the Basque cooperative movement), will have the function to represent their members, mediate between their associate organisations (or between these and their members), organise advisory and assistance services, foster cooperative promotion and training, collaborate with the Basque Cooperatives Register with respect to the census of societies recorded in said Register, and any other similar matter. To acquire legal personality, they must deposit their memorandum of association in the Basque Cooperatives Register, with the legally established contents. The new Law introduces a few minor adjustments regarding the duty of federations or confederations to include the «de Euskadi» reference to the Basque Country in their name³⁶.

The BCL develops to a greater extent different categories of economic collaboration, such as business groupings (art. 152), inter-cooperative agreements (art. 153), and business groups (art. 154 LC). The latter tend to base themselves on second-degree cooperatives (arts. 146 to 151), which have as their purpose to *complete, promote, coordinate, reinforce or integrate the economic activity of the member organisations and of the resulting group in the sense and with the extension or scope established in the articles of association*, a modality par excellence of economic collaboration between cooperatives, whose content will be more or less extensive, with the articles of association being determinant in this respect. With respect to the latter, we highlight the possibility that their full members may include, as well as cooperatives of an inferior level and members who work for the cooperative (not in worker cooperatives), all kinds of organisations and legal persons, public or private, whose votes are limited³⁷. The BCL stipulates a number of particularities with respect to their economic and organic system, now underlining that the general assembly must be made up of a number of representatives of the member legal persons proportional to the right to vote of each member organisation and, where appropriate, by representatives of the members who work for the cooperative (not in worker cooperatives), and who will be managed in all cases by a governing council, up to a third of whose members can be appointed by the directors elected from among capacitated persons, who may or may not be members of one of the cooperatives in the group.

³⁶ In the former case, when there is an association between more than 50% of the cooperatives entered in the Basque Cooperatives Register, with an activity accredited before said Register, or when the number of members of the federated companies is higher than said percentage with respect to the total members of the active and registered cooperatives. With respect to confederations, when at least 70% of the Basque cooperatives registered group together, they will be called «Confederation of Cooperatives of the Basque Country».

³⁷ The number of votes of an organisation which is not a cooperative society cannot be greater than a third of the member votes, unless there are fewer than four members. Moreover, these organisations as a whole cannot hold more than half of the total votes.

The current BCL has introduced a number of amendments worthy of note in this point. On the one hand, it removes from the legal text corporations, whose regulation was based on a dualist management system, given the understanding that, although its usefulness has been demonstrated, it may now turn out to be *constrictive and unnecessary*. This figure was effectively created by Basque legislation with the purpose of meeting the organisational needs of the structure of cooperation between Mondragon cooperatives, although part of the doctrine had already been considered unnecessary, taking account of the extensive scope with which second-degree cooperatives are regulated³⁸.

On the other hand, the regulatory development of cooperative groups is transferred to the BCL from the RBCL, which already distinguished between cooperative groups by collaboration and cooperative groups by integration, in which there will be a combination of common general directorate and true economic unity³⁹. Without going deeper at this time into the regulation on cooperative groups, we must point out that, in any case, we understand that the cooperation structures in which the cooperatives participate must respect the cooperative principles (expressly indicated by the BCL), very particularly their democratic control by the members and their autonomy with respect to other organisations. This is why, without prejudice to the existence of a unitary management and leading organisation at the head of the group, groups cannot be accepted where the cooperatives are hierarchically subject to other organisations, which may not sit well with certain cases in which a group by integration is understood to exist.

Finally, we mention mixed cooperatives, which were incorporated in Law 4/1993, and are regulated among the manners of economic collaboration (art. 155). These are characterised by the presence of minority members whose voting right in the general assembly can be determined, exclusively or preferentially, according to the capital contributed, which will be represented by means of shares or book entries, subject to the regulating legislation of the securities market.

³⁸ This above all as well, in general, as the models of cooperative integration, ALFONSO SÁNCHEZ, 2000.

³⁹ The BCL clarifies that economic unity will be presumed to exist when, together with the common general directorate, any of the following situations are met: a) Existence of de facto commercial, financial or patrimonial relations representing an effective dependence of any of the organisations in the group; b) Existence of an agreement of joint responsibility with respect to the exterior in regard to operations directly carried out with non-member third parties by corporate organisations integrated in the group, provided that these are permanent in nature and that the operations in question are necessary and not ancillary with respect to producing their business activity; c) Existence of commitments regarding the periodical contribution of resources calculated according to the income statement of the respective cooperative, when the amounts to be contributed amount to more than fifty percent of the previous net surpluses of each cooperative; d) Existence, between two or more companies in the cooperative group, of relations meeting the requirements that generate the obligation to consolidate accounts, such as those regulated in articles 42.1 and 43 of the Commercial Code. When any of these suppositions occur uniquely with respect to some of the cooperatives belonging to the group, these cooperative societies alone will be considered to be part of a cooperative group by integration.

12. COOPERATIVES AND THE PUBLIC ADMINISTRATION

As a principle which must guide public action with respect to cooperatives, the law states that *the public authorities of the Basque Autonomous Community assume as a function of social interest the promotion, stimulation and development of cooperative organisations* (art. 156.1).

Identification is made of the legitimate representative interlocutor for the cooperative movement, which will be *without prejudice of the existing rules on business representation, the organisation which associates more than sixty percent of the cooperatives recorded in the Basque Cooperatives Register* (art. 156.1).

The alliance proposed between the public sector and the cooperative sector is significant when we read that *the public authorities of the Autonomous Basque Community, with the purpose of developing and improving the public services, will stimulate the creation of cooperatives and their participation in the management of public services* (art. 157.3).

Furthermore, the system of offences and penalties applicable to cooperatives is regulated (arts. 158 a 162), attributing the task of cooperative inspection to the Basque Government Department competent in labour-related matters.

13. THE HIGHER COUNCIL OF BASQUE COOPERATIVES

On the other hand, as we previously indicated, the law establishes that the public administration must foster an associative approach by cooperatives, in order to articulate Basque cooperativism, in such a way that the *federations and confederations, and the Higher Council of Basque Cooperatives, become part of the Basque Autonomous Community cooperative movement* (art. 163.2).

The law regulates said Higher Council of Basque Cooperatives (HCBC), as a singular organisation, public in nature, characterised as the *highest body in the promotion and dissemination of cooperativism, consultative and advisory with respect to the Basque public administrations in all matters affecting cooperativism* (art. 165.1).

The Council is made up of representatives of the Basque Government, the Basque Confederation of Cooperatives (which holds the majority in the Council), of the three Basque universities and, as a new feature, of the three Provincial Councils.

A positive appraisal must be made of the incorporation of the Provincial Councils with a view to strengthening the Council, given that they hold important powers, particularly with regard to taxation, a sphere in which each of the three Provincial Councils holds complete power.

The HCBC catalogue of functions includes the task of cooperative arbitration. Here we find the new feature of the obligation to exhaust the internal cooperative channel, in potential situations of conflict between the cooperative and its members, without prejudice to the subsequent access to arbitration.

CONCLUSIONS

For all of the above reasons, we must welcome the new Basque Cooperatives Law, whether due to the technical improvements made to the legislation, or to some of the amendments introduced. In this respect, we must highlight aspects such as the express reference to the cooperative principles of the ICA, the adoption of non-discriminatory language from the gender perspective, the inclusion of provisions to promote gender equality, measures endeavouring to provide guarantees for the members and their rights, as well as those which endeavour to enable participation in the company bodies, the legal development of the administrators' duty of loyalty, clarification of the system of member responsibility, the provision of new cooperative categories and the legal development of some that already exist, and the mention of decent working conditions and the minimum labour standards of the ILO in worker cooperatives.

This said, as mentioned, there is no lack of controversial or reprehensible aspects in the new Law, whether referring to questions whose regulation could have been clarified or improved, or to certain changes made, such as certain new features referring to the administrative body or the excessive flexibility for hiring employees in worker cooperatives.

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Book Reviews

Picker, Christian, *Genossenschaftsidee und Governance* [The cooperative idea and governance], Tübingen: Mohr Siebeck 2019, XXII + 561 pp., ISBN 978-3-16-156567-0

and

Miribung, Georg, *The Agricultural Cooperative in the Framework of the European Cooperative Society. Discussing and Comparing Issues of Cooperative Governance and Finance in Italy and Austria*. Springer Series Economic Analysis of Law in European Legal Scholarship 8, Springer Nature 2020, XIV + 563 pp., ISBN 978-3-030-44153-1 and 978-3-030-44154-8 (eBook)

by **Hagen Henry¹**

As the review of Georg Miribung's book refers repeatedly to that of Christian Picker's book the reader might want to read the reviews in the sequence as presented here.

Picker, Christian, *Genossenschaftsidee und Governance* [The cooperative idea and governance]

I. Introduction

Christian Picker's book "*Genossenschaftsidee und Governance* [The cooperative idea and governance]" is like a gemstone, both high quality and rare. It is also timely. His book is based on a text which the Ludwig-Maximilians-Universität at Munich accepted as habilitation thesis [Habilitationsschrift], i.e. the classic last stepping-stone in Germany to full professorship. Its scientific quality and value are therefore beyond doubt. Its content, which the title of the book does not fully reveal, makes it a rarity. This is because, as the author acknowledges on the very first pages, cooperative law is almost completely absent from research and education. Although, it should be noted, that this is not only a phenomenon in Germany, but world-wide. ² The book is timely as it addresses the questionable drive to make the

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² Cf. also Henry, Hagen, *Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws*, in: *Uniform Law Review. Revue de droit uniforme*, 2012, Vol. XVII, 197-233; Lehmann, Matthias, *Cooperatives as Governance Mechanism* in: *European Company and Financial Law Review (ECFR)* 1/2014, 31-52; Villafañez Perez, Itziar, *Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico* [Some thoughts on the need to

governance structures of all types of enterprises converge. For those who are interested in German cooperative law - and can read German! - this 519 pages of dense text with more than 2800 footnotes and 35 pages of bibliography contain it all: description, critical analysis, sporadic outlooks to other jurisdictions and proposals for changes to the German cooperative law. This book will be a key reference for many years to come.

This short review cannot do justice to the book, given its volume and wealth of ideas. My approach is necessarily selective, as I present and reflect on those points which, in my view, are most likely to be of greatest interest to an international readership. To provide some structure to this review, I will begin with a brief summary of the contents of the book (II) and before concluding (IV) I will raise some questions (III). The questions posed are a reaction to an extraordinarily thought-provoking treatise.

II. Summary of the content

The book evolves from what the author sees as a German specificity in a double sense: Firstly, the purpose of registered cooperatives is to exclusively serve the user interests of their members, failing which they will be dissolved *ex officio*. Secondly, in contrast to other enterprise types, the ensuing specific legal form of cooperatives may not be used for any other purpose.

Consequently, and placing his treatise within organizational law (“form follows function”, pp. 21, 67 *et passim*), the author sets out to demonstrate this purpose and to detect any part of the law which might hinder its pursuit. He consistently and meticulously keeps this focus. No matter which political, economic or social circumstances might have prompted certain legal figures in the past or might prompt in the future, he examines any aspect of German cooperative law, from its beginning in the 1860’s, with an “anything goes” approach, provided that the law furthers the pursuit of the singular purpose of cooperatives. Contrary to the popular view, he is prepared to accept that such things as profit-making (in addition to surplus), the remuneration of the capital contributions of the members, non-member business, undemocratic management, management by non-members, divisible reserves and even measures that might be inefficient in the entrepreneurial sense, are acceptable, as long as they serve the members’ user interests. This approach allows the author to keep equal distance from two main tendencies in cooperative legislation (not only in Germany), namely a tendency to bring the features of cooperatives too close to

integrate the cooperative perspective in the study and development of the legal order], in: Hagen Henry, Pekka Hytinkoski and Tytti Klén (eds.), *Co-operative Studies in Education Curricula. New Forms of Learning and Teaching*, 2017, 54-71 (University of Helsinki Ruralia Institute: Publications Series No. 35).
To be mentioned, however, a vibrant and diverse “culture” in Germany and few other countries of publishing and updating regularly commentaries on their cooperative laws.

those of commercial enterprises or to bring them too close to those of general interest organizations. It also allows him to avoid engaging with the ideological, traditionalist or essentialist overtones used to defend or reject one or the other of these tendencies.

Chapter 1 is titled “[the] need for a cooperative governance [Notwendigkeit einer Cooperative Governance]” Referring to the economic and social importance of cooperatives the author leaves no doubt as to the need for such a specific cooperative governance. At the same time the chapter outlines the methodology and it introduces the content of the following three chapters.

Chapter 2 details the “function of a cooperative governance [Funktion einer Cooperative Governance]”. The chapter divides into two parts in line with the scope of organizational law. In the first part the author deduces the “German specificity” from German cooperative law using classic methods of statutory interpretation: understanding the wording of the law, seeking to establish the intention of the legislator, using teleological and systematic interpretation. He concludes that 1) member-user promotion is constitutive of the legal form of (registered) cooperatives and 2) that contrary to other forms of enterprise this legal form may not be used for any other purpose. He qualifies the latter aspect as a restriction on freedom of association and in doing so introduces a constitutional question with two interrelated aspects: the need to justify the restriction and the need to vest cooperatives with the widest possible byelaw autonomy. Concerning the first aspect, he argues that the restriction is justified on the ground of member and third party (mainly creditors) protection (p. 67 et passim). But he firmly rejects any justification on the ground of promoting general interests. He holds that positive economic and social effects of cooperative activities are desirable, but that having these would be jeopardized if cooperatives were obliged or allowed to serve other than their members’ user interests. This argument is expanded in Chapter 3. Concerning the second aspect, the author presents an adequate and (for legislative purposes) highly useful distinction between law and byelaws. This distinction also addresses the problem of how one general cooperative law might effectively cover the modern diversity of cooperatives (a solution the author favours). This diversity concerns the size (number of members and/or amount of turnover), the membership (homogeneous or heterogeneous by interest, social strata, profession etc.), the activity (single or multiple), the sector etc..

In the second part of Chapter 2 the author discusses self-help, self-administration, self-responsibility and democracy as structural principles of cooperative governance. It is arguably here that his approach best plays out. He upholds that, regardless of the origin, *raison d’être*, or role these principles may have played in practice or theory, the extent that they should be applied depends entirely on whether and how effectively they further the user interests of the members.

At the end of this chapter the author points to the two legislative tendencies mentioned earlier, namely commercialization, which he distinguishes from economization [Ökonomisierung, p. 294], and general interest orientation. They both pose a threat to the identity of cooperatives by distancing them from their purpose. He details these threats in the following two chapters.

Chapter 3 is on “cooperatives and general interest [Genossenschaften und Gemeinwohl]” and deals with the first of these two threats. The author starts by discussing different conceptions of the purpose of cooperatives in some European states and the one behind the Societas Cooperativa Europea as regulated by the Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE). He compares these conceptions with the “German specificity” and after further embedding this specificity in Germany’s constitution, he concludes that there are irreconcilable differences, which excludes any possibility of harmonization, even at the European level. He then goes on to challenge his own view. First, by exploring whether general interests could and should be made part of the purpose of cooperatives. He rejects this idea arguing that the cooperative self-help approach cannot be married with a help-for-others approach. He acknowledges that cooperatives should be of public utility [gemeinnützig], but does not accept that they may have a general interest purpose [gemeinwirtschaftlich]. He tests this conclusion by replacing the notion of share-holder value (capitalistic enterprises) and the notion of member value (cooperatives) with the notion of stakeholder value. The stakeholder value theory drives much of the contemporary governance debate. However, the author remains loyal to his basic tenet to reach a conclusion which will be counter-intuitive to many readers - cooperatives are less socially and societally responsible than other (capitalistic) types of enterprises as far as their purpose is concerned. As with the general interest, social or societal responsibility must not be made part of the one-dimensional purpose of cooperatives, which is to serve the members’ user interests.

Chapter 4 is titled “cooperatives and ‘capitalism’ [Genossenschaften und “Kaptalismus”]”. In this chapter, the author deepens his discussion of the second threat to the identity of cooperatives, namely the development of a capitalistic enterprise interest, detached from and potentially conflicting with the member-user interests. Against the background of what he sees as a general “economization” of entrepreneurial activities, the author develops ideas on new enterprise types, such as a cooperative stock company [genossenschaftliche AG] and a capitalistic cooperative [“kapitalistische” eG]. He rejects both. The first one on the ground of its perplexity of purposes, the second one on the ground of creating an unsolvable conflict between investing and user member interests. He concludes this chapter with suggestions for a “member promotion adequate capital structure [Förderzweckkonforme Kapitalverfassung]”.

Chapter 5 is about a “member promotion adequate organizational structure [Förderzweckgerechte Organisationsverfassung]”. The author weaves the threads he spun in his previous chapters into an ideal organizational structure for cooperatives in Germany. The chapter sets out to clarify which structural rules in the law are indispensable, so that a registered cooperative may promote the user interests of its members without running the risk of degenerating into a capitalistic or a general interest enterprise. The questions raised include: how autonomous may management be? How much member participation is needed? What (additional) control mechanisms must be in place in order to secure the purpose? The chapter then addresses the question of how management and control should be designed in order to allow for an optimal realization of the purpose. The author implies that the path to this optimization should be left to the members to lay down in the byelaws, which might differ according to type, size and structure of the individual cooperative.

The author suggests that the matters left to be regulated by law include several specific structural elements. To be mentioned three of them: The first one is the right of the general assembly to instruct the board on management issues. This means that the general assembly should not only be the highest decision-making body, but also the highest management body. The second specific element is the limitation on transacting non-member business, with a further limitation that it must not be conducted on the same terms as member business. The third such element is the non-admission of investing members. The matters that should be left to be regulated through the byelaws include various models for a more effective participation, such as the attribution of plural voting rights, information and reporting, and a cooperative specific audit. Member-control should be strengthened, but it should remain the second best choice after participation. These proposals ensue from the author’s recognition that the pursuit of the members’ interests will only be effective if members (are allowed to) participate.

III. Questions

I have already acknowledged that I found this book to be extraordinarily thought-provoking. My discussion of the following three points is my response to that provocation. They are formulated as questions to indicate my doubts as to their pertinence. The questions are:

- i.) Is the way (method) on which the author proceeds from the current state of the German cooperative law to his proposals for change tenable?
- ii.) Is the “German case” (to be) unique?

iii.) Is the notion of “governance” adequate for cooperative law?

ad i.): The author develops his proposals for changes to the German cooperative law by criticizing the legal form it prescribes for cooperatives on the ground of a “non-positivist [überpositiv] ... German cooperative legal type [deutscher Rechtstyp Genossenschaft, pp.15, 117]”. On the same page (15) he equates “cooperative legal type” with “normative guide [normatives Leitbild]”, and “cooperative idea [Genossenschaftsidee]”; on pp. 117 and 190 respectively with “cooperative legal idea [“Rechtsidee” Genossenschaft]” and “legal notion of cooperatives [Genossenschaftsrechtsverständnis]”. The origin and justification of this “German legal type” are not entirely clear. The equation of “legal type” with “cooperative idea” (the term also used for the title of the book) might lead to a methodological trap. If the “legal type” is the measure by which the current law is criticized, rather than an extra-legal criterion, then at least one element of this legal type must be a non-negotiable given. Indeed, the author tries to protect himself from falling into this trap by setting the cooperative’s purpose of serving the members’ user interests as an absolute, i.e. absolved from the need to be justified (cf. p. 117: “Unveräusserlicher Kern der deutschen “Rechtsidee” Genossenschaft ist damit nur ihr spezifisch mitgliederbezogener Verbandszweck [the only unalienable kernel of the German cooperative legal idea is its purpose to serve the members’ user interests]”; and on p. 119: “Absolut und damit zeitlos und inhaltlich unveränderbar [absolute, hence timeless and with immutable content]”).

Surprisingly, the author does not avoid the trap by using either one or both of the escape routes that he had already identified: The first route would have been to build on the fact that there are (according to him) “two notions of cooperatives, the positive one as laid down in the cooperative law and a universal or non-positivist one” (p.18).³ Instead, he reduces the meaning of “Genossenschaftsbegriff [notion of cooperative, p. 18 et passim] to that of “Genossenschaftsrechtsverständnis [legal notion of cooperatives]”. The second one would have been to follow the example of Schulze-Delitzsch, the master-mind behind the German cooperative law in the 19th century who derived the purpose of serving the members’ user interests from sociological findings and the legal form of cooperatives from principles distilled from practice. What was valid at the time when Schulze-Delitzsch designed the German cooperative law is equally valid now: Without disregarding reciprocal later effects, the legal notion of cooperatives flows from the non-legal one.⁴ By attributing the status of “absolute”, “timeless” and “immutable” to the purpose of cooperatives and declaring it the “unalienable kernel of the ... cooperative legal idea” one creates indeed a “genossenschaftlicher Grundtypus [cooperative basic type, p. 15]”. By doing so the author may have disregarded social facts and he may have unnecessarily tried to circumvent the common

³ Translation by the undersigned.

⁴ Cracogna, Dante, *Estudios de derecho cooperativo* [Studies in cooperative law], Buenos Aires: Intercoop Editora 1967.

problem of having to build a bridge from the non-legal to the legal. Do people choose to be/come members in big cooperatives [Grossgenossenschaften], e.g. consumer and banking cooperatives because of the kind of purpose the author suggests? Or is it because of the capital structure, the profit/surplus distribution criteria and the potential for participation, or simply because of the potential for a better 'deal'?

Principles might be more solid building bricks than a legal type to bridge between the non-legal and the legal. These principles do exist. They have been international from the start in the 19th century. As can be seen from the rivalry between Schulze-Delitzsch and Raiffeisen, there were several sets of principles in what is now Germany. These and other sets of principles are all expressions of a wider, indeed "universal" (p. 18), but not uniform set of principles. They were written down for the first time by the Rochdale Equitable Pioneers in 1844 and then they developed and were systematically and constantly reinterpreted by the International Cooperative Alliance (ICA).⁵ Their current version is laid down in the 1995 ICA Statement on the cooperative identity (ICA Statement). Several initiatives are underway to translate these principles into cooperative legal principles.⁶ Besides facilitating the translation of the cooperative principles into law, these legal principles may help to avoid an undue harmonization/unification of cooperative laws, something the author also opposes.

A more extensive look across national borders and a more intensive consideration of international texts related to cooperative law may have helped the author to question the uniqueness of the German cooperative law. It may also have helped him to critique the current German cooperative law using the criterion of flexible cooperative principles, rather than the inflexible notion of a "legal type".

ad ii.): The purpose of cooperatives according to the current German cooperative law might be unique.⁷ But only comparative studies, including a comparison of purposes as well as a comparison of legal forms, will reveal whether a specific purpose may be pursued only through one form.

As concerns international texts, which could serve as guide for cooperative law, the author briefly refers to and cites from the ICA Statement and the International Labour Organisation Promotion of Cooperatives Recommendation, 2002, No. 193 (ILO R. 193). But he may not have sufficiently exploited

⁵ Cf. International Cooperative Alliance, Blueprint for a cooperative decade 2011-2020, at: ica.coop/sites/default/files/media_items/ICA%20Blueprint%20Final%20version%20issued%207%20Feb%2013.pdf and

International Co-operative Alliance, Guidance notes to the co-operative principles, at: <http://ica.coop/sites/default/files/attachments/Guidance%20Notes%20EN.pdf>

⁶ Cf., for example, the Rules of the ICA Cooperative Law Committee and Gemma Fajardo, Antonio Fici, Hagen Henry, David Hiez, Deolinda Meira, Hans-H. Münkner and Ian Snaith (eds.), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge et al.: intersentia 2017, XII + 721 pp..

⁷ Different opinion for example Antonio Fici. Cf. Fici, Antonio, *An Introduction to Cooperative Law*, in: Dante Cracogna, Antonio Fici and Hagen Henry (eds.), *International Handbook of Cooperative Law*, Heidelberg et al.: Springer 2013, 3-62 (18).

the significance of these texts for his own arguments. The ICA Statement forms part of the byelaws of the ICA and the ICA is an association under Belgian law. It follows that the ICA Statement is legally binding upon the members of the ICA, and indirectly on the members of these members. Consequently, it should not be qualified as “unverbindliche Richtlinie [non-binding guidelines, p. 191]”. Through their membership of either of the two German cooperative federations, which are members of the ICA, many German cooperatives are bound by the ICA Statement. For the national legislator, the legal relevance of the ICA Statement is established by the fact that its content has been integrated into the ILO R. 193 (albeit with modifications that are not relevant here). Under its Constitution (Article 19) the ILO is empowered to adopt recommendations as well as conventions. Germany is a member state of the ILO. Its government, employers’ and workers’ representatives voted in favour of the adoption of ILO R. 193 in 2002. The principles laid down in the ICA Statement and included in the ILO R. 193 are principles and not “Charakteristika [characteristics, p. 169]”, “vage Programmsätze [vague programmatic sentences, p. 191], nor are the cooperative values laid down in these texts “Bekanntnisse [creeds, p. 249]”.

The ICA and ILO position may be less distant than the author is prepared to admit.⁸ This also applies to his assertion (p. 191) that the ICA and the ILO do not mention the promotion of the members’ user interests as the purpose of cooperatives. Even if otherwise at times vague, the ICA Statement and the ILO R. 193 define a cooperative as an “autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise”.⁹ The wording “persons ... meet[ing] their ... needs ...” is understood as member promotion in the sense proposed by the author.

ad iii.): My third question ‘Is the notion of “governance” adequate for cooperative law?’ relates to three issues: the title and the content of the book; the scope of “governance”; and the use of the term “governance” for cooperative law. The title does not indicate the strictly legal content of the book and the content is not limited to governance issues. There is hardly any part of the subject of cooperative law that this book does not address. Words like “Rechtsform [legal form, pp. 9, 15 et passim]”, “form follows function” (pp. 21, 67), “Unternehmensverfassung [enterprise structure, p. 9]”, “Organisationsverfassung [organizational structure, pp. 331 ff.]” indicate that the author is taking a wider scope than just “governance” (pp. 6 ff. et passim) when searching for a solution to the principal/agent conflict. Chapters 1 and 2 deal with more than “governance”, yet the titles suggest that the content is limited to that topic. In contrast, while Chapter 5 deals only with “governance” its title suggests that it will do more. Noticeably,

⁸ Cf. material referenced in footnote 4 and Paragraph 10. (1) et passim of the ILO R. 193.

⁹ On p. 191 of the book these definitions are cited in two different versions.

the titles of Chapters 1 and 2 use the English word “governance”, while Chapter 5’s title is entirely in German.

In terms of the attention given to governance and given the emphasis the author rightly puts on member participation as the mechanism to ensure compliance with the member-user purpose, he might have considered some additional issues. The author insists that participation is increasingly important, the more the (economic) activities of the members are integrated into the activities of the cooperative enterprise, for example, in agricultural cooperatives. But he does not consider the consequences for member participation of factors such as the adherence of most cooperatives to federated structures (unions and/or (con)federations of cooperatives),¹⁰ the existence of cooperative groups, the increasingly intensive organizational integration of enterprises, cooperative enterprises included, as part of (global) value chains composed of different enterprise types. He also neglects the impact of mechanisms which empower members to participate, such as adequate education and training, as well as relevant and understandable information delivered by the auditors to the members.

The author’s contention that there is a need for a cooperative specific governance model is convincing. In making his case, he criticizes the common practice of copying figures from the capitalistic enterprise model (cf. for example pp. 199 and 489 ff.). In my view, he may not be radical enough. Registered cooperatives are bodies corporate. In practice they (may) experience governance problems and cooperative law allows for that. However, if (good) governance is a response to the potential principal/agent conflict, it should not be an issue for cooperatives at all because, according to the cooperative idea, principals and agent are the same persons. The author himself defends this position, e.g. on pp. 84, 87 (“principle of identity”), and on pp. 117, 223 et passim.

The challenge of a more radical approach is two-fold: epistemological and methodological. The epistemological challenge consists in having to conceive cooperatives as bodies corporate, independent of their members and managed by them at the same time, i.e. to conceive them as an *Übersumme* and the sum total at the same time. This conceptual contradiction is accepted in many countries, at least so far as worker cooperatives are concerned. Because members of worker cooperatives are also their own employers, labour laws (i.e. those rules which regulate the relationship between employer and employee/worker)¹¹ which have been developed to solve the capital/labour conflict, do not apply. 12

¹⁰ This is the meaning behind the sixth of the seven ICA Principles cited by the author on p. 191 as “vague programmatic sentences”. Given the specifics of cooperatives’ unionizing and federating, such adherence is part of the structure of primary cooperatives. Cf. Paragraph 6. (d) of the ILO R. 193 and Henry, Hagen, Unioes, federacoes e confederacoes, en: Deolinda Meira e Maria Elisabete Ramos (coord.), *Código Cooperativo Anotado* [Unions, Federations and Confederations. Comments on Articles 101-108 of the Portuguese Cooperative Code, Lei no.119/2015, de 31 de agosto], Coimbra: Almedina 2018, 548-566.

¹¹ In many jurisdictions the term “labour law” covers also rules on workplace safety and social security.

Some jurisdictions conceive cooperatives as representing members in their relationship with third parties. Most Latin American countries tend to deal with this challenge for all types of cooperatives through the figure of the “acto cooperativo”.¹³

The methodological challenge follows from what the author evokes (p. 160) in terms of an autonomous cooperative law. He justifies his emphasis on a wide byelaw autonomy with the Leitbild [model] of an autonomous human being (pp. 159/160). Whether or not it is a universal, this Leitbild reminds us of the fact that, as opposed to economics, legal science is a normative science. The “dogma of economic efficiency and rationality of economics (p. 160)” also underlies the common practice of copying figures from the law on capitalistic companies, instead of testing their suitability for cooperatives, as does the author. As much as can and must be learnt from a comparison of the different enterprise types, as incomplete and inadequate this comparison is. The establishment of an autonomous cooperative law in our global world requires us to start from the assumption that cooperative enterprises are not different from capitalistic companies, but that they are a sui generis type of enterprise. The tendency to harmonize (cooperative) laws, the integration of cooperative enterprises into global value chains, and the dissipation of value chains into global networks of actors requires two super-imposed sets of comparisons. Firstly, cross-border comparisons of cooperative laws in the widest sense, including, for example, taxation of cooperatives. This must be conducted against the background of the cooperative principles. Secondly, comparisons of different enterprise types at national levels. This comparison should not be conducted using the definitional criteria of one of the compared types, as is mostly the case now (*secundum comparationis*), but rather by using a *tertium comparationis*. For example, by looking at purpose, efficiency or relevance to sustainable development of the compared enterprise types. As far as (these) methods are concerned, the comparisons ought to benefit from the experience of comparative law and they ought to be informed by a continuous dialogue between economics and law.

IV. Conclusion

One might not share all the author’s tenets. But one cannot but recognize the high value of the book and his critical stance. He argues firmly and he fairly and thoroughly discusses different and often opposing views. Besides being thought-provoking, the author’s scientific approach makes the book an invaluable

¹² For an instructive example, cf. ICA, Framework law for cooperatives in Latin America, Article 91 at:

<http://www.aciamericas.coop/Framework-Law-for-the-Cooperatives>

¹³ Cf. Pastorino, Roberto Jorge, *Teoría general del acto cooperativo* [General theory of the acto cooperativo], Buenos Aires: Interoop Editora 1993; Torres Morales, Carlos, *El reconocimiento del acto cooperativo en la legislación peruana* [The recognition of the acto cooperativo in the Peruvian legislation], Lima: Grafimag 2014; and ICA, Framework law for cooperatives in Latin America, *op. cit.*, Article 7.

and much needed contribution to the renascent cooperative legal theory.¹⁴ As part of legal science, such theory is international. If Chapter 6's summary of the book was available in English, those who do not read German would also be allowed the privilege to draw upon its wealth.

Miribung, Georg, The Agricultural Cooperative in the Framework of the European Cooperative Society

I. Introduction

In the book under review, Georg Miribung discusses the law applying to the establishment, governance and the financing of agricultural European cooperative societies or SCE 15 in Italy and Austria. Title and subtitle of the book indicate a peculiarity. SCEs are cross-border cooperatives with members from at least two European Union (EU) member states. They are regulated by the (EU) Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (EU Reg. 1435/2003). The regulation is directly applicable in the EU member states, but is incomplete in the sense that the law applicable to a SCE is a combination of its rules and of the national law of the EU member state where the SCE is to be registered (seat country). Hence, any legal study on SCEs involves comparing different laws. In this study, two national legal systems are considered and the question is whether the EU Reg. 1435/2003 leads to one form of SCE or to as many forms as there are EU member states. This leads to six comparisons between laws applicable to :

-Italian SCEs and Italian cooperatives

-Austrian SCEs and Austrian cooperatives

-Italian SCEs and Austrian SCEs

-Italian cooperatives and Austrian cooperatives

-Italian SCEs and Austrian cooperatives; and, finally,

-Austrian SCEs and Italian cooperatives. The comparisons are further complicated by the fact that the article is concerned with agricultural SCEs. This adds another set of comparisons and, because of the double nature of agricultural law (private and public), an extra degree of complexity.

¹⁴ Cf. Henry, Hagen, Una teoría del derecho cooperativo. ¿Para qué? [A theory of cooperative law. What for?], in: José Eduardo de Miranda, Leonardo Rafael de Souza, Enrique Gadea, (organizadores), *Direito cooperativo e identidade cooperativa. Derecho cooperativo e identidad cooperativa*, Cristo Rei – Curitiba: Brazil Publishing 2019, 175-191.

¹⁵ SCE is the acronym for their Latin name *Societas Cooperativa Europaea*.

By imbricating the cooperative and the agricultural laws of Austria, Italy, and the European Union, the author embarks on a high-risk journey. However, his ties to universities in both countries and his being bilingual help him to navigate the intricacies of the law on the SCE and to reach the port of better understanding.

II. Summary of the content

The book is divided into an introductory section and three main parts of unequal length. The preliminary section and Part I account for more than one third of the book. The central themes of governance and financing in Part II take up most of the balance. The unequal distribution of weight between each part is a consequence of the specific comparative approach, which requires a substantial amount of preliminary explanation.

The *introductory section*, entitled “Research Background”, includes sub-sections on comparative legal methods and on the Economic Analysis of Law. *Part I*, entitled “The European Cooperative Society (SCE) and Agricultural Cooperatives”, deals with the EU and the national laws of Italy and Austria on the establishment of an SCE. It also contains explanations of the SCE and of agricultural cooperatives/SCEs. A prerequisite of these comparisons is some common understanding of what is understood by the terms ‘cooperative’ and ‘agriculture’. Contrary to Christian Picker, who only deals with Germany, the author is confronted with three different main views on (the purpose of) cooperatives – the Austrian view, similar to the German; the Italian view, which also allows for public interest or general interest cooperatives (social cooperatives); and the EU view. As an arbiter or tertium comparationis, 16 Georg Miribung introduces the Principles of European Cooperative Law (PECOL), developed by the Study Group on European Cooperative Law (SGECOL). 17 The introduction of a tertium comparationis is an indispensable, yet seldom applied approach in comparative law. The answers to the question “what is agriculture”? also differ in the three legal systems involved.

For readers without knowledge of EU law, the author’s recount of the history of the EU Reg. 1435/2003 is a practical illustration of law-making without considering its impact on those who are to apply the law.

18 It is an attempt to square the circle, by regulating a cross-border cooperative, the SCE, while

16 In comparative law the “tertium comparationis” means the quality that the two things which are being compared have in common and the criterion or criteria used to assess their functionality as related to a specific legal question. For example, does the respective law make the risk management in plc more efficient than in cooperatives? This “arbiter” is necessary to avoid flaws in the comparison which inevitably occur when using the “secundum comparationis” as the measure.

17 Cf. Fajardo et al. (eds.), *Principles of European Cooperative Law ...*, op. cit.

18 Similar to the EU Reg. 1435/2003 the 2009 Estatuto de las Cooperativas del Mercosur regulates cross-border cooperatives. Membership of foreigners may not exceed 50% and national members must hold more than 50% of the capital. Other than the EU Reg. 1435/2003 the text is not directly applicable in the member states of the Mercosur (Argentina, Brazil, Paraguay, Uruguay, Venezuela (suspended)). It is technically simpler. Whether it will be used, remains to be seen. It has to be integrated into all the respective national laws in order to come into force. So far, only Uruguay has done so.

respecting all the national legal traditions within the EU. The outcome, as this book amply demonstrates, is a conglomerate of hierarchically ordered EU and national rules, whose correct application requires the expertise of a specialized lawyer. This is more likely to account for the low number of SCEs, even fourteen years after the coming into force of the EU Reg. 1435/2003 (cf. p. 160), than the often-cited reason of the minimum capital requirement of 30.000.- Euro. Reportedly, cross-border agricultural cooperatives do exist, but not in the form of an SCE. Apparently, the aim that the EU legislator pursued with Reg. 1435/2003, can also be reached through “purely” national cooperatives with members from several countries and/or cross-border activities.

Part II, entitled “Analysing Some Specific SCE Issues Comparing Relevant Italian and Austrian Legal Rules”, compares the respective national and EU rules on cooperative governance and finance and submits them to an economic analysis, while insisting (p. 14) - consistently with the views of Christian Picker - on the need to maintain the fundamental difference between law and economics. On his way, the author compares the rules on agricultural SCEs to the rules on national agricultural cooperatives.

In the concluding *Part III*, entitled “One Agricultural SCE or Many Agricultural SCEs?” the author debates the question of whether there is just one form of SCE or whether there are as many SCEs as there are EU member states. Contrary to the findings of – very few – other studies, Georg Miribung’s study argues, with abundant detail, that despite all the differences in terms of purpose, profit distribution, allocation (or not) to reserves and devolution of residual assets, there is reason to state that there is only one SCE.

III. Questions

In many ways, the author presents a unique study. He deserves respect for the application of his specific comparative approach to a complex subject, namely the law applicable to (agricultural) SCEs. The following discussion of two critical questions must not be construed as a contradiction of this opinion. They are intended to contribute to the general debate on cooperative law, beyond the legal traditions dealt with by Georg Miribung.

The questions posed are:

- i.) Is the author’s plea for a wide statutory freedom justified? and
- ii.) Is it appropriate to analyse the governance of cooperatives by using the same yardstick used for public limited-liability companies?

ad i.):In accordance with wide-spread opinion, the author advocates an even wider statutory freedom than proposed by Christian Picker as the most adequate response to the diversifying world of cooperatives in terms of size (turnover, membership, geographical extension etc.), type (consumer, producer, worker/employee, primary or higher-level cooperative, producer organization etc.), and degree of homogeneity/heterogeneity of membership/member interests, which a law with mainly mandatory rules would not capture adequately. This approach is arguably based on an assumption that “the members know better”.

Not everyone will agree with his statement that “[a]part from the feature of the legal personality, which can only be granted by law, the other four features [of a corporation] – limited liability, transferability of shares, delegation of management and ownership of capital providers – can simply be determined by contract” (p. 24). The positive effects of being granted legal personality come at the price of certain non-negotiable rules enshrined in law/legislation. For example, rules on the legal reserve (cooperatives) or on the minimum capital (stock companies) and rules on a governance structure that counterbalances the transfer of responsibilities from individual persons to impersonal corporate bodies. The minimum function of law/legislation is to provide for legal security.¹⁹ Allowing such wide statutory freedom at least requires reliable legal mechanisms for contract enforcement, which are not a universal given. The author repeatedly emphasizes the central role of indivisible reserves and is critical about the admission of non-user investor members. In doing so, he attenuates his own initial plea and delivers arguments to be considered when debating this issue.

In this context Georg Miribung points to a crucial issue for legal science. The more that cooperatives are allowed to self-regulate through their statutes (by-laws), the less lawyers will know about the “real” lived cooperative law, as they are not trained nor used to exploring the content of the statutes. Additionally, any widening of statutory freedom shifts the burden of costs of legal security. The wider the statutory freedom, the more costs business partners bear for finding out about their respective legal standing as a matter of due diligence or risk management.

ad ii.): Georg Miribung takes as a starting point for his analysis “a **general model** of a modern corporation or public limited-liability company” (pp. 24, 166 et passim). From a didactical point of view this is a suitable way, as it allows him to build the specifics of cooperatives on a model that the reader is more likely to recognise.

¹⁹ Possible other functions of law/legislation are: facilitate a democratic access to law; serve as instrument for the implementation of public policies; ensure legal security for members, third parties and the public; satisfy a possible socio-psychological need to be publicly recognized by law; serve as a social tie (not only “ubi societas, ibi ius”, but also “ubi ius, ibi societas”).

Apart from doubts about equating the “corporation” with the “public limited-liability company” (plc), which stems from comparative legal considerations, the question here is whether an approach that involves looking at cooperatives in terms of their difference from the plc, instead of seeing them as another distinct type of enterprise, is adequate. 20 Principal-agent theory, the notion of ownership of the New Institutional Economics and the attempt to capture the governance problematic through ownership and contract, are all theories that have been developed with the plc in mind. For a comparatist, it would be interesting to consider how much Anglo-Saxon legal thinking went into the “instruments” used to analyse the “general model”. Their application to cooperatives will at best lead to contradictions; at worst it might not allow a proper grasp of cooperatives and their underpinnings. To give an example: contrary to what the author states (p.85) and as he later corrects, a cooperative is not owned by its suppliers, workers or customers, if ownership in the economic sense signifies “the right to control and receive the firm’s residual assets” (p.164), as indeed “... members of a cooperative have no individual ownership [... and] often have no claim to residual earnings” (p. 169). Neither the legal nor the economic notion of ownership comes to terms with the balancing of interests of the various stakeholders in a corporation in the sense of a separate legal entity because corporations own themselves.²¹ But as the author also demonstrates, it does not follow that in the absence of ownership as a control mechanism, there is no remedy to address the situation where the management promotes its own interests.

Using the plc as the measure might eventually lead to what Georg Miribing (and Christian Picker for that matter) want to avoid, namely the dilution of the legal form of cooperatives. The fact that “... cooperative[s are] moving to corporate governance models” (p. 316) might be a reason for any of them to transform into another form of enterprise, but it should not be a reason to accept the dilution of the cooperative legal form.

If cooperative law is to establish itself again as an autonomous field of legal science, ²² which is important for the sake of diversity engendering sustainable development, then we need to develop

20 For the distinction between “different” and “other” in this context, see Henry, Hagen, *Entreprendre autrement : le droit coopératif n’y est pour rien* [The Decisive Role of Cooperative Law for Enterprising in a Radically Different Way], in : *Revue Economique et Sociale. Bulletin de la Société d’Etudes Economiques et Sociales*, Vol. 70, Septembre 2013, 93-103.

As for the methodological problems involved, see text around and in footnote 2.

21 Convincingly Stout, Lynn A., *The Shareholder Value Myth*, in: *Cornell Law Library Scholarship@Cornell Law: A Digital Repository*, 2013.

22 As of the beginning of the 1970ies cooperatives disappear from the textbooks on law and economics. See, for example, Villafañez Perez, Itziar, *Algunas reflexiones en torno a la necesidad de integrar la perspectiva cooperativa en el estudio y desarrollo del ordenamiento jurídico* [Some reflections on the need to integrate the cooperative perspective in the study and development of the legal system], in: Henry/Hytinkoski/Klén (eds.), *Co-operative Studies in Education Curricula – New Forms of Learning and Teaching*, University of Helsinki Ruralia Institute, Publications Series No. 35, 2017, 54-71. Almost all other contributions in this publication confirm this.

The moment of this disappearance is no coincidence. A number of observations may explain it. See Henry, Hagen, *Quo Vadis Cooperative Law?*, in: *CCIJ Report No. 72/2014*, 50-61 (in Japanese; original in English).

adequate and independent instruments to evaluate the governance and other issues experienced by different enterprise forms. There is a lot to be learnt in this respect from comparative law. And: we need more studies of the kind reviewed here.

IV. Conclusion

A five-page review cannot do justice to a study of more than 500 pages based on material listed on another 50 pages. The complexity of Georg Miribung's approach and its necessarily meandering technical style is demanding. But his book also compensates with enormous gains in understanding if one follows its flow. In many respects Georg Miribung's book is similar to Christian Picker's. Their common central theme is cooperative governance. Georg Miribung explicitly adds financing, which is a less obvious theme in Christian Picker's book. This raises the question whether financing should be considered as an integral part of cooperative governance. Georg Miribung's approach also differs from Christian Picker's. Whereas Christian Picker concentrates on German cooperative law, with sporadic outlooks toward other legal systems, Georg Miribung's book is conceived as a comparative study. His achievement in terms of applied comparative legal analysis is as interesting as the substantive content of the book. Of the two types of presenting comparisons, consecutive and simultaneous, he chose the latter and more challenging one. He knows where to search for similarities when everything looks so different, and he knows where and when to lay bare differences when things are apparently similar. That is what comparative law is about. It makes his conclusion in Part III convincing. In addition, he draws the reader's attention again and again to the many linguistic obstacles to overcome by any comparatist, including in this case the differences between the various official language versions of the legal texts of the EU.

Georg Miribung and Christian Picker both deplore the scarcity of studies on cooperative law (see pp. viii and 87). Given the sheer volume of their own publications within the space of one year, they have proved themselves wrong, or at least too impatient. The decades-lasting disinterest in cooperative law is over. But equalling or catching up with the amount of literature on the law of other enterprise types, especially the plc, will take time. It is also noteworthy that both authors took the last step on their academic career ladder by dealing with a still relatively marginal theme. Although some mainstream corporate lawyers might see in their focussing on governance an extenuating circumstance.

ANNOUNCEMENT OF PUBLICATION: "COOPERATIVE LAW AND COOPERATIVE IDENTITY"¹

by **Leonardo Rafael de Souza², José Eduardo de Miranda³**

Abstract

This short article aims to briefly present the book “Cooperative Law and Cooperative Identity”, produced jointly with Professor Enrique Gadea Soler, from the University of Deusto, Spain, and officially launched during the last Continental Congress on Cooperative Law, in San José (Costa Rica) in. This review will make a brief presentation of the authors involved in the project and the topics covered in articles compiled in Spanish and Portuguese.

In the end, this work hopes to encourage researchers in Cooperative Law to read this collective work. This work will be translated in English which will allow these reflections on cooperative identity, to reach the wider world as an important tool for the study of Cooperative Law.

I. Introduction

While discussing the history of cooperativism and its prominent place in the economic and social activities of the world, in Bilbao three years ago, the idea of dedicating a work that would critically evaluate the cooperative identity and its premise which germinates Cooperative Law, was born. The idea was to provoke reflections between jurists and researchers about the legal framework (in Portuguese and Spanish) of the cooperative society and the relevance of the cooperative identity itself to the law, always with a practical vision.

Therefore, the idea of inviting recognized names of the Brazilian and Spanish academies to accept the challenge of presenting readers with the meaning, size and application of the legal norms concerning cooperatives in these countries arose. What would be an initially a project among two countries, became an important international reflection on cooperative law and cooperative identity in the several countries. Researchers and lawyers from Brazil, Spain, Argentina, Portugal and Finland reflected on the importance of strengthening the Theory of Cooperative Law, Cooperative Identity as a pillar for the future of the

¹ Miranda, J.E., Gadea, E., & de Souza, L.R. (Org.) (2019). *Direito cooperativo e identidade cooperativa | Derecho cooperativo e identidad cooperativa*. Curitiba: Brazil Publishing, 197 pp.

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cooperative movement, Cooperative Identity in a market economy system, the secondary role of cooperative law in legislation and a Latin American vision of cooperative law and cooperative identity.

This work, edited and marketed by Brazil Publishing Editors, was officially launched at the Continental Congress of Cooperative Law, held in San José (Costa Rica) between November 20 and 22, 2019. A special tribute was accorded to the Professor Dante Cracogna for his historical contribution to Cooperative Law, during the launch.

II. Contents and authors.

The book seeks to unite recognized names of the international academy and is a specialized publication on Cooperative Law and Cooperative Identity, with an objective to develop an approach to an economic and social system based on the fundamentals of the cooperative identity. Additionally, it carries important reflections of experts on the need to build a theoretical basis for Cooperative Law as well as articles on current and historical realities of Cooperative Law worldwide.



The article “THE SECONDARY ROLE OF COOPERATIVE PRINCIPLES IN BRAZILIAN LAW AND ITS EFFECT ON THE AUTONOMY OF COOPERATIVE LAW”, by Brazilian authors

Leonardo Rafael de Souza and *José Eduardo de Miranda* presents a historical context of cooperative law in Brazil. In it, they reflect on how the case in Brazil, the complex and centuries-old cooperative legislation is not able to strengthen the cooperative identity, concluding that in addition to the simple existence of the law, it is essential to build a national cooperative identity that guides the act of cooperation and actions of cooperatives.

Also, on the theme of history, Argentine author *Dante Cracogna* in his article “COOPERATIVE LAW AND COOPERATIVE IDENTITY: A LATIN AMERICAN VISION” addresses the doctrinal evolution of Cooperative Law in Latin America for the theoretical construction of the “cooperative Act” as an expression of the cooperative legal identity. As a consequence, his contribution presents the current continental reality of Latin America, which, through its Framework Law for Cooperatives, contributes to the recognition of cooperative law in the legal universe.

In order to strengthen the fundamental aspects of Cooperative Law, in his article “A THEORY OF COOPERATIVE LAW, FOR WHAT?” Professor *Hagen Henry*, from the University of Helsinki, Finland, presents important reflections on the necessary development of the Theory of Cooperative Law. In the author's view, a solid theory not only makes it possible to understand cooperative practice, but also authorizes the formulation of useful general statements capable of supporting the practice itself and understanding changes. When analyzing the fields of application of the theory of cooperative law, he concludes this theory will have to reconstruct Cooperative Law itself from the legal understanding of cooperative identity.

Continuing with ideas on theoretical foundation, Professor *Enrique Gadea Soler* in his article “A LEGAL ANALYSIS INTO THE IDENTITY OF THE COOPERATIVE SOCIETY IN A MARKET ECONOMY SYSTEM” discusses how in a market of strong competition the cooperative model, remodelled from Rochdale to face the challenges of the market, has renounced the plurality of its principles, solidarity and its social ends. After re-discussing the concept of cooperatives, its openness and democratic vision, the author reinforces that the cooperative identity is the foundation for reviewing the current objectives of the cooperative movement, in search of a transformation of the market based on sustainability.

The following articles reflect on the practical aspects of the cooperative reality and its legal dimension; these are important articles that address topics that, despite their relevance to their respective countries, present essential reflections and further foundations for the creation of a Comparative Cooperative Law.

Based on the comparative study on the protection given to cooperatives in the Constitutions of Brazil and Portugal, Brazilian authors *Amílcar Barca Teixeira Júnior* and *Marianna Ferraz Teixeira* - in their article “THE GLOBAL CONSTITUTIONALIZATION OF COOPERATIVE LAW AS AN ALTERNATIVE FOR THE PRESERVATION OF COOPERATIVE IDENTITY ”- write about the necessary involvement of the global cooperative movement in proposing and developing, in the domestic law of their respective countries, constitutional texts that reflect cooperative values and principles as an effective way to preserve cooperative identity. To this end, the authors argue that strengthening cooperative legal education is essential.

Still from the reality of Portuguese Cooperative Law, Professor *Deolinda Meira* in her article “COOPERATIVE IDENTITY, ADMISSION AND DISMISSAL OF COOPERATORS. CONVERGENT REALITIES IN PORTUGUESE LAW” addresses the adequacy of the legal regime for the admission and dismissal of cooperators (provided for in Portuguese law) in accordance with cooperative principles, as an essential aspect of cooperative identity. This, they argue is also defended by the Principles of European Cooperative Law (PECOL). In the author's view, there is a convergence between the Portuguese cooperative legislation, the cooperative identity and the legal regime of the employees' admission and dismissal rights. Proof of this is the mandatory dissolution, by the Portuguese State, of cooperatives that do not observe cooperative principles.

Writing about the possibility of state interference in cooperatives that do not observe the cooperative identity, Brazilian lawyer *Paulo Roberto Cardoso Braga* in the article “COOPERATIVE IDENTITY AND THE SANCTIONING ADMINISTRATIVE PROCESS” writes about the current reality of credit cooperatives in Brazil with the publication of Act No. 13,506 / 2017. Under the new law, he writes, cooperative managers who fail to comply not only with the legal orders in the Brazilian Financial System, but also with the rules of their own bylaws, will be subject to administrative and criminal penalties. However, the author warns that the lack of knowledge of the cooperative identity by the judges may impose more severe penalties on the managers of Brazilian credit cooperatives for not knowing the social and solidarity dimensions of the cooperative societies.

From the perspective of Spanish cooperative law, Professor *Alberto Atxabal Rada* defends, as the title of the article indicates, “THE COOPERATIVE IDENTITY AS A JUSTIFICATION FOR A DIFFERENT TAX TREATMENT”. The author argues, despite recognizing legal principles such as equality in preventing special tax regimes, for special treatment to cooperative societies, with the following five areas of arguments: (1) the type of activity they perform, (2) the role of the people, (3) the special rules of operation of the cooperatives, (4) the lesser capacity of the cooperatives to contribute and

(5) the protection of the premises of the cooperativism in the Spanish Constitution. In addition, he argues that cooperatives integrate or replace the provision of social services, which are fundamental to citizenship. For these reasons, the author defends the cooperative identity as an instrument of a favorable tax regime that guarantees proportionality to the social value of the cooperatives.

Finally, in the article “THE COOPERATIVE IDENTITY AS A PILASTER OF THE FUTURE OF COOPERATIVISM - PUBLIC SERVICES PROVIDING COOPERATIVES: CONTRIBUTIONS TO COMMUNITY WELFARE FROM YOUR IDENTITY” the Spanish authors *Vega María Arnáez Arce* and *Itxaso Gallastegi Ormaetxea* argue that (by the 7th principle) Cooperative movement is essential for the provision of public services as a strategy for their improvement. In other words, by maintaining a strong commitment to society even in the current global context of systemic crisis and increasing inequalities, the authors conclude that only cooperatives essentially take cooperation as an agent of development and innovation, basic conditions for the new citizenship.

2. Conclusion

The book *Cooperative Law and Cooperative Identity* brings reflections from important South American and European authors from the cooperative fraternity, who analyze the legal regime of cooperative enterprise and the fundamental issues related to their identity. The objective is to raise the importance of consolidating and preserving cooperative identity as a central aspect of cooperative enterprise and form.

It is the cooperative identity that supports the socioeconomic aspect of cooperative companies and justifies, for instance, a differential tax treatment. In other words, the book highlights that cooperative values and principles are inseparable precepts of the cooperative business, and essential for understanding the differences between the cooperative form and the profit-oriented forms of bodies corporate, that often compete for the same space in the economic market.

Considering that twenty-five years have passed since the ICA Statement on Cooperative Identity in Manchester, the book, coordinated by Professors José Eduardo de Miranda, Leonardo Rafael de Souza and Enrique Gadea, preserves the latent debate on cooperative identity. The maintenance of the cooperative spirit is a transcendental element of Cooperativism, the only system that is concerned with the complete transformation of the person, whether in the economic, social and spiritual realms.

Finally, it is important again to thank each of the co-authors of this collective work. These theoretical essays represent responsible and modern scientific thinking on Cooperative Law. They will

provoke discussions, expose controversial points and clarify mistakes. Therefore, its reading is essential for lawyers, academics, practitioners, and others interested.

Events

WEBINAR ON COOPERATIVE LAW AND THE PANDEMIC

Dante Cracogna¹

On October 23rd 2020, the Cooperative Law Committee of Cooperatives of the Americas held an online seminar on “Cooperative principles and cooperative law in the context of the pandemic”. The seminar was facilitated by the Committee’s chairman Dante Cracogna.

The seminar’s purpose was to analyze the legal problems that the current situation poses to cooperatives in the region and to share solutions that have attempted to overcome these problems.

The backdrop to this seminar was the idea of furthering the cooperative identity, as laid out by the International Cooperative Alliance (ICA) on the occasion of its 125th anniversary and the 25th anniversary of the Declaration on the Cooperative Identity. It was noted that the topic of cooperative identity shall play the central role in the next ICA Congress, to be held in Seoul (South Korea) in December 2021.

Three introductory presentations provided context to the theme and topic. The opening presentation was given by the President of Cooperatives of the Americas, Graciela Fernández, who outlined the situation in the continent. This was followed a speech given by Hagen Henry, chairman of ICA’s Law Committee, who provided an overview of the international scene and actions taken by the international committee. ECLAC’s representative Marco Dini, provided the final introductory speech and discussed the social and economic situation in the region and the role played by cooperatives.

The second part of the meeting dealt with the presentation of the specific problems of cooperative legislation regarding each of the seven principles included in the Declaration on the Cooperative Identity in the different countries of the region. The presentations were given by the members of the Cooperative Law Committee.

The principle of open and voluntary association was addressed by Carlos Acero, President of the Confederation of Colombian Cooperatives, who emphasized the role of credit and savings cooperatives in relation to this principle, and their contribution to relieving the effects of the crisis.

¹ University of Buenos Aires, Argentina

Ana Paula Andrade Ramos Rodrigues, legal manager of the Organization of Brazilian Cooperatives (OCB), and Mario de Conto, Dean of the School of Higher Education on Cooperative Management, Rio Grande do Sul, analyzed the principle of democratic member control and discussed the problem of democratic government within the context of the pandemic, as well as recent regulations in Brazil allowing remote general meetings as a solution.

María Eugenia Pérez Zea, Executive Director of the Colombian Association of Cooperatives, discussed economic member participation and the issues involved in putting it into practice within the context of the economic difficulties triggered by the pandemic.

The principles of autonomy and independence, and cooperative education and training were addressed by the legal counsel for the Confederation of Rural Cooperatives of Paraguay, Hernando Raichakowski, who discussed legal regulations involving autonomy as enforced by the administrative body in charge of cooperative affairs, and the rules on cooperative education currently in effect in that country.

Finally, Daniel Sánchez, member of the Cooperative Law Committee of the Bar Association of Costa Rica, talked about cooperation among cooperatives and concern for the community. In doing so, he raised issues relating to the challenges involved in applying these principles in this particular moment and the solutions implemented by cooperatives in order to overcome them.

In closing address, the chair, Dante Cracogna, summarized the main aspects of the principles and solutions analyzed in each presentation and placed them within the context of the unique situation that the world is in at this moment in time. He emphasized the need to find solutions that will enable cooperatives to overcome those problems and ensure that, post pandemic, they enjoy a legal regulation that encourages their development and benefits their respective communities.

REPORT ON THE SESSION ON COOPERATIVE LAW ON THE OCCASION OF THE INTERNATIONAL COOPERATIVE ALLIANCE EUROPEAN RESEARCH CONFERENCE AT BERLIN, AUGUST 21-23, 2019 AND ON THE CONTINENTAL CONGRESS ON COOPERATIVE LAW AT SAN JOSÉ, COSTA RICA, NOVEMBER 20-22, 2019

Dante Cracogna¹ and Hagen Henry²

2019 saw two international events on cooperative law, one as part of the 2019 International Cooperative Alliance European Research Conference at Berlin in August and another one on the occasion of the XXI Regional Conference of Cooperatives of the Americas at San José, Costa Rica in November.

SESSION ON COOPERATIVE LAW ON THE OCCASION OF THE INTERNATIONAL COOPERATIVE ALLIANCE EUROPEAN RESEARCH CONFERENCE AT BERLIN, AUGUST 21-23, 2019

After having organized a research conference biannually over many years, the European regional organization of the International Cooperative Alliance (ICA) decided to hold the European research conference on a yearly basis. The 2019 conference was organized by the host university, the Humboldt University at Berlin. It attracted some 150 presenters from all continents. They shared their latest research results in some 25 parallel sessions. This came in addition to the plenary sessions with keynotes and a “Business Meets Science Event”.

To be noted: the considerably increased number of participants from Eastern Europe.

Under the overall theme of “Cooperatives and the Transformation of Business and Society”, the presentations dealt with subject matters such as: platform cooperatives; cooperatives and sustainable development; cooperatives and the transformation of food systems; internal governance; cooperatives and the transformation of market mechanisms; cooperatives in socialist and post-socialist transformation; cooperatives and the transformation of energy systems; and cooperative law.

Under the theme of “Transformation. Cooperative identity. Cooperative law” some twenty presentations were given at the session on cooperative law. It attracted almost twice as many listeners as past years. This confirmed a steady upward trend since 2011 of lawyers attending and presenting at the European and

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² University of Helsinki, Finland

the global research events of the ICA. The gradual integration of cooperative law in cooperative studies and these trans-disciplinary contacts are necessary and mutually enriching.

Independent of the type of cooperative the presentations referred to, all of them dealt with the problem of legislators and/or regulators diluting the cooperative identity as constituted by the internationally recognized cooperative values and principles, albeit to varying degrees of intensity. Such measures are not limited to the law on cooperatives. In one given case they relate to the general competition law; in another one to general rules on the governance structure of financial institutions. Where some presentations analyzed the consequences of these measures, others suggested an outright overhaul of the cooperative law of their country in an attempt to bring the legal framework (again) closer to the cooperative values and principles.

The session on law was also an occasion to further strengthen the ties between cooperative lawyers by, for example, planning to build and maintain a data base on cooperative law, participating in the setting-up of a map of cooperative lawyers and in the publication of the International Journal of Cooperative Law (IJCL), of which the 2nd issue could be presented during the session.

CONTINENTAL CONGRESS ON COOPERATIVE LAW AT SAN JOSÉ, COSTA RICA, NOVEMBER 20-22, 2019

A new Congress on Cooperative Law took place in San José (Costa Rica), between November 20th and 22nd, 2019, under the initiative of the Law Committee of Cooperatives of the Americas. This Congress carried special significance, since it was held on the occasion of the fiftieth anniversary of the First Continental Congress on Cooperative Law organized in Mérida (Venezuela) in November 1969.

The meeting coincided with the XXI Regional Conference of Cooperatives of the Americas and was sponsored by the Bar Association of Costa Rica and the University of Costa Rica. In his inaugural address, the chairman of the Congress, Professor Dante Cracogna, gave an account of all the congresses held in different countries of the region throughout the fifty years following that first one in Mérida, and of their effects for the progress of cooperative law on the continent. Representatives of the scholarly, professional and cooperative organizations took the floor and emphasized the importance of the meeting, which was attended by over two hundred lawyers from 19 countries. Also, the President of the International Cooperative Alliance, Ariel Guarco, underlined ICA's interest in the topic as well as its influence on the advancement of the cooperative movement. Particularly worth mentioning is the speech

given by the Chief Justice of the Supreme Court of Costa Rica, Dr. Fernando Cruz Castro. He highlighted the provision of the National Constitution ordering the promotion of cooperatives and explained how that mandate has been developed by constitutional case law.

For the duration of the Congress the activities were organized into plenary and committee sessions. Reports from the meetings held in different countries in preparation of the Congress were presented at the first plenary session, and the following ones dealt with lectures given by extra-continental experts, who addressed topics of particular interest. Dr. Carlos Vargas Vasserot, professor of Mercantile Law at the University of Almería (Spain), talked about the “Incorporation of the cooperative act into Spanish Law”. Also, Professor Eba Gaminde Egía, Vice President of the International Association of Cooperative Law, discussed “Good corporate government: a special difficulty in cooperatives”. Finally, Dr. Hagen Henry, chairman of the Cooperative Law Committee of the International Cooperative Alliance and professor at the University of Helsinki, was in charge of the final lecture of the Congress, called “Reflections on cooperative law from a global perspective - in homage to Dante Cracogna”, whereby he provided a broad outlook on cooperative law in the international field and a sharp analysis of its current problems.

The committee sessions were held by means of discussions following the presentations made on the different topics included in the agenda of the Congress, to wit: 1. The cooperative act. The treatment afforded to it in the statutes and in case law. The effects on the different types of cooperatives; 2. Comparative cooperative law. Cooperative principles and cooperative statutes; 3. State supervision of cooperatives: purposes and limits. Cooperative self-control; 4. The government of cooperatives. The differences with corporations; 5. Tax treatment of cooperatives.

The analysis of the presentations made on each of the topics gave rise to broad discussions - which evidenced the various opinions existing in the different countries of the region - and the valuable exchange of information as well as experiences.

A summary of the output of the committees was included in the corresponding reports, which, in turn, were shared by the respective secretaries at the closing session of the Congress.

At the plenary session, different presentations were made on the topic of the several international organizations currently engaged in the development of cooperative law. Dr. Ifigeneia Doutriva presented *Ius Cooperativum* and mentioned its organization of international forums and the edition of the *International Journal of Cooperative Law*. Also, Professor Eba Gaminde Egía talked about the International Association of Cooperative Law, headquartered at the University of Deusto (Spain), which

is in charge of the publication of the International Association of Cooperative Law Journal and the organization of seminars and meetings on this topic. Dr. Luisa Fernanda Gallo Herrán from the Regional Office of Cooperatives of the Americas brought forward information on the research on cooperative legal frameworks being done by ICA in its four regions, pursuant to a project developed in common with the European Union. Further, the collective book ‘Cooperative Law and Cooperative Identity’ was presented and information was supplied in relation to the CLARITY project, sponsored by the national organization of cooperatives of the United States of America for the purpose of promoting the progress of cooperative legislation in different countries.

At the closing of the Congress, tribute was paid to the First Continental Congress on Cooperative Law in the words of attendee Dr. David Esteller Ortega, a Venezuelan lawyer who delivered a vivid, moving speech reminiscent of that event. Finally, the chairman of the Congress gave the final address, by looking back on the achievements already made and ahead to the goals yet to be accomplished.

During the last session a warm tribute was paid to Professor Cracogna for the task he performed during many years for the advancement of cooperative law in Latin America.

As has been the case on previous occasions, the materials of the Congress of San José shall be the object of a special publication to be made by Cooperatives of the Americas in order to preserve and disseminate the results of this significant meeting.

Practitioners' Corner

A STUDY OF INDIVISIBLE RESERVES IN COOPERATIVES IN EU MEMBER STATES¹

Cliff Mills

Introduction

Indivisible reserves are a common feature of cooperatives. They can help to provide financial stability; build solidarity and sustainability for future generations; and can act as a disincentive to those seeking to take over its assets.

But the manner and extent to which different EU member states deal with indivisible reserves within their national legal system vary greatly. Some have sophisticated cooperative laws making significant provision. Others do not even have a cooperative law.

The purpose of this study is:

- To carry out a high-level review of the cooperative laws of the 28 EU Member States
- To identify relevant aspects of the cooperative laws relating to indivisible reserves
- To summarise the findings
- To draw some conclusions and make some recommendations which might be helpful for lawmakers.

The way it has been approached is as follows.

The cooperative law of each of the 28 member states has been considered, and a series of questions has been answered in relation to each of them. These questions are:

1. Does the national constitution of the member state refer to cooperatives?
2. Are there separate laws to govern cooperatives?
3. Are cooperatives defined?
4. What is the nature of capital?
5. Are “investor members” allowed?

¹ This is an abbreviated version of a paper originally published by Foundation for European Progressive Studies and Mutuo in their paper *Who Owns Europe?*¹ in January 2020

6. Must a proportion of trading surplus be set aside to reserves, not to be distributed?
7. Are capital surplus/indivisible reserves protected on winding up?
8. Is conversion to a company permitted?
9. Are capital surplus/indivisible reserves protected on conversion?
10. What are the legal advantages in having indivisible reserves?

The answers to these questions have been put in summary form into tables. For this purpose, states have been divided into two categories:

- those whose national constitution specifically refers to cooperatives in some way, namely Bulgaria, Greece, Italy, Malta, Portugal, and Spain (Group A): and
- those that do not, which comprises the rest (Group B). Norway is also included in Group B. Whilst it is not a member of the EU, its membership of the European Free Trade Association and inclusion in the European Economic Area means that it continues to be subject to the State aid rules. If the UK leaves the EU, it might end up in a similar position.

This categorisation is taken from the valuable work of Ifigeneia Douvitsa, to whom I am most grateful for permission to use her work.²

It is appropriate to acknowledge in addition the invaluable help provided by the following publications to which much reference has been made: the International Handbook of Cooperative Law, D. Cracogna, A.Fici and H.Henrÿ (eds.) Springer, Heidelberg, 2013; and Principles of European Cooperative Law, G.Fajardo, A.Fici, H. Henrÿ, D.Hiez, D. Meira, Hans-H.Münckner and I.Snaith. Reference has also been made to the Final Study Executive Summary and Part I: Synthesis and comparative report; and Part II. National Reports, 5 October 2010, the Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE).

I am also grateful to Ifigeneia, to Deolinda Meira, Sonja Novkovic, David Hiez and Ian Snaith for their support in this study.

It is important to state that this study has been carried out mainly in August 2018, using the texts of 2013 and 2017 referred to above, supplemented by other sources including unofficial translations of national laws. In each of Tables A and B, in the first column, any other sources used are acknowledged. Also, the latest year is specified to which the entries for that state are up to date. Where those laws have changed

² National Constitutions and Cooperatives: an overview, Ifigeneia Douvitsa, International Journal of Cooperative Law, Issue 1 2018 at page 128 <https://iuscooperativum.org/wp-content/uploads/2018/08/Issue-1-2018.pdf>

after that date, this has not been taken into account in this study, and therefore to that extent this study is qualified.

This paper proceeds as follows.

- Section 1: Executive summary
- Section 2: The ICA Principles and reasons for indivisible reserves
- Section 3: What are indivisible reserves and what needs to be considered?
- Section 4: From an EU perspective
- Section 5: Summary of EU member states' approach to indivisible reserves
- Section 6: Conclusions
- Section 7: Recommendations

At the end of this abbreviated report are the following Appendices:

- Appendix 1 – Summary Table A covering Member States with constitutional recognition of cooperatives
- Appendix 2 – Summary Table B covering Member States without constitutional recognition of cooperatives (and Norway)

1. Executive Summary

Indivisible reserves are a powerful manifestation of cooperative distinctiveness and identity.

Whilst cooperatives exist to serve individuals and meet their needs, having indivisible reserves underlines how cooperatives are a collaborative endeavour, through which individuals forego (greater) personal financial benefits and rights in order that such endeavour may prosper and achieve its purpose.

This helps their cooperative to be more sustainable, creditworthy and financially secure; it supports wider cooperative development and education; and it sustains the cooperative beyond the current members' own life-time for the benefit of future generations.

Conclusions

- This study concludes that 23 of the 29 states consider indivisible reserves to be important, and sufficient to justify specific provision in their legislation. But only 10 of them protect those

reserves beyond the life of the cooperative, as is recommended by the PECOL project team of lawyers.³

- It also concludes that there is great variation between individual member states as to the extent to which they acknowledge the existence of cooperatives as a business form, have created cooperative laws and define cooperatives, as well as requiring cooperatives to set aside money from surplus into indivisible reserves, and protecting those reserves when the cooperative is wound up.
- Five of the six member states whose national constitutions expressly refer to cooperatives do all of those things, namely Greece (for some cooperatives), Italy, Malta, Portugal and Spain.
- But they are not the only states which do. So do Belgium (for some cooperatives), Croatia, Cyprus, France, Hungary and Romania. A number of states leave the fate of indivisible reserves to be determined by the cooperative's by-laws (Germany, Lithuania, Luxembourg, Netherlands, Norway and Slovenia).
- At the other end of the spectrum, five member states (Austria, Czech Republic, Denmark, Ireland and UK) and Norway, do not have any requirement for setting aside indivisible reserves.

Recommendations

- States should seek to recognise cooperatives in their constitutional document, or where this is not possible
 - recognise in ordinary legislation the existence of a range of different corporate purposes including cooperatives
 - require the promotion of corporate diversity
 - require that cooperatives should be considered in certain specific sectors such as energy and care
- States should have their own national cooperative law which
 - protects cooperative identity relative to investor-owned companies
 - defines cooperatives by reference to the essential features which are necessary to achieve the corporate objective or purpose of a cooperative

³ PECOL is a legal project to create a set of modern cooperative legal principles to underpin national and EU laws (see further in section 4 below)

- National cooperative laws should provide for the compulsory allocation of some part of surplus to indivisible reserves, in accordance with PECOL, and should ensure that indivisible reserves remain indivisible, even on dissolution or conversion
- States should continually keep their cooperative law under review alongside company law, including the extent to which other laws (tax, regulation, competition) work to the detriment of cooperatives
- The EU should
 - support and encourage member states to improve/optimize their own cooperative law, including through projects such as PECOL
 - support and enable cooperation within member states and within the EU
 - continually keep the EU's own laws and regulations under review to ensure that other laws (tax, regulation, competition) do not operate to the detriment of cooperatives.

This is a desk-top study which looks at the national laws of member states. It is not the purpose of this study to explore whether there is any correlation between having a supportive legal system and having a more vibrant cooperative economy. This study is only up to date according to the availability of relevant texts for each member state, as stated.

This is also a study by a lawyer qualified in one jurisdiction having the temerity to comment on the laws of 28 others where he is not. To the extent that this study unfairly represents those laws, that is his fault alone and those qualified to do so are humbly requested to correct him in the interests of our own cooperative legal endeavours.

2. The ICA principles and reasons for indivisible reserves

a. ICA Principle 3 is as follows:

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 of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefitting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership. [Highlighting added]

b. The concept of indivisible reserves was re-introduced into the ICA Principles in 1995 by the French delegation, to ensure that the concept of collective ownership did not disappear.⁴ As Professor Ian MacPherson explained subsequently, in the previous version in 1966 reference to indivisible reserves had been dropped because of increasing complexity, and variation of approach.⁵ The unfortunate result had been that many co-operators had lost sight of the importance of commonly owned capital, as a symbol of co-operative distinctiveness, as a security for its financial growth, and as a protector in times of adversity.

c. The ICA's recent Guidance on the Co-operative Principles takes the view that the formulation of the 3rd Principle shows that the key economic concept enshrined in it is that in a cooperative, capital is the servant, not the master of the enterprise. The Guidance goes on to argue that this Principle is mainly a financial translation of the definition of the identity of a cooperative and of the financial implications of the 2nd Principle of Member Democratic Control.

d. A number of reasons can be put forward for providing in cooperative laws for the indivisibility of reserves, including the following:

- i. to create commonly-owned property as a symbol of cooperative distinctiveness;
- ii. to counterbalance and supplement the variable share capital;
- iii. to increase financial security and provide protection in times of adversity;
- iv. to increase the creditworthiness of the cooperative and provide greater protection to creditors;
- v. to reduce the threat of speculative winding-up to liberate from cooperative control the assets built up by previous generations;
- vi. to demonstrate concern for the future and sustainability, and to create solidarity across generations;
- vii. as part of the financial implementation of cooperative identity.

3. What are indivisible reserves and what needs to be considered?

a. Indivisible reserves are funds which are set aside out of annual trading surplus or profits, and are thereby not available for distribution to members either as a patronage dividend or via a distribution. Therefore, a member who leaves the cooperative is entitled to the repayment of their share capital, but is not entitled to a share of that surplus represented by the indivisible reserves. Some jurisdictions permit the

⁴ See Table B and entries for France: until 1992 reserves were indivisible in French law, but in that year this was softened. Also collective interest cooperatives introduced in 1992.

⁵ See the quotation from his guidance on the 1995 Principles at page 29 of the ICA's recent Guidance on the Co-operative Principles <https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>

creation of a divisible reserve from which a departing member may be entitled to claim a portion, but this is not common.

b. Indivisible reserves are generally intended to provide capacity to absorb trading losses. Recourse can be had to them before members' share capital is needed to perform that function. Individual jurisdictions also specify other categories of indivisible reserves, such as for education, or cooperative development and promotion.

c. From the members' point of view, since the creation of indivisible reserves establishes some form of common or shared ownership over some part of the cooperative's assets, it results in some restriction on individual rights. The allocated funds become inaccessible (non-distributable) to the members, as part of the contract between the members created by the cooperative's statutes.⁶ Instead, those funds become restricted to the use to which they have been allocated.⁷ In some cases, it is compulsory to allocate a proportion of surplus to these funds.

d. From the cooperative's point of view, the allocation of funds to reserves which are indivisible during the life-time of the cooperative thereby creates an asset (the value of those reserves) to which nobody has an individual current right of ownership, but which is held in common by the cooperative. It is the prospect of a winding up of the cooperative, while it is solvent and the reserves have significant value, which makes cooperatives and other mutuals (which in the UK includes building societies) attractive to predatory organisations looking to benefit from assets accumulated by previous generations, but to which no individual member has a right of ownership. So it needs to be considered how member states address the question of what happens to these indivisible reserves if a cooperative is wound up.

e. In some cases, there is no protection of such reserves, and they simply become distributable to members, either as provided by laws or by the cooperative's statutes. Traditionally, such distribution is in some way linked to the amount of members' trade with their cooperative; in others, the distribution can be in accordance with shareholding. In these instances, indivisibility only applies during the life-time of the cooperative. In other cases, at the point of winding up, the members have a choice as to whether to distribute to themselves, or to retain the indivisibility of the funds by transferring them to another cooperative or cooperative institution. In yet other cases, members have no choice and the funds must be

⁶ The document setting out an individual cooperative's internal regulations is called by a variety of different names, which in English can be translated as foundation document, rules, constitution, articles of association, statutes, by-laws or regulations. To avoid confusion, in this paper the document will be referred to as the cooperative's statutes or by-laws.

⁷ See for example Portugal: five categories comprising a general (legal) reserve, education fund, funds required by legislation, funds required by the cooperative's own constitution, and funds allocated by the general meeting.

transferred to another cooperative, or to an institution dedicated to a cooperative or community-based purpose. Where, at the point of winding up, members do not receive anything beyond repayment of their capital subscribed and payment of other entitlements arising during the life-time of the coop, this is generally described as a “disinterested distribution”.

f. In some states, as well as allocating funds to an indivisible reserve, there is a legal requirement to set aside a proportion of surplus which must then be paid to a secondary or tertiary coop or a cooperative federation for certain purposes, such as cooperative development and promotion,⁸ or the furtherance of co-operative education, training, research and the general development of the co-operative movement.⁹ In truth it is probably incorrect to characterise such allocations of surplus strictly as indivisible reserves in the sense that they no longer belong to the coop, even though they serve a similar function. They continue to be funds allocated to a specific and restricted cause, over which the coop may have some say as a member or participant in the organisation entrusted with the funds. Because these funds are no longer owned and controlled by the cooperative, they cease to be available on winding up, whether solvent or insolvent, or on conversion to a company. They therefore remain completely protected, and dedicated to a cooperative purpose.

g. In jurisdictions which make no provision in their cooperative laws for indivisible reserves, the same issue nevertheless arises about what happens to the capital surplus on a solvent winding up, after the payment of all liabilities including repayment of share capital. This is the situation in the UK, for example, where the legislation makes no provision for indivisible reserves. However individual coops can, and many do, provide in their statutes that members are not to be entitled to a share in those reserves on a winding up and that they must be transferred to another coop or specified type of organisation; but statutes can be changed, so whilst this provides an impediment to demutualisation, it cannot completely protect the assets and so they remain vulnerable.

h. So, the questions of indivisibility and asset protection need to be looked at both during the lifetime of the coop, and on a solvent winding up. In addition, coops need to be aware of the possibility of conversion into a limited company, as this provides another mechanism by which the cooperative sector can lose ownership of accumulated reserves. It is therefore necessary to consider whether the laws of member states make provision for what happens to indivisible reserves on a conversion, if that is permitted by their laws.

⁸ Table A, Italy – 3% of annual profits

⁹ Table A, Malta – 5%

i. Moving on from the intrinsic or inherent benefits of cooperatives having indivisible reserves, it is appropriate to give some consideration to the question of whether, where national laws which seek to acknowledge and protect cooperative identity, there are other legal benefits or advantages arising from having indivisible reserves. For example, in some states favourable tax provisions effectively encourage the setting aside of indivisible reserves.

4. From an EU perspective

a. There are four matters¹⁰ from an EU perspective that need to be briefly commented on:

- i. Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)
- ii. A subsequent communication from the Commission to the Council and the European Parliament on the promotion of cooperative societies in Europe;
- iii. The PECOL Project; and
- iv. A decision of the European Court of Justice about preferential treatment for cooperatives.

Statute for a European Cooperative Society

b. This piece of EU legislation provided for the creation of a supranational legal form suitable for cross-border cooperative operations. An SCE is a legal corporate form with specific rules about the involvement of employees. It can be considered as the cooperative equivalent of the European Company (Council Regulation No 2157/2001) and was aimed at ensuring that cooperatives had a level playing field with for-profit companies. The EU was anxious not only to ensure equal relative treatment to companies, but also to contribute to their economic development.

c. It is relevant to note in passing what is stated about cooperatives in the recitals to this legislation, namely as follows:

- i. *Cooperatives are primarily groups of persons or legal entities with particular operating principles that are different from those of other economic agents. These include the principles of democratic structure and control and the distribution of the net profit for the financial year on an equitable basis.*
- ii. *These particular principles include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man,*

¹⁰ It might also be noted that indivisible reserves are referenced in ILO Recommendation 193 under the heading Policy Framework and Role of Governments (paragraph 6(b))

one vote' rule is laid down and the right to vote is vested in the individual, with the implication that members cannot exercise any rights over the assets of the cooperative.

iii. ...

v. A European cooperative society (... 'SCE') should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities, in compliance with the following principles:

1. ...

5. ..., net assets and reserves should be distributed on winding-up according to the principle of disinterested distribution, that is to say to another cooperative body pursuing similar aims or general interest purposes.

d. It is significant to note here that the EU itself expressly recognises the existence of cooperatives as a different form of business, with “operating principles that are different from other economic agents”, and implicitly that those principles have a value which is worth addressing in legislation. There are various features of the European Cooperative Society which it is also worth noting for the purpose of this study.

i. Share capital is variable

ii. A legal reserve fund must be built up, until the point where it is equal to the registered capital

iii. Not less than 15% of available surplus must be paid into the reserve

iv. Members leaving the coop have no claim on the reserve fund

v. The SCE provides for disinterested distribution on a winding up, i.e. distribution to another coop or general interest purposes. However this is not compulsory (a matter of regret)¹¹, in order to reflect the fact that national laws normally allow alternative arrangements.

e. There is no need to consider this legislation further for present purposes, save to comment that although this legislation has hardly been used, it has important symbolic and political value, raising the profile and underlining the importance of cooperatives, and highlighting the importance of indivisible reserves and their protection. A comprehensive review of the SCE has been carried out and published in 2010.¹²

Communication on the promotion of cooperative societies

f. Subsequent to the Statute for a European Cooperative Society, the Commission issued a Communication to the Council, the European Parliament, the European Economic and Social Committee

¹¹ See the comments of Fici A. on page 146 of International Handbook of Cooperative Law, D. Cracogna, A.Fici and H.Henry (eds.) Springer, Heidelberg, 2013

¹² See “Final Study Executive Summary and Part I: Synthesis and comparative report 5 October 2010 the Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)” (accessible at http://base.socioeco.org/docs/sce_final_study_part_i.pdf)

and the Committee of the Regions, on the promotion of cooperative societies in Europe (Com (2004) 18). This noted that “All co-operatives act in the economic interests of their members, while some of them in addition devote activities to achieving social, or environmental objectives in their members’ and in a wider community interest.”

g. Having noted that the role of cooperatives had gained renewed interest following the adoption of the recent Statute, the Commission expressed the belief that “the potential of cooperatives has not been fully utilized and that their image should be improved at national and European levels. Particular attention should also be paid to the new Member States and candidate countries, where despite extensive reforms the instrument of co-operatives is not fully exploited.”

h. The Commission also noted “the important and positive role of cooperatives as vehicles for the implementation of many Community objectives in fields like employment policy, social integration, regional and rural development, agriculture, etc. The Commission believes that this trend should be maintained and that the presence of co-operatives in various Community programmes and policies should be further exploited and promoted.”

i. The main points of the Communication were:

- i. The promotion of the greater use of cooperatives across Europe by improving the visibility, characteristics and understanding of the sector
- ii. The further improvement of cooperative legislation in Europe
- iii. The maintenance and improvement of cooperatives’ place and contribution to community objectives.

j. Whilst it is not of direct legal impact, this Communication contains much that is relevant to this study’s subject (such as encouraging Member States to provide for disinterested distribution on a winding up of a cooperative). This Communication is also referred to by the ECJ in the judgement discussed below.

PECOL Project

k. The output of the PECOL project were published in 2017.¹³ A helpful summary of PECOL is contained in a recent review:

¹³ Principles of European Cooperative Law (2017) Intersentia, Gemma Fajardo, Antonio Fici, Hagen Henry, David Hiez, Deolinda Meira, Hans-H Münckner and Ian Snaithe

“The basic idea of PECOL is, as the name states, to determine the general principles that identify, according to European cooperative traditions, the features of a cooperative. It is based on principles and rules that are found in different European jurisdictions and therefore constitutes some kind of common denominator, which ultimately defines what might be understood under the notion cooperative. From this, it clearly follows that PECOL is applicable to European cooperatives rooted in different European jurisdictions. It has to be specified that these principles are meta-principles.

PECOL describes cooperative legal norms. In doing so, PECOL addresses how cooperatives are actually organised and function. The final goal of these principles is to create principles in parallel with European and national law. With this, the authors try to establish patterns that might help to better understand cooperative law.

In this regard, three reasons for establishing PECOL are identified: first, PECOL shall establish a legal cooperative identity. In this context, it has been correctly criticised that the principles established by the ICA are too general. Then, PECOL should work as a pattern for other enterprises and therefore PECOL can be used as a model. Last and not least important, PECOL should be used as a tool to enter into academic debates.” Georg Miribung¹⁴

1. The PECOL Project is therefore aspirational in nature, and does not purport to create something normative or prescriptive. Its relevance in the present context is as a possible baseline against which to consider the specific laws of individual Member States. The relevant section¹⁵ is as follows:

SECTION 3.4

RESERVES

- (1) *In cooperatives there are mandatory reserves and voluntary reserves.*
- (2) *Mandatory reserves include the legal reserve and other reserves required by law or cooperative statutes, such as the reserve for cooperative education, training and information.*
- (3) *The legal reserve and the reserve for cooperative education, training and information are indivisible, even in the event of cooperative dissolution.*
- (4) *The legal reserve is established by:*
 - (a) *a percentage of the net annual cooperative surplus ...*

¹⁴ International Journal of Cooperative Law, Issue 1 2018 at page 191 <https://iuscooperativum.org/wp-content/uploads/2018/08/Issue-1-2018.pdf>

¹⁵ At page 83

m. This extract provides a helpful summary of what national cooperative laws would ideally provide in this area.

ECJ decision

n. As mentioned in the introduction, six EU member states expressly refer to cooperatives in their national constitution. They recognise that cooperatives contribute something which private for-profit businesses do not. The Italian constitution, for example, recognises that they operate for mutual benefit, rather than private speculation. The Spanish and Portuguese constitutions expressly seek to support and promote the creation of cooperatives.

o. It will be seen below that those states whose constitutions refer to cooperatives have the most favourable and pro-cooperative laws. The degree of protection of indivisible reserves/capital surpluses against threats from outside the sphere of cooperation is significantly greater than that provided by the other states, with some notable exceptions. This links closely to the question of what individual states do to support and promote cooperatives when their national constitution requires them to do so. The most common approach is to provide tax reliefs, based on indivisible reserves, which are not available to other types of business.

p. This was challenged in Italy under EU law on the grounds that it was contrary to State aid rules. The decision of the European Court of Justice on 8 September 2011 found that such tax reliefs were not necessarily contrary to State aid rules subject to a number of factors.¹⁶ Essentially, the ECJ found that because cooperatives were at certain disadvantages when compared to other trading entities (lower profit margins than capital companies which are better able to adapt to market requirements), it was justifiable and proportionate to provide tax benefits to them, but not to those other trading entities.

q. The following characteristic of cooperatives meant that they could not, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies:

- i. Registration as cooperative societies conforms to particular operating principles which clearly distinguish them from other economic operators.

¹⁶ Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08) Court of Justice of the European Union, 8 September 2011 (C-78/08 to C-80/08) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0078&from=EN>

- ii. The primacy of the individual, which is reflected in the specific rules on membership, resignation and expulsion.
- iii. Net assets and reserves should be distributed on winding-up to another cooperative entity pursuing similar general interest purposes.
- iv. Cooperative societies are not managed in the interests of outside investors.
- v. Control of cooperatives should be vested equally in members, as reflected in the 'one man, one vote' rule.
- vi. Reserves and assets are therefore commonly held, non-distributable and must be dedicated to the common interests of members.
- vii. As regards the operation of cooperative societies, in the light of the primacy of the individual, their activities should be conducted for the mutual benefit of the members, who are at the same time users, customers or suppliers, so that each member benefits from the cooperative's activities in accordance with his participation in the cooperative and his transactions with it.

r. This judgement took note of a number of things, including the European Cooperative Statute, the Communication referred to above, and the positive comments about cooperatives in the Italian constitution. But the presence of indivisible reserves, which are not distributable to members on a winding up, was also a significant factor.

5. Summary of EU member states' approach to indivisible reserves

Please see the tables set out in Appendix 1 and 2.

6. Drawing some conclusions

The key points from the two tables can be summarised as follows:

- i. There is significant variation between states across most of the 10 questions above
- ii. On the main question, a majority of states (23) require funds to be set aside to indivisible reserves
- iii. Fewer (10) protect such reserves on solvent winding up
- iv. Only 8 of these states protect such reserves in relation to conversion
- v. Most states have their own cooperative law, and define cooperatives in legislation
- vi. Share capital is variable in all the states considered

Some more supportive of indivisible reserves

a. From the analysis above, it can be concluded that a group of 10 states go further than others in requiring and protecting indivisible reserves, and generally supporting cooperatives. They all have separate cooperative laws, define coops in legislation, require a proportion of surplus to be set aside to reserves, and protect those reserves on winding up; the majority also protect reserves on conversion. They are supportive of cooperatives and regard the protection of indivisible reserves as important.

b. This group includes 5 of the Table A states whose constitutions refer to cooperatives; Bulgaria is the only state from this group where there is no requirement for the allocation of surplus to reserves, and no protection of assets on winding up. But this group of more supportive states also includes 5 of the Table B states whose constitutions do not refer to cooperatives. So it can be argued that having constitutional recognition of cooperatives makes it more likely that states will have more supportive cooperative laws; but it does not follow that without such recognition, a state will not have supportive cooperative laws.

Member state	1. Does national constitution refer to coops?	2. Are there separate laws to govern coops?	3. Are coops defined?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on winding up?	9. Are indivisible reserves protected on conversion to a company?
Greece	Yes.	Yes.	Yes	Yes	Yes for some coops	Yes for some coops
Italy	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
Malta	Yes.	Yes.	Yes.	Yes.	Yes.	No provision
Portugal	Yes.	Yes	Yes.	Yes.	Yes.	Yes (conversion forbidden)

Member state	1. Does national constitution refer to coops?	2. Are there separate laws to govern coops?	3. Are coops defined?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on winding up?	9. Are indivisible reserves protected on conversion to a company?
Spain	Yes.	Yes	Yes.	Yes.	Yes.	Yes
Croatia	No	Yes	Yes	Yes	Yes	Yes
Cyprus	No	Yes	Yes	Yes	Yes	Yes, conversion not permitted
France	No	Yes	Yes	Yes	Yes	Yes
Hungary	No	Yes	Yes	Yes	Yes	Yes
Romania	No	Yes	Yes	Yes	Yes	No provision

c. Whilst this group of states certainly includes some that are known to have strong cooperative sectors (Italy, Portugal, Spain), this study does not attempt to determine whether there is a correlation between having more supportive cooperative laws in relation to indivisible reserves and the strength of the national cooperative economy. Many other factors clearly play a part in this.

Some less supportive of indivisible reserves

d. There is another group of 5 states which are essentially at the other end of the spectrum, in providing no protection at all to cooperative reserves and generally being less supportive of cooperatives. All of these states are from Table B. Of these 5 states, one does not have cooperative laws at all, and 2 do not define “cooperative” in their legislation or fulfil all the requirements for a cooperative law as described by Fici above. None of these 5 require part of the surplus to be allocated to reserves or provide any

protection to surplus assets on a winding up or conversion to a company. In these states, there is no long-term protection of cooperative assets.

Member state	1. Does the constitution refer to coops?	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	9. Are indivisible reserves protected on conversion to a company?
Czech Republic	No	Yes	Yes	No.	No.	No provisions
Denmark	No	No.	Yes.	No.	No.	No
Ireland	No	Yes	No	No	No	No provisions
Norway	No	Yes	Yes	No	Up to the statutes	[Unclear]
UK	No	yes	No	No	No	No

e. As with the more supportive group of states referred to above, this study makes no attempt to determine whether there is any correlation between having comparatively less supportive cooperative laws in relation to indivisible reserves and the comparative strength of the national cooperative economy.

So what?

f. The basic finding that there is such a wide variation between the 29 states in relation to indivisible reserves, and the supportiveness of their laws towards cooperatives, is not exactly dramatic. But does it matter? Is it important to have supportive cooperative laws – are they essential to the development of cooperatives?

g. This question was considered in depth by Fici in his article already referred to.¹⁷ He concludes that “the essential function of cooperative (organizational) law is to recognize and preserve the distinct identity of cooperatives relative to joint-stock (for-profit) companies. This function of cooperative (organizational) law is ‘essential’ inasmuch as workable substitutes for it could not be found elsewhere in the law and is ‘specific’ in comparison to the general, essential function(s) of company law.”

h. He goes on to conclude that “a definite, distinct legal identity of cooperatives is increasingly being seen by the cooperative representatives as a precondition for the cooperative defence and growth, also in light of the fact that a particular legal identity may justify a specific policy regime of cooperatives, especially under tax law. Once that the distinguishing traits of cooperatives are recognized by law, it becomes easier for cooperative advocates to invoke policy measures in favour of cooperatives and for the state to justify these policies in light of the principle of equal treatment.”

i. So the preservation and promotion of cooperative identity are essential requirements for developing cooperatives, and legislation is the foundation upon which such identity is built in individual states. For the reasons explored in this study, indivisible reserves play a sufficiently significant role in defining that identity and in distinguishing cooperatives from other forms of ownership that the concept was re-introduced by the ICA in 1995, that it is included in the cooperative law of the majority of states considered, and it is both a feature of the SCE and the PECOL project. Where national laws do not adequately protect cooperative reserves, they are left open to attacks by predators, endangering both substantial existing ventures which help to preserve corporate diversity, and losing the accumulated capital from previous generations which should remain dedicated to cooperative endeavours.

j. Based on these arguments, the wide variation in how the 29 states treat indivisible reserves is obviously a source of concern amongst cooperators. It should be of concern to the EU, given its broad support of cooperatives as evidenced by: the European Cooperative Statute which was aimed at ensuring that cooperatives had a level playing field with for-profit companies; the subsequent 2004 Communication on the promotion of cooperatives; the funding of research by EURICSE on the implementation of the European Cooperative Statute commenced in 2009; and its funding of the subsequent PECOL project.

k. It should also clearly be of concern to those individual states which recognise the need and wish to strengthen and grow their cooperative economy for a variety of reasons including:

¹⁷ Fici, A. (2014), The Essential Role of Cooperative Law, The Dovenschmidt Quarterly December 2014 no. 4

- To reduce the dominance by and dependence on investor-ownership, with a view to building more resilient economies through greater corporate diversity
- To change the drivers in law-making to be more focussed on future generations and protection of the environment, rather than on wealth-creation for today
- To enable cooperative initiatives to have the opportunity to address major challenges which governments and markets struggle to address efficiently, including human services, and the ownership of utilities, data, and property
- Specifically, to support collaborative endeavours between citizens to meet their own needs, rather than relying on markets and governments.

1. So, what actions should therefore follow?

7. Recommendations

Constitutional recognition

a. Reference to cooperatives in national constitutions (supreme or foundational laws) is desirable, but clearly a long-term matter, and opportunities to support cooperatives in this way are likely to arise infrequently. However, other approaches are possible. The fundamental issue is to address the default setting commonly adopted by governments (not always intentionally) when legislating in relation to any trading activity, namely that they are dealing exclusively or mainly with investor-ownership. Whilst investor-ownership is the dominant and most familiar basis for business, governments should be open to the possibility of other corporate purposes than profit maximisation, and other forms and models of business, including cooperatives and other forms of democratic or locally accountable business.

b. Alternatives to recognition in national constitutions might include:

- i. Recognising in ordinary legislation the existence of a range of different corporate purposes, including in particular cooperatives and the values and principles on which they are based
- ii. Requiring the promotion of corporate diversity by government departments responsible for business. This could include establishing/revising standard procedures when assessing the impact of all new legislation to make sure that all corporate purposes and forms are considered and appropriately treated.¹⁸

¹⁸ This is one of the recommendations in *Co-operatives Unleashed*, New Economics Foundation 2018, Lawrence M., Pendleton A. and Mahmoud S. which can be found at <https://neweconomics.org/uploads/files/co-ops-unleashed.pdf>

iii. Requiring in legislation in particular sectors such as energy, or care, that cooperatives should be specifically considered¹⁹

A Cooperative Law

c. As argued powerfully by Fici referred to above, having a cooperative law which protects cooperative identity relative to investor-owned companies is essential, and a precondition to “defence and growth”. This point is affirmed in relation to the UK in *Co-operatives Unleashed*²⁰ where it is stated: “Our research finds that co-operatives and the wider cause of democratising and more evenly spreading the benefits of enterprise are held back due to an absence of legislation and policy, institutional support, advice, incentive and promotion. With an economy that does nothing to help co-ops thrive and everything to create a hostile environment for models of co-operation, it is unsurprising that the UK has one of the smallest sectors of any country.”

d. Where states wish to encourage the development of cooperatives, changing national laws to recognise and accommodate cooperative enterprise establishes an important foundation for other legislation to provide appropriate support and encouragement to establish or explore cooperative approaches. Cooperative law has an important role to play, both in helping to define and protect cooperative identity, and providing the basis for the appropriate treatment of cooperatives elsewhere in legislation including in relation to tax and competition law. This can also be an incentive for citizens, through self-help, to cooperate to meet their changing needs, and to rely less upon the state or markets to provide essential services.

e. If it is to be effective in supporting and promoting a healthy cooperative economy, cooperative law needs to be regularly reviewed and updated at state level, by every individual state to ensure that it meets changing needs. This has been normal in relation to company law for many years. For example, in the UK company law is generally reviewed comprehensively every 25 years or so (1925, 1948, 1985, 2006), involving a careful consideration of what changes are needed to enable companies to be as efficient and effective as possible. No such review has ever taken place in the UK for cooperative law. It needs to, in all states.

¹⁹ A good example of this is in Wales, where The Social Service and Well-being (Wales) Act 2014 expressly requires the promotion of cooperatives and certain other types of organisation (section 16).

²⁰ See previous footnote

Defining cooperatives

f. Without providing a definition of cooperatives in national law, there is no legal certainty, and no clear basis for appropriate policy making. Organisational laws (company law, cooperative law) need to set out the essential features which are necessary to achieve the corporate objective or purpose. By setting out these essential features for the corporate purpose, the organisational laws thereby create and define the identity. It is not sufficient to have internationally recognised principles (such as the ICA statement) unless the core features are anchored in national organisational laws. Without that, an organisational form will lack an identity. “In other words, when a legal entity, or category of legal entities, has a defining feature that relates to the objective pursued – whether negative (the profit non-distribution constraint that qualifies nonprofit entities) or positive (the mutual purpose that qualifies cooperatives) – the organizational law of that entity, or category of entities, plays the essential role of defining their particular identity in light of the objective pursued.”²¹

Indivisible reserves, variable capital

g. Indivisible reserves play a significant part in defining cooperative identity. Reference was made above to the removal of indivisible reserves from the ICA principles, and their subsequent reintroduction because, in the words of Ian MacPherson, “*many co-operators have lost sight of the importance of commonly owned capital, as a symbol of co-operative distinctiveness, as a security for its financial growth, and as a protector in times of adversity.*”

h. But arguably indivisible reserves provide a more fundamental role than that. In the laws of all of the states considered, cooperative share capital is variable. This is in direct contrast to company law, in which capital is basically fixed, though increasingly mechanisms are being introduced to enable capital to be more variable. But such measures have to take account of the need to protect creditors, for whom fixed capital otherwise provides basic protection. In cooperatives with variable capital, indivisible reserves provide some protection to creditors. So requiring cooperatives to set aside funds to indivisible reserves not only reinforces the concept of commonly owned capital among the members, it also helps to build their business credibility and creditworthiness when compared with companies.

i. The recommendation is to implement the PECOL provisions in relation to setting aside indivisible reserves.

²¹ Fici, A. (2014), The Essential Role of Cooperative Law, The Dovenschmidt Quarterly December 2014 no. 4

Protecting reserves

j. As well as specifically requiring indivisible reserves to be set aside, the subsequent protection of those reserves is also highly significant. The appreciation of the importance of corporate diversity has increased greatly as a result of the economic crisis ten years ago. Protecting organisations and assets which have been built up by people over generations in support of a particular purpose is not only important in order to give effect to those peoples' legitimate intentions. Protecting such organisations and assets should be a matter of public policy for wider public benefit. In particular, protection against changing the corporate purpose is essential. Where organisations have served their useful purpose and are to be wound up, allowing their surplus assets to continue to be committed to the particular purpose is simply completing the purpose of supporting such organisations in the first place. Likewise, where founders wish to allow the possibility for future generations to "cash in" on the organisation, they should have the freedom to do so.

k. These issues are too important to be left to chance. States should legislate clearly so that everybody knows what the position is in dealing with individual organisations. Just because companies have a well-known and understood failure and winding up regime, it should not be assumed that other types of corporation should follow suit. Those establishing organisations should ensure that they address the question of the destination of any surplus assets beyond the life of the organisation itself. Protection needs to be provided both on the winding up of cooperatives, but also on any other process of change of purpose permitted by national legislation, such as conversion into or take-over/purchase by an investor-owned company.

l. The recommendation, as above, is to implement the PECOL provisions.

Recommendations for EU

m. It has been pointed out that the EU is itself supportive of cooperatives as another form of business, as evidenced by its own legislation, the European Cooperative Statute, and the Communication referred to above. It is committed to the promotion of the greater use of cooperatives across Europe by improving the visibility, characteristics and understanding of the sector; the further improvement of cooperative legislation in Europe; and the maintenance and improvement of cooperatives' place and contribution to community objectives.

n. Since the establishment and maintenance of cooperative law is primarily a matter for individual states, the EU therefore has an important role to play in supporting and encouraging member states to optimise their own cooperative law. The PECOL project is an important example of valuable work which can be undertaken to advance the European cooperative agenda, and it provides an important and helpful tool for individual states. This should be built upon further.

o. But there is another important role for the EU to fulfil. Cooperation is a world-wide movement; cooperation between cooperatives is one of the underlying principles, and both supporting and enabling cooperation within member states and within the EU as a whole are important. This means continually keeping under review, at transnational level as well as at individual state level, the extent to which other laws (tax, regulation, competition) work in favour of investor-owned enterprise and/or to the detriment of cooperatives. The EU's own laws and regulations must be kept under continual scrutiny to ensure that this does not happen.

Final comments

Both in Europe and beyond, faith in democracy is at a low ebb. There are many contributing factors to this, not least the worrying level of politically unaccountable corporate power, which challenges the very sovereignty and even the relevance of smaller states. We should not be surprised if the sight of banks and other large businesses regularly getting away with scandalous behaviour, contributes to broader disillusionment with established institutions, fuelling more extreme electoral reactions.

Cooperatives are important, and different. Substantial entities trading for broader social purpose and differently accountable, smaller local enterprises empowering local people and meeting local needs, and the greater prominence of democratic control in the operation of businesses could all help to change the narrative, and reclaim the rightful place of individuals rather than money and class which still control modern society. The dominance of investor-owned business is one of today's major challenges.

Cooperative law may be particularly important in this context, in raising awareness about the role of business, improving its robustness and credibility, and providing incentives which encourage the start-up and development of businesses designed to meet the needs of people, rather than capital.

But it is important also for the future of the EU and its member states in addressing urgent challenges which governments struggle to meet, and where private ownership does not provide a solution or threatens to undermine democracy, including:

- the health and well-being of its citizens

- climate change
- information and communications
- the changing nature of work/employment.

Cooperative law is important, and for it to succeed, so are indivisible reserves.

Appendix 1

Summary Table A of Member States with constitutional recognition of cooperatives

Member state	1. Does national constitution refer to coops? ¹	2. Are there separate laws to govern coops?	3. Are coops defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
1 Bulgaria	Yes	Yes	Yes	Variable	No provision	Yes	No	No provision	No provision	Some tax relief
2 Greece	Yes	Yes	Yes	Variable	No provision	Yes	Yes for some coops	No general provision, yes for some	Yes for some coops	Limited tax relief
3 Italy	Yes	Yes	Yes	Variable	Yes	Yes	Yes	Yes	Yes	Tax reliefs

¹ See Main Table A (Appendix 3) for explanation of sources, and further information about individual questions

Member state	1. Does national constitution refer to coops? ¹	2. Are there separate laws to govern coops?	3. Are coops defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
4 Malta	Yes	Yes	Yes	Variable	No provision	Yes	Yes	No provision	No provision	Tax reliefs
5 Portugal	Yes	Yes	Yes	Variable	Yes	Yes	Yes	No, forbidden	Yes (conversion forbidden)	Tax reliefs
6 Spain	Yes	Yes	Yes	Variable	Yes	Yes	Yes	Yes	Yes	Tax reliefs

Appendix 2

Summary Table B of Member States without constitutional recognition of cooperatives

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is a conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
1	Austria	No	Yes	Yes	Variable,	Yes.	No.	No.	No	Effectively yes, as conversion not possible	None
2	Belgium	No	Yes	Yes	Variable	Appears to be possible	Yes	No	Yes	No	Limited tax advantages
3	Croatia	No	Yes	Yes	Variable	No	Yes	Yes	Probably	Yes	None
4	Cyprus	No	Yes	Yes	Variable	No	Yes.	Yes.	No	Yes, as	Some tax

² See Main Table B (Appendix 5) for explanation of sources, and further information about individual questions

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
						apparent reference				conversion not permitted	advantages
5	Czech Republic	No	Yes	Yes	Variable	No apparent reference	No.	No.	Yes	No apparent reference	None
6	Denmark	No	No.	Yes.	Variable	No	No.	No.	No provision	No	Limited tax benefits
7	Estonia	No	Yes	Yes	Variable	No apparent reference	Yes.	No.	No apparent reference	No apparent reference	None
8	Finland	No	Yes	Yes	Variable	Yes	Yes	Probably not.	Yes	Presumably not	Some other tax advantages

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
9	France	No	Yes	Yes	Variable	Yes	Yes	Yes	Yes	Yes	Tax exempt. Other significant tax advantages
10	Germany	No	Yes	Yes	Variable	Yes	Yes	No, unless provided in the by-laws	Yes	No specific information	Limited tax advantages
11	Hungary	No	Yes	Yes	Variable	Yes, if allowed by the statutes	Yes.	Yes	Yes.	Yes	Tax free up to a limit
12	Ireland	No	Yes	No	Variable	Nothing specified.	No	No	Yes	No	No significant advantages
13	Latvia	No	Yes	Yes	Variable	Nothing specified	Yes	No	No apparent reference	No apparent reference	None

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
14	Lithuania	No	Yes.	Yes	Variable	No apparent reference	Yes	No, unless provided in the by-laws	Yes.	No, unless in by-laws	Limited tax benefits
15	Luxembourg	No	Yes	Yes.	Variable	No provision	Yes	No, unless provided in the by-laws	Yes	No	None
16	Netherlands	No	Yes	Yes	Variable	Yes	Yes	No, unless provided in the by-laws	Yes	No information	Limited tax advantages
17	Norway	No	Yes	Yes	Variable	No provision	No	No, unless provided in the by-laws	Yes	No information	None
18	Poland	No	Yes	Yes	Variable	No	Yes	No	Yes, but limited	No	None

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
19	Romania	No	Yes	Yes	Variable	No provision	Yes	Yes	No express reference	No information	None
20	Slovakia	No	Yes	Yes	Variable	No provision	Yes	No	Yes	No apparent reference	None
21	Slovenia	No	Yes	Yes	Variable	No provision	Yes	No, unless provided in the by-laws	Yes	No	None.
22	Sweden	No	Yes	Yes	Variable	Yes	Yes	No	No provision	No.	Limited tax advantages
23	UK	No	Yes	No	Variable	Yes.	No for coops;	No for coops;	Yes	No	None

	Member state	1. Does the constitution refer to coops? ²	2. Are there separate laws to govern coops?	3. Are co-operatives defined?	4. What is the nature of capital?	5. Are “investor members” allowed?	6. Must a proportion of surplus be set aside to reserves?	7. Are reserves indivisible on a winding up?	8. Is conversion to a company permitted?	9. Are indivisible reserves protected on conversion to a company?	10. What are the legal advantages of indivisible reserves?
							yes for community benefit societies	yes in community benefit societies			

LEGAL FRAMEWORK ANALYSIS AND THE ICA-EU PARTNERSHIP: AN UPDATE ON ENSURING A LEVEL PLAYING FIELD FOR PEOPLE-CENTRED ORGANISATIONS'

John Emerson, Jeffrey Moxom¹

Abstract

This paper builds on existing research conducted within the ICA-EU Partnership's Legal Framework Analysis Research, which analyses the national cooperative legal frameworks of a variety of countries worldwide. The research aims to provide harmonised information on cooperative law and its provisions, both at the national and supranational level, including a critical analysis of laws that impede or promote cooperatives, and the degree to which the legislation can be considered adequate for cooperative development.² With greater knowledge and access to a country-based legal framework analysis partly established through an open access online platform, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks and monitor their evolution.³ This paper outlines the exploratory findings and insights gained through this current implementation with a view to analysing, based on the current work completed, the emergent trends in a discussion on the necessary elements of a strong cooperative law.

The paper discusses four main recurrent elements that can impact cooperative development. First, it discusses the necessity for cooperative law to be well drafted, implemented and enforced. Secondly, the extent to which cooperatives can compete on a level playing field with other business models is also highlighted, not only from the perspective of supporting the development of a thriving cooperative movement but also of cooperative autonomy, the fourth principle of the cooperative movement. The current results also suggest that cooperatives generally benefit from legal frameworks that respect their common cooperative identity. Third, based on the insights at present, the fragmentation of cooperatives by governing them under special sectoral laws instead of a general law can generally be seen as negative

¹ John Emerson of Cooperatives Europe and Jeffrey Moxom of the International Cooperative Alliance (ICA) with support from the ICA Regional Offices, and external support from EURICSE (European Research Institute on Cooperative and Social Enterprises)

² The paper serves as an update to a previous paper, in which the initial purpose and methodology behind the research are documented. See Arielle Romenteau & Jeffrey Moxom, *Legal Framework Analysis And the ICA-EU Partnership: Acknowledging the Specificity of The Cooperative Model and Ensuring A Level Playing Field for People-Centred Organisations*, International Journal of Cooperative Law (IJCL), Issue 2. 2019.

³ For more information and to view the database of national reports, please visit www.coops4dev.coop

*for cooperative development*⁴. Finally, the importance of a legal framework that reflects the modern and evolving context of cooperatives by being sufficiently up-to-date is also discussed, being commonly cited by national experts as important to ensure an adequate legal framework for cooperatives.

The paper concludes by arguing that there are certain commonalities applicable across national legal frameworks and argues that observing the presence or absence of these commonalities within legal frameworks can be a step towards establishing an enabling environment for cooperatives, and for international cooperative development in general. Despite the harmonised collection of information on cooperative legal frameworks, specific national contexts must be carefully considered when making recommendations for changes at different levels of governance. Finally, the paper also aims to lay the ground for more in-depth analysis to be conducted following the completion of the Legal Frameworks Analysis under the ICA-EU Partnership.

Introduction

This current research falls within the scope of the knowledge building activities undertaken within the partnership for international development signed between the International Cooperative Alliance and the European Commission in 2016, to strengthen the cooperative movement and its capacity to promote international development worldwide, with a number of work streams based on advocacy, visibility, capacity building, and research. Under this partnership, the ICA is carrying out a number of global research activities in collaboration with its four regional offices, which includes the national and regional analysis of cooperative legal frameworks featured within this paper.

Current status of the research

The ongoing Legal Framework Analysis research (LFA) has three primary objectives i) acquiring general knowledge of the national legislation on cooperatives; ii) evaluating the national jurisdictions covered by the LFA according to their enabling environment for cooperatives (their degree of ‘cooperative-friendliness’); and iii) providing concrete recommendations for eventual renewal of the legal frameworks.

⁴ Although there are also examples of cooperative-friendly legislation in the study with fragmented legal frameworks, in general these national experts still see a unified framework as an objective to aspire to.

The LFA aims to cover a wide range of national jurisdictions throughout the study, focusing upon the 109 jurisdictions where ICA member organisations are located⁵. When analysing national legal frameworks, it examines general cooperative legislation but also examines special cooperative laws covering different types of cooperatives, where this is crucial to gaining an understanding of the country's legal framework.

Methodology

A methodological structure was jointly developed with the support of an external partner EURICSE (European Research Institute on Cooperative and Social Enterprises) and with input from the ICA regional offices. The methodology has two main stages, supported by regional and national experts. First, the collection of data is undertaken with the completion of a harmonised questionnaire, submitted by national legal experts for each of the jurisdictions covered by the LFA. This questionnaire is also provided via ICA regional offices to member organisations, which provides an opportunity for member centred input to the study. As a second step, the respective national experts then analyse and evaluate the information collected from the questionnaire responses and produce national reports for each country in a harmonised format, with the support of Partnership staff. The completed national reports are currently available on an open access online database, launched on 4 March 2020.

In order to provide a picture of the cooperative landscape at the regional level in each ICA region, this analysis will later be compiled into four harmonised regional reports, one for each ICA region, compiling the main highlights of the national jurisdictions covered, as well as relevant regional analysis of cooperative law. Finally, the regional reports will be gathered in one complete global report, combining all inputs into a single document. At the time of writing (May 2020), the LFA has been completed for 46 countries worldwide, with 10 legal frameworks in Africa, 18 in the Americas, 13 for Asia-Pacific, and 5 in Europe.

The LFA is a contribution towards improving our general understanding of cooperative legislation and to create an assessment tool that can aid future policy recommendations in the pursuit of an enabling environment for cooperative development. As noted by national legal experts, comparative analysis between countries is particularly challenging task without detailed operational knowledge of a local context. Without space for such detailed comparisons here, the aim of this paper is limited to providing an analytical overview of the research to date and exploring four common elements that are prominent across a variety of countries covered. The exploration of these recurring elements is therefore intended to build upon the existing analysis of cooperative law in the national reports. It is also important to note that the

⁵ As of May 2020.

elements chosen are by no means exhaustive, but a selection of measures for the cooperative friendliness of a country, both in the eyes of the national expert and membership organisation input that, where obtained, has been a crucial in offering a complementary perspective within each country report. These four elements are further developed in the theoretical section below.

Theoretical Framework:

This section seeks to provide theoretical context behind the recurring elements referred to throughout the paper. The main elements discussed here are enforcement of cooperative legislation, the existence of a level playing field, fragmentation of cooperative law, and up-to-date legislation. The paper provides background on each of these elements, before assessing their presence within the completed national reports with the use of illustrative examples.

Firstly, the **enforcement of cooperative legislation** is necessary for it to be effective. According to Hagen Henry, "*in order for an effective and efficient cooperative movement to emerge and/or to thrive, the law must be applied.*"⁶ This point is expanded by noting that the law needs to be understood by those affected by it in order for it to be applied effectively, including through ensuring that the law is available in the languages of the territory (vernacular languages are included in the analysis). Beyond this point, implementation of a cooperative law be accompanied by efficient registration and auditing systems for cooperative organisations, as well as sufficiently resourced monitoring and promotional mechanisms⁷. On this basis, well implemented cooperative legal frameworks will facilitate a cooperative movement that is both efficient and effective. By contrast, poorly implemented cooperative law can harm the cooperative movement in a territory. For example, poor registration and monitoring of cooperatives can lead to a phenomenon of "pseudo cooperatives" created solely to take advantage of legal advantages afforded to cooperatives by the law. ILO Recommendation 193 both calls for national policies to ensure cooperatives are not set up for the purpose of avoiding compliance with labour laws, and also for the combatting of pseudo-cooperatives which it states violate workers' rights⁸. This is also relevant given that pseudo-cooperatives are an issue identified by national experts in the study.

For a strong cooperative movement to exist, cooperatives must be able to compete with other business models on a **level playing field**. ILO Recommendation 193 supports this through both its provisions on oversight and national law and practice, which should treat cooperatives no less favourably than that

⁶ H. Henry, 'International Labour Organisation, Guidelines for cooperative legislation / by Hagen Henry; International Labour Office. – 3rd ed. Rev', Geneva: ILO, 2012, p. 104.

⁷ Ibid.

⁸ ILO, R193 - Promotion of Cooperatives Recommendation, 2002 (No. 193), para 8(1)(b)

applicable to other forms of enterprise⁹. Countries can therefore make use of the recommendation to enact sufficient forms of protection and regulation for cooperative enterprises. Some legal frameworks in our analysis were seen to treat cooperatives unfairly compared to for-profit businesses or even prevent them from participating in certain sectors. Additionally, cooperatives cannot compete on a level playing field with for-profit businesses if they are not treated as a distinct type of business model¹⁰. In the ongoing LFA, examples of this have included allocating responsibility for cooperative matters to the government department in charge of for-profit businesses. Alternatively, a lack of distinct treatment may result in the absence of a specific tax regime for cooperatives. At both the national and global level, there is a wider trend of ‘companisation’. Henryř describes a legislative trend called “stock companisation”, referring to those processes in legislation through which the features of cooperatives are approximated with stock companies¹¹. This is due to using for-profit companies as a measure for evaluating the performance and efficiency of all types of enterprise¹². At an international level, there are examples from the LFA demonstrating how an increasingly globalised economy focused on for-profit enterprises renders cooperatives less capable of operating to their full potential. This paper will therefore look in greater detail at features of national legal frameworks that either facilitate or hinder the ability for cooperatives to compete on a level playing field.

This paper will also address the issue of **fragmentation** within legal frameworks, another element identified as a hindrance to the cooperative movement by experts throughout the research. To understand the concept of fragmentation, it is necessary to understand that many legal frameworks govern cooperatives through special laws applicable to different categories of cooperative in different sectors. The issue of fragmentation in legal frameworks is seen as negative for cooperatives by national experts working in the field of cooperative law who took part in the Legal Framework Analysis and note that such law-making effectively disregards the shared identity of cooperative organisations. Such fragmentation also leads to an uneven playing field between different cooperative types, as in some jurisdictions certain cooperatives are treated more favourably by the law than other types, which may face more restrictions. By contrast, Hagen Henryř states that unification and harmonisation of special laws can lead to more coherent policymaking, a reduction in bureaucracy and actually leads to greater cooperative autonomy¹³. At the same time, it is noted that special laws are not always to be seen as a negative and, indeed, might be necessary to protect smaller cooperatives and justified from the activities and objectives of the wider

⁹ Ibid, paras 6(c) and 7(2)

¹⁰ C. Mills and W. Davies, ‘Blueprint for a Cooperative Decade’, International Cooperative Alliance, 2013, p. 26

¹¹ H. Henryř, ‘Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws’, The Bulletin of Belgorod University of Cooperation, Economics and Law, 2012 no. 2, pp. 414-415, footnote 7.

¹² Ibid, p. 407.

¹³ Op cit, Henryř, at supra 5, see footnote 41 of p. 15

social and solidarity economy¹⁴. From the study, there are examples of frameworks which either do not foresee certain types of cooperatives, or which are focused mainly on agricultural cooperatives to the exclusion of other sectors. For these specific national contexts, the experts believe the cooperative sector would benefit from further specialisation of cooperative laws.

A further point raised in the current national reports is the importance of **up-to-date** cooperative law. Cooperative legislation in some countries in the study has not been updated in several decades, during which time the economic, administrative and labour contexts have changed dramatically. At the same time, frequently updated legislation will not necessarily benefit the cooperative movement in a country unless it is well drafted. As part of this process, the genuine inclusion of the cooperative movement in the consultation and drafting of the legislation, with timely notice, can be considered a route to better outcomes, such as efficient transposition or implementation of the updated law in practice.¹⁵ The study finds at least once example where frequently changing cooperative legislation leads to instability and an environment that is not conducive to growth of cooperative organisations.

This paper takes each of the four elements, the enforcement of cooperative legislation, the existence of a level playing field, fragmentation of cooperative law, and up to date legislation in turn. Combined with support of the analysis from national legal experts gathered from the completed legal framework analysis reports, the paper argues that the consideration of these elements is important for the pursuit of an enabling environment for cooperative development.

(i) Implementation and enforcement

When assessing countries for which national reports are currently available, it is clear that how well a law is implemented, for example through effective auditing and oversight mechanisms, can impact on the effectiveness of cooperative legislation at achieving better cooperative development. For example, in Mexico the national expert notes that, despite some significant deficiencies in the country's general cooperative law, there are no legal barriers to cooperative development from a regulatory perspective.¹⁶ At the same time, cooperative development in the country suffers as the law is not effectively enforced. The national expert highlights in particular that the law establishes duties and obligations but without any consequences for non-compliance.

¹⁴ Ibid, p. 60

¹⁵ One example of inclusion of the cooperative movement in drafting legislation is noted in Nepal. In more general efforts, the ICA has been involved in contributing to enabling environments for cooperatives during parliamentary processes involving legislative change in Argentina in 2018, and more recently in Greece, among other instances.

¹⁶ Cooperatives of the Americas, Legal Framework Analysis, 'National Report for Mexico', ICA-EU Partnership

Additionally, while legislation might facilitate grants and tax benefits for cooperatives in order to support their growth and development, if this leads to positive discrimination towards cooperatives over other types of enterprises, this can at times result in a negative side-effect, pseudo cooperatives¹⁷. For South Africa, the legal system offers some advantages for cooperative enterprises such as grants that such organisations can access at both national and local levels. However, the national expert describes a “light hand” state to the effect that there are currently insufficient checks to identify which enterprises are operating in line with cooperative values and principles and those which are not¹⁸.

There are more unscrupulous reasons for why an organisation would wish to register as a cooperative under false pretences, namely as a type of ‘law-shopping’ in order to avoid compliance with labour or social security rules¹⁹. Given cooperatives serve member and community needs, this is undoubtedly a particularly negative use of the enterprise model. As an example, in South Africa, members of cooperatives do not benefit from legal protections for employees under labour law, on the pretext that cooperative members are not employees. The national expert notes that pseudo cooperative organisations have proliferated in the clothing industry, an industry known for low wages and poor labour standards²⁰. In simple terms, these organisations, which do not operate in line with cooperative values and principles, hire workers who are formally ‘members’ of the pseudo cooperative in order to avoid obligations under labour law they would be liable under if these workers were hired as employees, which they may truly be.

Other territories also experience this phenomenon²¹, including Italy, which has been identified as a legal framework that is, overall, conducive to the growth of cooperatives²². In this territory, the national expert also identifies false cooperatives setting up on a short-term basis with the sole aim of circumventing tax and labour laws²³. The consequence of this is that genuine cooperatives which abide by the laws are put at a disadvantage and also reputational damage to the image of cooperatives which may harm their future development.

One means of overcoming, or indeed, preventing this trend from occurring without excessive government interference is integration, either horizontally or vertically, of cooperatives. The principle of freedom of association means that cooperatives ought to have the right to form unions, federations or

¹⁷ Op. cit, Henry, at supra 5, p. 53

¹⁸ The Alliance Africa, ‘*South Africa National Report*’, ICA-EU Partnership, p. 13

¹⁹ Op cit, Henry, at supra 5, pp. 36-37

²⁰ Op cit, ‘*South Africa National Report*’, at supra 17, pp. 13-14

²¹ Other examples, highlighted previously by the ILO and other organisations including the FAO, include Belgium, Brazil, Georgia and India.

²² Op cit, Henry, at supra 5, p. 36

²³ E. Emmolo, ‘*Legal Framework Analysis National Report: Italy*’, Cooperatives Europe, ICA-EU Partnership, p. 11

confederations²⁴. Under a system of vertical integration, cooperatives at the highest level in countries such as Italy may be tasked with monitoring cooperatives lower down in order to ensure compliance with the law, for example through auditing²⁵. In simple terms, cooperatives that are able to network with other cooperatives through cooperative representative organisations can enjoy the benefits of cooperation with each other and gain from economies of scale²⁶, as well as collective knowledge and information sharing.

The South African expert notes that the pseudo cooperatives present in the country are allowed to proliferate, at least in part, due to the lack of a cohesive or unified cooperative movement in the country²⁷. By contrast, in Italy, the cooperative movement has strong networks supported by umbrella cooperative organisations²⁸. In response to the problem of pseudo cooperatives in Italy, in 2016 this network mobilised with the leadership of the Italian Cooperative Alliance. It presented the Italian Parliament with a legislative proposal which would remove from the National Cooperative Register entities escaping controls or failing to demonstrate the necessary mutualistic requisites.²⁹ While there has not been a change in law at this time, this is nonetheless an example of the importance of a strong coherent cooperative movement to advocate for change. Another possible means of tackling pseudo-cooperatives is through legislation. Though not discussed in the national report of this study, one example of a legislative framework that has been inspired by ILO Recommendation 193's stance on pseudo-cooperatives is Colombia's Law 812 of 2003, which the ILO cites as an example of a national development plan aimed at tackling this phenomenon³⁰.

It is important to note that it is not enough for cooperative integration to be provided for by the legislator if cooperatives are prevented from forming unions by restrictions and conditions.³¹ In Greece, for example, the national expert as well as the ICA member organisation note that a main legislative barrier is that different types of cooperatives are unable to form unions. For example, agricultural cooperatives can only form unions with other agricultural cooperatives with the same or similar agricultural products³². The result is that, in Greece, the setup of a national confederation representing the whole cooperative movement has proved impossible.

²⁴ Op cit, Henry, at supra 5, p. 100

²⁵ Op cit, 'Legal Framework Analysis National Report: Italy', p. 9

²⁶ Ibid

²⁷ Op. cit, 'South Africa National Report', at supra 17, p. 14

²⁸ See also Henry's discussion of Italian social cooperatives and their success in preventing law-shopping by actors wishing to avoid labour and social security laws, at supra 5, p. 36

²⁹ Op. cit, Emmolo, at supra 22, p. 11

³⁰ ILO, 'The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No.193), a review of the process of making ILO Recommendation No.193, its implementation and its impact', 2015, p. 67

³¹ Münkner H-H. (2013) 'Worldwide regulation of co-operative societies – an Overview', Euricse Working Paper n. 53 | 13, p.20.

³² I. Douvitsa, 'Legal Framework Analysis National Report: Greece', Cooperatives Europe, ICA-EU Partnership, p. 22

Overall, the legal frameworks discussed here highlight several elements that can impact adequate implementation and enforcement of the law. While a legal framework might be cooperative friendly in the sense that it does not impede cooperative development, attention must also be paid to the enforcement of any law for it to be effective. Furthermore, incentives for cooperatives provided for by law should be accompanied by a strong system of monitoring, preferably through a system of cooperative integration. This integration should provide support, develop networks, strengthen the cooperative identity, as well as ensure the collection of harmonised information on the cooperative sector, all of which can help to alleviate the proliferation of pseudo cooperatives. The freedom for collective organising between first and second degree cooperatives through the principle of cooperation among cooperatives, can also be important to ensure effective cooperative integration.

(ii) A level playing field for cooperatives

As previously stated, for a strong cooperative sector to exist, it must be able to compete alongside other enterprise forms, as cooperatives operate within a wider market orientated economic system. From a negative perspective, this means a lack of legal obstacles that discourage the emergence of new cooperative enterprises. Cooperative-specific tax and audit policies are also beneficial from the perspective of membership promotion³³, but also as a recognition of cooperatives as a distinct enterprise model³⁴. In this section, it is evident that currently cooperatives are in some cases subject to greater oversight and control than other types of enterprise models. In other cases, cooperatives may be excluded from benefits offered stock companies or may have limited access to capital, or other grants to facilitate business growth. In addition, the lack of a level playing field for cooperatives can also be seen as a driver of ‘*companisation*’ where cooperatives increasingly adopt or have features of stock companies imposed on them³⁵. It is also recognised that the trend of *companisation* and an increasingly globalised economy can have impacts that go beyond the reach of the legislator, which are also discussed in this section.

From the national reports of the LFA, there are examples of cooperatives being subject to greater oversight when compared to for-profit enterprises. In Jordan, the national expert notes that cooperatives are subject to regulatory and financial control by the Jordanian Cooperative Corporation, (An independent organisation formed by the government for overseeing, promoting and registering cooperatives)³⁶, contrary to the principle of cooperative autonomy³⁷. Companies, by contrast, are characterised by their

³³ Ibid, p. 24

³⁴ Ibid, p. 25

³⁵ Ibid, pp. 8-16

³⁶ ICA - Asia and Pacific, ‘*Legal Framework Analysis National Report for Jordan*’, ICA-EU Partnership, p. 16

³⁷ Ibid, p. 20

financial independence³⁸. In practice, the country's taxation rules also treat cooperatives like private enterprises in terms of taxation, and the lack of incentives encourages entrepreneurs and those wishing to work on projects to be registered as for-profit enterprises³⁹.

Conversely, cooperatives in Bolivia are promoted by the state in order to encourage participative democracy and contribute to social justice⁴⁰, and the national expert describes the Bolivian cooperative legal framework as cooperative-friendly⁴¹. At the same time, cooperatives in the country are also subject to increased oversight and taxation compared to private enterprises. For taxation, cooperatives pay double the sectoral tax rate compared to private companies, which is negative from the perspective of competitiveness. For oversight, they are also subject to oversight not only by the sectoral regulator but also from AFCOOP, the cooperative regulatory authority⁴². By contrast, companies are only subject to regulation by the former.

Beyond oversight and controls, the study also highlights that in some countries, cooperatives are excluded from operating in certain sectors, and thus unable to compete with other business models. One example is Colombia, where the national expert notes that only companies regulated by the Colombian Code of Commerce can participate in certain sectors, including health or private security. It is noted that since cooperatives fall under a separate legal regime, they are excluded from operating in these sectors⁴³. Another example is Paraguay, where the national expert notes that only entities registered as companies can carry out activities under the country's banking and insurance laws, thus preventing cooperatives from participating in such activities⁴⁴. Cross-sectoral recognition of the cooperative model can serve as one route towards tackling this problem and is a priority at the regional level, for example in Europe.⁴⁵

In certain countries, the legal framework allows for-profit enterprises to access certain benefits, while cooperatives are excluded from accessing these benefits due to their status. For example, in Côte d'Ivoire, the national expert notes that there is an investment code that provides advantages for entities recognised as enterprises. Since cooperatives in the country struggle to be recognised as such, they have difficulty accessing the benefits of this instrument that are enjoyed by commercial enterprises, and therefore the

³⁸ Ibid

³⁹ Ibid, p. 16

⁴⁰ M. A. Weise, 'Legal Framework Analysis National Report for Bolivia', ICA - Asia and Pacific, ICA-EU Partnership, p. 3

⁴¹ Ibid, p. 11

⁴² Ibid, pp. 11-12

⁴³ Cooperatives of the Americas, Legal Framework Analysis, 'National Report for Bolivia', ICA-EU Partnership, p. 17

⁴⁴ Ibid, p. 12

⁴⁵ Karakas, C. (2019), 'Cooperatives: Characteristics, activities, status, challenges', Briefing, European Parliamentary Research Service, February 2019.

national expert argues for more explicit reference to cooperatives in this text⁴⁶. From the literature and the examples from this study, the explicit recognition of the cooperative enterprise form in legislative instruments is therefore a priority for policy makers and legislators to help ensure a level playing field for cooperatives.

In a number of legal framework reports, there are also factors that impact on the ability of cooperatives to compete on a level playing field that go beyond the scope of the national legislator⁴⁷. For instance, in Panama, the national expert highlights the impact of a globalised economy on cooperatives in the country. While the legal framework of the Panama is notable for its absence of barriers to cooperative development, international anti-money laundering rules mean that savings and loans cooperatives in the country are placed under significant pressure by the obligation to submit periodic reports, with sanctions for non-compliance⁴⁸. In the view of the expert, the sanctions placed on these cooperatives are disproportionate, especially given they apply regardless of whether the lack of compliance was merely due to lack of understanding of the obligation.

Furthermore, harmonisation of cooperative law, when this takes place, also limits the scope national legislators have for reforming cooperative law. The Côte d'Ivoire is a party of the *Organisation pour l'harmonisation en Afrique du droit des affaires* (in English, the Organisation for the Harmonisation of Corporate Law in Africa, hereinafter 'OHADA') Treaty, a system of corporate law and implementing institutions adopted by 17 west and central African countries. Under this treaty, there has been harmonisation of cooperative law under a uniform act for cooperative societies. The national expert for Côte d'Ivoire thus highlights that the national legislator can only legislate for cooperatives for matters that are not harmonised, namely fiscal law⁴⁹. The national expert for the Côte d'Ivoire believes that, since the OHADA Uniform Act applying to Cooperatives system has been in place for nearly a decade, a study into the overall implementation of it in each country could identify weaknesses and bring about suitable solutions⁵⁰.

Overall, this study demonstrates that there are numerous obstacles to achieving a level playing field for cooperatives. This section notes that from the examples discussed, cooperatives in a number of countries

⁴⁶ J. Gbede, , '*Rapport National Analyse Du Cadre Juridique des Cooperatives en Côte D'ivoire*', The Alliance Africa, ICA-EU Partnership, p. 22

⁴⁷ As an additional example of the impact of global economic trends on national cooperative movements, the expert for New Zealand cites an interesting example of global economic factors driving companisation, where a large national dairy demutualised its century old cooperative model after being sold to a Chinese industrial group: see A. Apps, '*National report of New Zealand*', ICA-AP, ICA-EU Partnership, p. 19.

⁴⁸ Cooperatives of the Americas, Legal Framework Analysis, '*NATIONAL REPORT FOR PANAMA*', ICA-EU Partnership, pp. 11-12

⁴⁹ Op cit, Gbede, at supra 45, p. 22

⁵⁰ Ibid

are subject to the burden of increased oversight compared to regular companies, with cooperatives in some cases regulated by a body specific to cooperatives along with oversight by the bodies other enterprise types are subject to. Legislators should aim to address this imbalance. Additionally, some national experts note that regulatory conditions exclude cooperatives from operating in certain sectors or accessing grants available to for-profit companies, hindering their ability to compete on a level playing field with other business models. Where possible, national legislators should remove such obstacles to cooperative participation in certain sectors. Furthermore, the study highlights the impact of extra-judicial factors on cooperatives, which policy makers should take into account. Factors that go beyond the scope of the national legislator are highlighted by the national experts, such as international treaties and a global trend towards the companisation of cooperatives.

(iii) Fragmentation

In the guidance notes to the cooperative principles, the ICA defines a cooperative as “*an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.*”⁵¹ Therefore, although cooperatives operate in virtually every sector, they share a common cooperative identity. As stated previously, a unified legal framework is beneficial from the perspective of a building a coherent public policy for cooperative development, for a reduction of bureaucracy and also from the perspective of cooperative autonomy.

Several of the national experts in our study have highlighted the cooperatives in their respective countries are governed not by one cooperative law but by a series of sectoral laws. In Greece, the national expert notes that the cooperative movement is served by a legal system burdened by a problematic architecture that divides cooperatives into numerous special cooperative laws⁵², justified by a provision of the Constitution that explicitly divides cooperatives into rural and urban categories⁵³. The expert argues that this results in the shared identity of cooperative enterprises being disregarded by the legislator, noting that there is no general definition for a cooperative in Greece. Beyond this, the fragmentation of Greek cooperative legislation results in registration of cooperatives under different registers and different authorities, thus rendering statistical collection for the whole cooperative movement very difficult and preventing a cohesive public policy for cooperatives. To address these issues, the Greek expert

⁵¹ International Cooperative Alliance, ‘*Guidance Notes to the Co-operative Principles*’, 2015

⁵² Op cit, Douvitsa, at supra 31, pp. 20-21

⁵³ Ibid, p. 3

recommends the harmonisation of existing cooperative laws, the introduction of a general cooperative law, as well as a unified register for cooperatives⁵⁴.

Similarly, in Tunisia the national expert also notes the fragmented and complex legal system as a major obstacle to achieving a cooperative-friendly legal framework⁵⁵. In Tunisia, there is a general cooperative law, existing alongside other special laws, dividing agricultural cooperatives into two sectors⁵⁶. To complicate matters, the general law explicitly allows the special laws to deviate from it⁵⁷. The national expert for Tunisia thus suggests that abolishing the special laws and bringing all cooperatives in the country under one law or amending each individual law would be beneficial to the cooperative movement in Tunisia⁵⁸.

It is important to remember that socio-economic contexts can influence the development of cooperative laws in different countries. The national expert for Japan notes that cooperative law in this country evolved differently from other countries for due to its particular history. As such cooperatives in Japan have since their inception been regulated through different ministries and under special laws for different types of cooperatives⁵⁹. It is therefore in the view of the national expert that it would be unfeasible to unify cooperatives in Japan under a general law. The Republic of Korea is another country in which cooperatives are regulated under special laws. It is important to note that the Republic of Korea's legal framework relies on special laws for cooperatives and its expert notes the country has a thriving cooperative movement, with the 2012 Framework Act seeing over 15,000 new cooperatives (discussed in greater detail in section (iv), below). Nonetheless the expert still considers a coherent legal framework to be something that the country's legislators should aspire to⁶⁰.

A further point is that, as noted by Henry above and depending on the context, certain types of cooperative might need to be specifically regulated by separate legislation. An example of this is Bolivia, where in addition to a general cooperative law, there are special laws applying to open and corporate savings and credit unions, and mining cooperatives. The view of the national expert for Bolivia is that for this country, a further special law to facilitate the creation of associated work cooperatives is needed since the general law does not foresee such cooperatives⁶¹. In another example, for Côte d'Ivoire, the national expert notes that, since the vast majority of cooperatives in the country are agricultural, legislation and

⁵⁴ Ibid, p. 25

⁵⁵ A. B. Rhouma, '*Rapport national Analyse du cadre juridique des coopératives en Tunisie*', ICA-EU Partnership, p. 22

⁵⁶ Ibid, pp. 6-7

⁵⁷ Ibid, p. 12

⁵⁸ Ibid, p. 24

⁵⁹ A. Kurimoto, '*National Report of Japan*', ICA - Asia and Pacific, ICA-EU Partnership, p. 16

⁶⁰ ICA - Asia and Pacific, Legal Framework Analysis, '*National Report of Republic of Korea*', ICA-EU Partnership, p. 29

⁶¹ Op cit, Weise, at supra 39, p. 11

policy is focused on cooperatives in this sector. At the same time, the country's informal sector could be particularly well suited to the cooperative enterprise model and the national expert therefore supports studies that look into specific cooperative legislation for this sector⁶².

Overall, most national experts consider the division of cooperatives into special laws to be undesirable from the perspective of cooperative development. Fragmentation of cooperative law can not only disregard the shared identity of cooperatives; it can also prevent a coherent public policy for cooperatives by governing cooperatives in different sectors under different authorities. An overly complex legal framework can also make the formation of new cooperatives and the implementation of cooperative law more difficult. Notwithstanding the fact that replacing special cooperative laws is not always feasible or desirable in the national cooperative context, as well as the fact that legislative frameworks affecting cooperatives can interact with several areas of law (e.g. labour law, competition law or taxation), lawmakers are encouraged to ensure cooperative laws are not more complex than necessary and strive for a coherence in cooperative law in the interests of cooperative development and policy.

(iv) Up-to-date law

In addition to implementation, a level playing field and addressing fragmentation, an up-to-date legal framework is the final category discussed within this paper. The regular review and, where necessary, update and revision of legislation impacting cooperatives are important indicators that cooperatives continue to be taken into account by policy makers.⁶³ This is important from the perspective of ensuring legislation takes into account the distinctness of cooperatives from other types of business model, and also so that government ministers, advisors and citizens are educated on cooperative law and policy. In addition, the inclusion of cooperatives and cooperative representative organisations in consultation, drafting and development of the law is also important.

For several other countries, the national experts also call for updates to cooperative laws which have not been updated for decades. The national expert for the Dominican Republic notes that cooperatives have experienced growth in the country, but that legislation is antiquated. It is the opinion of the expert that the main legislative instruments that have been in force since 1963 and 1964 are not fit for purpose, especially given developments that have taken place in the previous decade⁶⁴. In Ghana, the national expert notes that the current law was introduced during in 1968 during an era of military dictatorship and

⁶² Op cit, Gbede, at supra 45, p. 22

⁶³ A. Apps, '*National report of Fiji*', ICA - Asia and Pacific, ICA-EU Partnership, p. 15

⁶⁴ J. Méndez, '*National Report for the Dominican Republic*', Cooperatives of the Americas, ICA-EU Partnership, p. 12

for the purpose of maximising government control over cooperatives⁶⁵. As such, although the expert notes that cooperatives offer a means of improving livelihoods, the current legislation does not provide for an enabling environment for cooperatives and prevents them reaching their potential to contribute to poverty alleviation⁶⁶.

By contrast, experts in other countries have welcomed updates to their cooperative legal frameworks. For Nepal, the first cooperative law of 1959 was amended in 1961 on account of the authoritarian *Panchyat* regime which began in 1960. Following the end of the regime, the autocratic constitution was replaced by a democratic constitution and a new cooperative law came into place in 1991⁶⁷. The expert notes that only 830 cooperative enterprises existed in the country before 1992, compared to over 34,000 within the past year when the report was written⁶⁸. The expert credits the 1991 legal framework for supporting the cooperative movement in the country, as it is noted that the cooperative movement emerged after this law came into effect⁶⁹. In general, the expert also highlights the importance of introducing new legislation to reflect constitutional changes⁷⁰.

The national expert also notes that the 2015 constitution of Nepal recognised the cooperative model as one of the three pillars of the economy. This was accompanied in 2017 by a new Cooperative Act which was formulated with the involvement of the country's cooperative movement, namely through the cooperative federation and confederation⁷¹. Although the expert notes that not all recommendations from the movement appeared in the final Act, Chapter 13 of the Act contains significant adjustments for cooperatives⁷².

Some countries have updated their cooperative laws on a very frequent basis. In the Republic of Korea, the national expert highlights that all of the cooperative laws in the country have been updated to take into account socio-economic and industrial changes in periods of increased economic growth⁷³. The Agricultural Cooperative Act has been amended over eighty times, for example. The Framework Act on Cooperatives designed to recognise self-help organisations, excluded from the scope of the eight sectoral laws, has also been amended four times since its creation in 2012. The Framework Act has been notable

⁶⁵ A. Boakye, Legal Framework Analysis, 'Ghana National Report', The African Alliance, ICA-EU Partnership, p. 8

⁶⁶ Ibid, p. 6

⁶⁷ ICA - Asia and Pacific, Legal Framework Analysis, 'National Report of Nepal', ICA-EU Partnership, pp. 1-2

⁶⁸ Ibid, p. 16

⁶⁹ Ibid, p. 2

⁷⁰ Ibid, p. 3

⁷¹ Nepal Law Commission, Cooperatives Act, 2017 An Act Made for Amendment and Consolidation of Laws concerning Cooperatives, Act No. 41 of the Year 2074, Date of Authentication 2074-7-4 (October 18, 2017)

⁷² Ibid. pp. 15-16

⁷³ Op cit, National Report of Republic of Korea, at supra 59, p. 3

for facilitating a simplified process for creating a cooperative and cooperatives in a wide variety of sectors have emerged as a result, and more than 15,000 cooperatives have been set up as of March 2019.

At the same time, one must be careful to recommend frequent updates to legislation for their own sake. The Greek national expert notes that cooperatives in that country are subject to greater legislative changes compared to the Anonymous Societies (SA) business model, to the detriment of cooperatives. The SA model has experienced mainly minor changes or those resulting from European Union law. By contrast, cooperatives have been subject to not only a considerably greater number of changes, but these changes are of a more severe nature. Revisions to cooperative legal frameworks entail the constant amendment and abolishment of special laws, replaced by new legislation.⁷⁴ It is in the view of the Greek national expert that the nature of these changes does not benefit the cooperative movement but rather leads to uncertainty around the cooperative legal form, thus dissuading parties choosing it as their form of business⁷⁵.

Overall, there is a broad consensus among national experts in the study that cooperatives benefit from legal frameworks that are up to date. For some countries in the study, the cooperative legal frameworks have not been updated in over half a century, during which time the socio-economic context has dramatically changed. Arguably, outdated legislation does not create an adequate enabling environment for modern cooperatives to thrive. Due to evidence from national experts that well drafted and modern cooperative legal frameworks can result in strong growth in cooperative numbers, lawmakers should encourage growth in the national cooperative movement across different sectors by updating outdated laws. One potential good practice identified is giving the cooperative movement of the country a voice through consulting with cooperative stakeholders when drafting new legislation, as noted in Nepal.

Conclusions

Considering the need for cooperatives to benefit from enabling legislation and policies, the legal framework analysis strives to make knowledge on legal frameworks more accessible to cooperative organisations and provide them hands-on tools to support their advocacy and recommendations. Based on the current research completed, this paper discusses four main trends from the legal framework analysis that could be used to form recommendations for national legal frameworks.

In part (i) of this contribution, national experts cite the importance of not only a strong legal framework but good enforcement and implementation, in order to ensure compliance with the law and to protect

⁷⁴ Most recently, changes were enacted for agricultural cooperatives. See <https://www.ica.coop/en/newsroom/news/ica-advocates-regulatory-improvements-greece-help-agricultural-cooperatives>

⁷⁵ Op cit, Douvitsa, at supra 31, p. 20

cooperative identity as a distinct form of enterprise. This should entail strong and proportionate auditing and registration of cooperatives, preferably through a legal system that facilitates integration of cooperative networks and maintains cooperative autonomy. Part (ii) of this contribution concludes that for cooperatives to be able to compete on a level playing field, they should not be subject to greater oversight or taxation than other business models. The reports of some national experts demonstrate that cooperatives still face legislative barriers. Attention should also be paid to legislation that excludes cooperatives from competing in certain sectors. In part (iii) of the contribution, it is noted that most national experts are in favour of replacing legal frameworks that divide cooperative laws by special laws with a unified text covering all cooperatives, in recognition of their common cooperative identity, though it is recognised that in some national contexts this is not possible or even desirable.

Finally, in part (iv) this paper notes that in the opinion of national experts, cooperatives benefit from regular review, update and revision of the legal frameworks governing them. Lawmakers should therefore identify where cooperative legislation is no longer fit for purpose and make updates to cooperative law, with consultation and genuine inclusion of the cooperative movement and other relevant international stakeholders. This paper also recognises national contexts differ widely from country to country and also that factors going beyond the national legislator, such as financialisation and companisation, can also impact the cooperative sector.

In short this paper asserts that the absence of an adequate legal framework for cooperatives, or the presence of a weak or fragmented legal framework, can negatively impact cooperatives and their evolution; while in contrast, the existence of supportive regulations can foster cooperative identity, cooperative development and is also instrumental in supporting a fairer, more inclusive and sustainable economy.

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THE CONTRIBUTION OF COOPERATIVE BANKS AND BANKING TO SOCIAL MARKET ECONOMY FOR EUROPE – MODERATION OF CAPITAL ‘MARKET AND COMPETITION’

Holger Blisse¹

The reserves of credit unions, credit cooperatives and cooperative banks in Europe have grown over a long period of time even over many generations of members and have contributed to build and to maintain the current network and federate structures. As stated in ICA principle 3 (Member Economic Participation), “members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. 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 cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the cooperative; and supporting other activities approved by the membership.” (ICA 1995). The individual capital of each member is maximally paid in up to the nominal amount of all shares held by a member and repaid when the member leaves (e. g. § 73 German Cooperative Act).

But times for banks have changed. If we look at cooperative systems in European countries, we realize an Anglo-American understanding of companies is increasingly shaping the way of doing business in (continental) Europe. Companies in the legal form of a (registered) cooperative should also follow the path of “emerging, growing and declining” of companies. This includes conversions and the range of possibilities of mergers and acquisitions. The more standardized a company is, the easier to handle in terms of processes and of valuation, in particular if its shares are transferrable and listed on a stock exchange. A listing has become the case already for parts of cooperative banking groups in countries like Italy (Banche Popolari), France (Crédit Agricole) and Austria (Raiffeisen Bank International) (see for Germany a discussion e. g. by Bartels 1994).

Similar is the understanding of the development of cooperatives published as early as by Hermann Schulze-Delitzsch (1808 to 1883), originator of the German commercial cooperative movement and author of the Cooperative Act (first 1867). He never changed his view on this (Waldecker 1916, p. 26, fn. 1). If subsequent generations had followed this understanding, many of today’s credit cooperatives and cooperative banks would no longer exist. Bank services would then certainly be more expensive, or new

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local self-help organizations would have been formed, such as those credit unions found in the Anglo-American region and also in Eastern European countries, a movement attributed to Friedrich Wilhelm Raiffeisen (1818 to 1888).

Social Market Economy

Part of the (theoretical) understanding of a market and competitive economy is that institutions that are not viable can no longer survive as market participants. But it is only superficially companies that ‘perish’; behind them are always people whose personal circumstances are affected, and who are sometimes seriously hurt. Therefore, the supporter of a market economy in the young Federal Republic of Germany, Ludwig Erhard, was persuaded that a social balance is needed – at least in the form of a social market economy (Fuhrmann 2017, Tügel 2018).

At European level, in connection with the banking and capital markets union, it is assumed that “stronger capital markets will complement Europe’s strong tradition of bank financing ... By opening up a wider range of funding sources, it will help to share financial risks and mean that EU citizens and companies are less vulnerable to banking contractions.”(European Commission 2015, p. 3).² On the one hand, the fact is likely to be ‘forgotten’ that it was precisely the size of the market participants, their interdependence (“too big and too interconnected to fail”) and capital market products that brought credit institutions and insurance companies into such difficulties that states and central banks have been challenged with rescue measures in the financial market crisis since 2007.

Safe cooperative legal form and federation

On the other hand, it remains in our memory that decentralized banking groups that widely act market-autonomously were less affected by the crisis, including the German cooperative FinanzGruppe – with the exception of two very large institutions, maybe those with strongest ties to capital market.

For European banks the European Banking Authority expects, based on a sample of 189 banks, regulatory capital requirements to increase by 135.1 billion Euro in the next few years, in particular for large banks (EBA 2019, p. 22).³

Where does the money come from?

² “It [The Capital Markets Union] aims to get investment and savings flowing across all Member States, benefitting citizens, investors and companies, regardless of where they are located.” (European Commission (2020): p. 2).

³ For 104 large banks 134.1 bill. Euro, with 82.8 bill. Euro for global systemically important institutions (8 G-SIIs) and 43.8 bill. Euro for other systemically important institutions (67 O-SIIs), EBA 2019, p. 22.

With respect to capital needs, European banking regulators seem to prefer the business model of a (listed) corporation for every bank as well as savings bank. Above all, international investors are solicited to invest capital. The plan to promote mergers into ever larger units (Mersch 2019,⁴ also AWP 2020) is not immediately comprehensible if these units are only viable with higher capital, unless a change of ownership is being prepared at the institutions, which should gradually lead these institutions out of the market in an orderly manner and replace banking services with market services.

In the cause of offering a business model that is attractive for investors, risks and additional capital requirements for banks are both interactively increasing. The risks increase in order to maintain the prospect of higher earnings and have to be covered by additional equity capital because the risk of default increases. The institutions themselves should pay for this in order not to burden the state and thus the general public again. At the same time, the possibilities for risk diversification are limited by requiring ever increasing backing with equity capital for certain assets, such as company investments (Cluse, Cremer, Farruggio 2019, p. 5).

The dilemma of a so regulated business model for banks lies in the fact that customer deposits are at stake. The interests of owners of listed banks and bank customers continue to diverge. Bank's management has to endure this balancing act. If investors sit in the management, then at least ownership and control match in the corporate governance. How about the expectations of customers and the general public in keeping deposits safe and using them for responsible lending? This seems to exclude focusing only on earnings and high profits for the owners of a bank (apa/red. 2020).

Therefore banks which are owned by particularly profit-oriented owners, i. e. investor-owned banks (Birchall 2013.2, pp. 9, 11-13), should have their own deposit insurance. It is important to protect banks with largely coincident interests of customers, owners and management. These are banks that – in the worst case – cause the least problems, provided that this coincidence of interests is taken into account. This type includes cooperative banks with their support of members as well as savings banks with their focus on the common good, but both more and more for all customers.

A listing on a stock exchange and thus the market orientation of a bank always means that interests diverge – unless the customers themselves hold the shares. But how long will they do so? If these institutions also become attractive for financial investors, then – as the market prices for the major European banks have already indicated (Raoul Pal in Onvista/dpa-AFX 2019) – the end of a longstanding

⁴ "Our risk-aversion is not meant to block market-driven consolidation initiatives – and should not be understood as such." (Mersch 2019), for a different perspective on the influence of regulation on the market see Nowotny in Hämmerle (2019).

institution is emerging, which would also be the end of an alternative to the market, although it is itself structured like a market.

Capital markets aren't perfect, but theoretically they should function on transaction costs as low as possible. Not surprisingly, markets, e. g. stock exchanges, were originally conceived as cooperatives and associations – the sponsors, stock exchange associations, in Germany but e.g. also in Switzerland. In these cases benefits from the market mechanism are directly available for all organized market participants.

A (purely) commercial business model contradicts the nature of credit institutions, banks and savings banks. Increasing the focus on profit in banking is one reason why the institutions finance their (re)financing by comparing prices with market prices and invest in market products that have been difficult to understand in terms of their complexity and thus their risk– in the crisis even by rating agencies.

Continuing specialized activities in the (German) banking system

Today banks are well advised to go back to their roots as long as they are solid and there is scope to cope not only with technologically difficult phases of change and crises. But at the moment it seems that cooperative associations are working against their members and for the capital market when they offer negative interest rates for (new) private customers or (would) recommend that savers invest their money into investment funds (apa/dpa 2019). The lack of alternatives via information technology solutions standardizes the banking business so much that the degrees of freedom and scope for decision-making at the individual cooperative bank continue to decrease and in the end a pure market (intermediate) function remains.

Many generations of members, private and commercial customers, before today, have relied on the continued existence of their cooperative bank. They have increased reserves and provided for the current generation and future generations. If this – social – dimension of cooperative banks (Blisse 2020), which is not vulnerable to capital markets, is maintained, then there is the prospect of moderating the market and (price) competition, similar to what happens in the housing industry (Feichtinger, Schinnagl 2017).

What gives a bank even greater reason to exist today, that is, contrary to a “banking is necessary, banks are not” idea, is that savers can trust in the institution ‘bank’ and in its ability to keep money safe (and with interest) on the one hand and on the other hand to make savings available to people and companies who need money for larger and long-term projects – certainly with regional or local relevance. This constellation is comparable to a market, but the institution is owned by its customers (Birchall 2013.1)

and is able to make socially responsible decisions about the lending of money – with regard to credit-worthiness, but also with regard to the kind of project.

Protection for cooperatives and reserves

Money serves the society based on the division of labor and contributes to social cohesion because the flow of money corresponds to and regulates the flow of trade, goods and services. Money in cooperative banks doesn't come under the influence of only a few institution(al investor)s – again controlled by a few – but remains under control of a broad (member / owner / citizen) base – leading to the understanding of “banks are necessary, listed banks are not”.

To further enable cooperatives in general and cooperative banks, credit cooperatives and credit unions and similar banking entities in particular to continue their social and sustainable role in an even more dynamic market and competitive economy, they need some kind of protection to persist (Henry 2013, pp. 69ff.). This could be similar to the Constitutions of Italy (Art. 45 (1)) and Greece (Art. 12). Possibly the law can explicitly be at least related to the reserves of prior generations of members, to protect this social contribution, which was built in the past for the future of the cooperative. Then cooperatives would act and contribute as moderators in a market- and competition-driven economy.

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WHY AUSTRALIA'S CO-OPERATIVE NATIONAL LAW IS NOT REALLY A 'NATIONAL' LAW

Ann Apps¹

Recently the Queensland Parliament passed the *Co-operatives National Law Act 2020* (Qld). This was a quiet but significant moment in the history of co-operative law in Australia. When this Act commences,² the Australian states and territories will, for the first time, have consistent laws for co-operatives. The advantage for co-operatives includes consistent terminology for two co-operative types (co-operatives will be either 'distributing' and 'non-distributing'); a consistent reporting regime which is less onerous for 'small' co-operatives; mutual recognition of co-operatives registered in other states; and the ability to issue co-operative capital units (CCU's) to members or non-members. However, the 'Co-operative National Law' is not a 'national' law in the sense that most would understand. It is not a law that has been passed by the Australian federal legislative body, the Commonwealth Parliament, rather, it is a template law that was introduced in 2012 by the State of NSW as the lead jurisdiction, as *the Co-operative (Adoption of National Law) Act, 2012*.

The idea of a using template law to achieve uniform laws between the states and territories in Australia is not new. A lack of uniformity of laws passed by the states has long been regarded by the Australian business community as an unnecessary transaction cost and a problem in need of a solution. The source of the problem is a federal system that divides law making powers between the Commonwealth Parliament and the six state and two territory parliaments.

When the Australian federation was created by the *Commonwealth of Australia Constitution Act 1900* (Imp), the state and territory governments were responsible for the administration of co-operative law in Australia. At the time this was not surprising, as most business law regimes including company law, employment law and taxation law were all administered at the level of state government. The original impetus to federate the six self-governing colonies was the unification of defence, currency and immigration policies. In the early part of the 20th century Australia's economy was said to 'ride on a sheep's back'³. The business sector was reliant on agriculture and rural and regional economies and it made sense for business laws to remain a state priority.⁴

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² The *Co-operatives National Law Act 2020* (Qld) was passed by Queensland Parliament on 17th June but is commencement date has yet to be proclaimed.

³ An idiomatic phrase referring to Australia's dependence on wool as the source of export income and national prosperity.

⁴ During this period, we saw a rise in agricultural co-operatives in Australia, particularly in grain and dairy industries

The need for harmonised business law was not a pressing issue until the period of rapid economic growth following World War II. In the second half of the 20th century, the Australian states have gradually handed over their legislative powers on most aspects of business law to the federal system. This began with income taxation,⁵ followed by a uniform scheme for competition and consumer law,⁶ company law,⁷ and finally employment law.⁸

When the states agreed to refer their law-making power with respect to corporations, co-operatives (as corporate bodies) opted to be removed from the express referral of legislative power and remain as corporate bodies under state control.⁹ This was an understandable and rational decision in 2001. Co-operatives are locally based organisations; historically they had strong support from state governments of all political persuasions. As member-based organisations, they were less likely to require the supervision and oversight of the national corporate watchdog, Australian and Securities Investment Commission (ASIC).¹⁰ But forty years on, the regulatory and legal landscape looks very different and the co-operative sector tends to be marginalised and forgotten, particularly when it comes to policy decisions affecting businesses – and where federal politics is dominant.

One of the main reasons that most aspects of business law were transferred to the federal sphere was the problem of maintaining uniform legislative schemes. Unlike the United States, where their brand of ‘competitive federalism’ means that the states are in competition for business registrations as a source of revenue,¹¹ Australia has a long history of ‘co-operative federalism’ where the states have worked together to try and achieve harmonised laws.¹² Unfortunately, most attempts have eventually proven to be unsuccessful. The schemes work for a while, but over time the political priorities in each state diverge, resulting in inconsistencies and complexity.

⁵ The Australian federal government first began to levy income tax in 1915 to help fund Australia's war effort. Between wars, income taxes were levied at both the state and federal level. Since World War II the states' have not imposed income tax.

⁶ A scheme for consistent consumer laws was introduced in the 1980s using a template legislation scheme based on Part V of the *Trade Practices Act 1974* (Cth). A single federal law replacing the mirror schemes in each state and territory was introduced under the *Competition and Consumer Act 2010*(Cth).

⁷ The state Attorney Generals agreed to refer their law-making power with respect to companies and financial services in August 2000, later formalised in the *Corporations Agreement 2002*. This followed a series of unsuccessful attempts to create uniform company law schemes between the states and territories between 1961 and 2001. This referral of power created the constitutional basis for the *Corporations Act 2001*.

⁸ The validity of the controversial *Workplace Relations Amendment (Work Choices) Act 2005* was based on state's referral of the corporation's power, enabling the federal government to take over most of the field of employment law in Australia. The Act was later replaced with the *Fair Work Act 2009* (Cth), but the centralised regulatory system remained intact.

⁹ *Corporations Agreement 2002*, s503(1) see <https://www.coag.gov.au/sites/default/files/agreements/Revised-Corporations-Agreement-2002.pdf>

¹⁰ ASIC was set up as a response to a number of significant corporate collapses in the 1960's and 1970's.

¹¹ L Bechuk, “Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law” (1992) 105 *Harvard Law Review* 1435

¹² Robert S French, “The Referral of State Powers – Cooperative Federalism Lives?” (2003) 31 *UWALR* 19

Forty years after choosing to remain as state-based businesses, co-operatives in Australia are united by consistent legislation for the first time. But there is no guarantee that uniformity between the states will be successfully maintained over time. The *Co-operative National Law* ('CNL') may prove to be a temporary fix given the difficulties faced in implementing the scheme so far:

- The states had tried to achieve uniformity by agreeing to adopt 'Core Consistent Provisions' in co-operative laws 1996. The scheme unravelled when the states failed to maintain consistent legislation and neglected updating their co-operative laws.
- The process of intergovernmental negotiations to introduce a harmonised scheme began in 2007. It took another five years before the states and territories entered the Australian Uniform Co-operative Law Agreement ('AUCLA') in 2012 with NSW as lead jurisdiction.
- Western Australia made it clear from the outset that it was not interested in replacing the *Co-operatives Act 2009* (WA) with the CNL. Western Australia has agreed to continue to update its laws to ensure consistency with the CNL.¹³
- Queensland withdrew from the AUCLA in 2015. It continued to negotiate with the intergovernmental working party, and eventually agreed to adopt the CNL with the passing of the *Co-operatives National Law Act 2020* (Qld).
- Any jurisdiction may withdraw from the AUCLA at any time.

In the meantime, there are some arguments in favour of shifting co-operatives to the federal sector. Most importantly co-operatives suffer from the lack of representation in a federal ministerial portfolio. Company law dominates in Australia – because a unified single-entry system has made it quick and easy to incorporate as a company. The process of registering a new co-operative may take weeks or even months. If legal advice is required, it is likely to be very expensive.

The *Corporations Act* is a broad legislative scheme and it has the potential to accommodate diverse legal models including co-operatives within its framework. But any such accommodation would need to recognise that co-operatives have a governance model that is distinct and different to 'for profit' businesses. If co-operatives were included as a distinct type of corporation in the *Corporations Act*, a legal requirement for directors of co-operatives registered under the Act to report annually to members on steps taken to operationalise or embed the co-operative principles and values in the co-operative entity would serve multiple purposes. Not only would it crystallise the co-operative identity at the national level, it would incentivise directors, lawyers and accountants to learn about the co-operative model and encourage educational institutions to include co-operatives in their curriculum.

¹³ <http://services.eneews.fairtrading.nsw.gov.au/online/18268207-7.html>

Interviews

Interview with Professor Dr. Isabel Gemma Fajardo García.

Questions prepared by Ifigeneia Douvitsa and Hagen Henry

Douvitsa & Henry: Thank You first of all Gemma for having accepted this interview!

You retired recently from editing - together with Professor Olavarría - the journal “CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa”. This journal has gained a remarkable reputation. “Our” journal, the International Journal of Cooperative Law (IJCL), is still in its infant stage. This is its 3rd issue. It would be naïve to not measure the high risk to which we expose ourselves by interviewing such an experienced editor of a journal with a closely related core subject.

Your academic work addresses both cooperative law and social economy law. This attests to a wide view of things that, held separately, keep many a colleague more than busy. We wonder where you draw the line between the two fields, if indeed a line should be drawn? Do you see cross-fertilizing effects? If so, in which way?

Professor Fajardo: I conceive of the social economy as a way of identifying and at the same time claiming a business model that is not oriented towards obtaining benefits from and for the invested capital, but rather towards satisfying the needs of people and the best conditions for them.

Currently, the capitalist model is the main or the only one for the legislator, so it is good that another form of economy is claimed and that this claim is shared by both mutualistic companies and non-profit entities. And: cooperatives also need to be recognized and regulated, in a way that takes into account their characteristics.

Douvitsa & Henry: You are the master mind behind the Spanish social economy law (Ley 5/2011). How did You get involved in its development? What were the reasons to develop this law? Did You face opposition? If so, what were the arguments? Do the effects of the implementation of the law meet the expectations that the legislator pursued when adopting it? Should the law be amended? If so, why?

Professor Fajardo: Spanish social economy enterprises, represented by CEPES, the Confederación Empresarial Española de Economía Social [Spanish Business Federation for the Social Economy], asked for a law that would recognize and promote the social economy, as recommended by the European Parliament in 2009. For this reason, the Ministry of Labor commissioned CIRIEC-Spain with developing a “Law for the Promotion of the Social Economy”. José Luis Monzon, President of CIRIEC, invited me to participate, as well as professors Rafael Chaves, Rafael Calvo Ortega and Fernando Valdes Dal-Re, all of them highly recognized in their respective specialties.

In addition to our proposal, CEPES presented its own one. We proposed many more measures to promote social economy enterprises and included social enterprises in our draft. The law, as finally approved, integrates both texts and was supported by all political groups.

The law does not need to be modified, but it must be further developed and applied. For example, it must give space to social and solidarity enterprises. On the other hand, I believe that the development of the social economy should be a cross-cutting function of various ministries and not only the Ministry of Labor, as hitherto. The social economy is much more than worker-owned cooperatives and societies.

Henry: The International Labour Organization (ILO) and other international and regional organizations are about to develop guidelines for social economy legislation, implying the need for such legislation. In my view the debate does not differentiate sufficiently between organizational law and laws to support policies which aim to promote actors within the social economy. Do you think that I am seeing things correctly?

Professor Fajardo: Indeed, I believe that cooperatives, mutualistic and other entities of the social economy need regulation that allows them to function according to their characteristics more than social or fiscal aid. Currently, in Spain these entities are predestined for legal reasons to become capital companies, especially in sectors such as credit, insurance, commerce, agriculture, etc..

This must not be allowed. What is the use of the national constitution declaring that the public authorities must promote cooperatives through adequate legislation, if this is not the result?

There is also a great lack of knowledge of what the specifics of these entities are and how they operate, particularly amongst business promoters/advisors and those who must apply the laws.

Douvitsa & Henry: Let us concentrate on cooperative law. As already mentioned, you played a central role in the creation of “CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa”. That was 30 years ago. Did the creation of this journal coincide with your developing an interest in cooperative law? How and why did you develop this interest?

Professor Fajardo: My interest in cooperative law began because in 1985 I was hired by the Regional Government of Valencia to advise them on the development of the agricultural cooperative sector, once the regional Cooperative Law of 1985 was approved. A year later, I began my doctoral thesis on responsibility in the economic management of cooperatives, and in those years the Spanish association of CIRIEC was also established in the Faculty of Economics of the University of Valencia where I worked at the time and where I continue to work.

The Journal was born in 1990 as an annual compilation of jurisprudence on the social economy, accompanied by comments on the most important court cases. It was a proposal that I made to CIRIEC, together with Professor Jesus Olavarria. We both had experience in collaborating in the jurisprudence section of the Journal of Commercial Law. In 1991 the journal incorporated a section on social economy legislation, and from 1992 articles by researchers and professionals on the subject.

Henry: We all seem to have spiritual mothers and/or fathers. Although you have not done so, I personally have used them first when trying to gain attention and then in order not to lose the inspiration. Who inspired and maybe continues inspiring you when it comes to cooperative law?

Professor Fajardo: I started studying cooperative law upon the suggestion by my thesis director Vicente Cuñat, who also transmitted his interest in research and in the critical analysis of law to me. The person from whom I learned the most about cooperative law was Professor Francisco Vicent Chuliá, who continues to be a great reference in the field in Spain.

Henry: I had the privilege of being invited by you many times to contribute to publications that you directed and I had the pleasure of collaborating with you on several projects, not the least the one by the Study Group on European Cooperative Law (SGECOL) on the Principles of European Cooperative Law (PECOL). The former included colleagues from Central and South America, the latter colleagues from Western Europe. Obviously, language barriers are higher when working with colleagues from Western

Europe. But beyond this, what struck/strikes you most when exchanging opinions/views/knowledge? Do the differences, if any, allow us to speak of cooperative law in the singular?

Professor Fajardo: Thank you very much Hagen, but I have to correct you because the privilege was mine. Of course, Spanish cooperative law is very close to the one in Latin America, but there are also many similarities with cooperative law in Portugal, France or Italy. The divergences usually derive from the greater or lesser approximation with the law of capital companies; and in practice, I think, cooperatives in operation are much more similar to each other than the divergent laws might suggest. I am convinced that it is necessary to work on harmonizing cooperative law, based on the identity principles, as was done in the PECOL project.

Douvitsa & Henry: According to the Spanish Constitution powers to legislate on cooperatives lie with the central State and with the Comunidades Autónomas [autonomous communities]. Not the least because other fields of law that impact cooperatives are part of the exclusive powers of the central State, such as labour law, conflicts of law are inevitable. How are they solved? Do they affect the development of cooperatives?

Professor Fajardo: The competence to legislate in the matter of cooperatives was initially only requested by some Comunidades Autónomas in which the cooperatives had an important presence (País Vasco, Cataluña, Andalucía y Valencia) and it was a shared competence with the central State. Over time, the competences of the Comunidades Autónomas in cooperative matters increased, and eventually all of them assumed that competence. However, it is also true that the central State constantly seeks to extend the application of labor, civil and commercial legislation to the internal relations of cooperatives, limiting their autonomy. In my opinion, the situation is not very favorable to cooperatives, because it is tempting for the regional governments to use cooperatives to implement economic policies and to fight unemployment, putting more emphasis on their entrepreneurial than on their cooperative nature.

Douvitsa & Henry: Initiatives to harmonize the various cooperative laws of the Comunidades Autónomas and the national cooperative law - private initiatives, so we understand - have not yielded any result yet. Recent revisions of regional laws, such as the ones in Extremadura (Ley 9/2018) and in the Basque Country (Ley 11/2019), seem to run counter to any attempt to harmonize.

In this connection, has the Council Regulation (EC) No.1435/2003 on the Statute for a European Cooperative Society (SCE) had a harmonizing effect on the various cooperative laws in Spain?

Professor Fajardo: I do not know of any initiative to that end, although some of us have been requesting it for years. Instead, there has been an initiative to regulate cooperatives as yet another capital company, and therefore subject to the commercial legislation of the central State, but it has not yet led to any result.

The (EC) Regulation has not had a harmonizing effect, nor do I think this is desirable. The SCE Regulation is an instrument to promote the creation of trans-border cooperatives, but its legal regime is complex and “uncooperative”.

Douvitsa & Henry: Could you give us some insight into the differences between these various cooperative laws in Spain, which might hinder their harmonization?

Professor Fajardo: The diversity of laws does not necessarily involve a great difference between them, but rather a competition to create a regime increasingly open to the market and profit, while preserving the benefits reserved for cooperatives. In general, the laws are very similar, but each one goes further in that. I do not think that harmonizing the cooperative legislation in Spain is a technical problem; it is a political one.

Henry: Let me be a bit provocative! Doesn't the answer to the question of whether or not to harmonize lie in the recognition (or not) of the international cooperative values and principles, as laid down in the 1995 International Cooperative Alliance Statement on the cooperative identity (ICA Statement) and in the Promotion of Cooperatives Recommendation, 2002, of the International Labour Organization? And, related to this, do the cooperative laws in Spain translate these values and principles into legal rules?

Professor Fajardo: Yes, cooperative values and principles should inspire the regulation and operation of cooperatives. Therefore, I consider that they are an essential element also in any harmonization process.

Cooperative laws in Spain usually include the ICA principles as rules for interpreting their rules. The Basque Country Cooperative Law of 1993 broke with cooperative principles, and this was imitated by other later laws. However, the new 2019 Law has incorporated them again as rules with which the cooperatives must comply, in their structure and operations. This change is good news.

Douvitsa & Henry: It is commonly accepted that membership of a cooperative should be conditional upon contributing to the capital of the cooperative. Also referring to the ICA Statement I (Hagen) have asserted this many time. But You have insisted that this assertion is incorrect. Which of the cooperative laws in Spain allows for cooperatives to be set up without any capital? What is the idea behind it and does this not slow down the development of cooperatives, not to speak of negative effects it might have on their creditibility and the motivation of members to control the management? Apparently, we did not read your doctoral dissertation, which was published, was it not? Were these issues part of your doctorate?

Professor Fajardo: Yes, in my doctoral dissertation, on the “Economic Regime of the Cooperative: Responsibility of the Members” (Ed. Tecnos, 1997), I analyze the limited function that social capital plays in cooperatives as compared to capitalist companies.

I do not consider it wrong that membership is conditional upon the contribution of share capital to the cooperative, but rather that a certain minimum amount of share capital is set as a requirement for the establishment of a cooperative, because this requirement can hinder the establishment. The same is true for membership fees. An excessive fee can prevent people from becoming members.

In Spain, most laws require a minimum capital to form a cooperative, similar to that required for limited liability companies (3,000 euros). However, in many cooperatives it is not necessary to have this initial capital, since the main resources are provided by the members and the cooperative does not have to acquire them (work, funds to acquire goods and services, goods to be marketed by the cooperative, etc.).

With the arrival of the 2008 crisis and to favor business initiatives, the minimum capital requirement for the formation of a limited liability company (which is a capital company) has been abolished. But it is still necessary to have that minimum share capital to be able to form a cooperative. At this very moment when cooperatives are most needed, the requirement of this minimum capital is an obstacle to their establishment.

The important thing is that the cooperative has its own resources that offer guarantee and stability, but that patrimony can also be constituted from the results of the year, results that can be used both for reserves and for distribution among the members as shares in the social capital.

Douvitsa & Henry: Research on and teaching of cooperative law have improved over the past few years. You yourself have contributed to this improvement at all levels of university studies, not only as researcher and teacher, but also by setting up and administering programs. In your opinion, should more be done and if so, what would be appropriate measures to improve cooperative studies, in general, cooperative legal studies, in particular?

Professor Fajardo: I do not know if I understand the question well, but of course research related to cooperatives must be promoted and it must have access to existing public and private funding.

Cooperative research should preferably be multidisciplinary. And from a legal perspective, I believe that it is essential that the researcher has a good legal background, in particular in company law and other forms of organization (associations, foundations, etc.), that they know the history of institutions, comparative law and the reality of practice, so that our research does not stray either in its approach or in its conclusions from the reality that it seeks to improve.

Henry: It is, of course, a common place to say that the factors of globalization (digitalization and telecommunication technology) are redefining/redesigning the world of work and enterprises. But I think we cannot deny that the blurring of the borderline between public and private, which is impacting on and stemming from a shift of the share-holder and member value paradigms to the stake-holder paradigm; that the confusion of the positions of producers and consumers and the digitalization-induced confusion of the positions of entrepreneurs and workers; that the integration of cooperatives into (global) value chains, composed of various kinds of enterprise types; and that the transformation or rather de-formation of the component parts of the value chains and the tendency towards enterprising through networks of actors are having their effects on cooperative enterprises and, hence, on cooperative law.

If that is so, where do you see the challenges for cooperative law?

Professor Fajardo: I think that the context you describe offers a great opportunity for cooperatives as a way of organizing people to respond to their needs and concerns, and also to those of their environment.

All the changes you indicate are going to have consequences that must be thought through and regulated. Cooperative law must adapt, not in its essence, which remains universal, but in a way which allows current models to be regulated. Cooperative law must take into account the existence of cooperatives whose members may have different interests even if they share the same social purpose; cooperative activities carried out in virtual environments; frequent international transactions of goods and services; online assemblies, etc.. I believe that cooperatives must meet conditions to respond to new needs, and cooperative law must provide them with the adequate legal resources.

Douvitsa & Henry: To come back to the IJCL: we are eager to learn from you on how to improve it. Is the interest in the subject of cooperative law increasing, as we want to believe? Have you noticed an increase in publications over the past years? Are there topics that you think are important, but are neglected by our or other journals?

Professor Fajardo: In Spain, there is currently a good production of articles and books on cooperative law and there are also good specialized journals on cooperative law. Possibly in other countries it is more difficult to publish or there are no specialized journals on cooperative law.

I think that the key to deciding where to publish is in the academic consideration of the journal in question, because the recognition that the author receives also depends on it. It is important that the journal is well positioned in the ranking of prestigious journals because it benefits the author (productivity index, remuneration, promotion, etc.). We all want the result of our research to be positively valued and this, today, depends on where it has been published.

Regarding the topics, it is difficult for me to suggest important topics, but I think that exploring the jurisprudence and the problems of cooperatives should inspire academics to study the problems and propose good solutions.

Douvitsa: Any advice Gemma for young (legal) scholars?

Professor Fajardo: The study of cooperatives allows you to combine the world of business and the world of social values, and that, as my friend Rafael Chaves says to young researchers, catches and absorbs you. I think that research in cooperative law is very formative and generates great personal satisfaction, because you end up sharing those values that are so important for life, such as mutual aid,

solidarity, equity, and social justice. You feel that what you are doing is worthwhile, you find your research meaningful and you are proud to work for a better world.

My advice to young researchers is to be honest as researchers, to be judicious and courageous in presenting your results, and to create or join networks of researchers. In Spain there is the REJIES Network of young researchers in social economy, which is a good example of good practice.

Henry: One last question. Our colleague and friend Professor Deolinda Meira inspired me to ask it. It relates to our work ethos as researchers and teachers in general. At the beginning of the mentioned PECOL project there were some - rather hidden - divergent views amongst the members of SGECOL as to whether we would/should pursue an aim beyond delivering the outcome of our scholarly reflections. The question is: To what extent does your work as a researcher and teacher contribute to a different, more inclusive and solidary world?

Professor Fajardo: I am sure that it is so, especially as a teacher. We train people and transmit ideals, we make them reflect not only on what is possible, but also on what is most appropriate to the interests of the cooperative, its members and the public at large. We create new perspectives for them and encourage their professional instinct to lead or join social and cooperative economy projects, aimed at improving the well-being of people and their communities.

But also from the perspective of research, and especially applied research, we contribute to improving the conditions in which the entities and organizations of the social and solidarity economy carry out their activity, which has an impact on their performance and the well-being they generate.

Douvitsa & Henry: Thank you again for the interview Gemma!

Professor Fajardo: Thank you very much. It has been a great honor for me. I wish you success with the International Journal of Cooperative Law.



International Journal of Cooperative Law

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